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193 Cal. 428

PEOPLE ex rel. NORTHWESTERN MUT. FIRE ASS'N v. STANLEY, County Superintendent of Schools. (L. A. 7145.)

(Supreme Court of California. April 1, 1924. Rehearing Denied May 1, 1924.)

1. Schools and school districts 🔑79—Authority of trustees to place insurance on school property purely statutory.

Boards of trustees of school districts possess no authority to place insurance of the school property other than that granted to them by Pol. Code, § 1608, subd. 3.

2. Statutes 🔑190—Legislative intent determined from language used if free from ambiguity.

To ascertain the intent of the Legislature in enacting a statute, recourse must first be had to the language of the statute itself, and if the words, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning.

3. Schools and school districts 🔑79—Board of trustees could not place fire insurance with mutual company organized under laws of another state.

Under Pol. Code, § 1608, subd. 3, empowering boards of school trustees to insure school property, "such insurance to be written in any solvent insurance company doing business in this state or in any mutual insurance company organized under the laws of this state," a school board had no power to place fire insurance on school property with a mutual insurance company organized under the laws of another state.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Petition for a writ of mandate by the People, on the relation of the Northwestern Mutual Fire Association, a corporation, against Grace C. Stanley, as County Superintendent of Schools of San Bernardino County, to compel approval of a warrant for premium on a policy of fire insurance. Judgment for defendant, and plaintiff appeals. Affirmed.

Hahn & Hahn, of Pasadena, and Shank, Belt, & Fairbrook, of Seattle, Wash., for appellant.

T. W. Duckworth and John L. Campbell, both of San Bernardino, for respondent.

RICHARDS, J. This is an appeal from a judgment of the superior court of the county of San Bernardino, after an order made by said court sustaining the defendant's demurrer to the plaintiff's petition for a writ of mandate, requiring her, in her capacity of county superintendent of schools of said county, to approve a warrant issued by the Alta Loma school district to the Northwestern Mutual Fire Association, in payment of an annual premium upon a policy of fire insurance taken out by said district in said association, and covering certain property of the school district.

The petitioner, in the opening averment of its petition, sets forth that "it is a mutual fire insurance company, organized under the laws of the state of California"; in the next paragraph of its petition, however, in connection with its averment that it is qualified to do business as a mutual fire insurance association in the state of California, it refers to the certificate of compliance with the laws of said state, issued by the insurance commissioner thereof, attaching said certificate to its complaint as Exhibit A, and expressly making the same a part of its said complaint "as fully as if set forth herein." By reference to said certificate it is found to be recited therein that "the Northwestern Mutual Fire Association of Seattle, Washington, is duly organized under the laws of the state of Washington and is authorized by this department to issue policies and transact business of mutual fire and automobile insurance." The plaintiff also incorporates in its bill for the insurance premium upon which the warrant which the respondent failed to approve was issued and in which it describes itself as "Northwestern Mutual Fire Insurance Association of Seattle, Washington." In the opening brief of the appellant its counsel asserts that "the petition sets forth that Northwestern Mutual Fire Insurance Association is a mutual fire insurance company organized under the laws of the state of Washington," and it is nowhere stated or argued in said brief that the petitioner is other than a mutual insurance company organized under the laws of another state.

The decision of the trial court in sustaining the defendant's demurrer to the petition herein was evidently based upon the fact that the petitioner was not a mutual insurance company organized under the laws of this state, and for that reason did not come within the permissive authority given to boards of trustees of school districts to place insurance upon the school property of their respective districts under the provisions of section 1608, subdivision 3, of the Political Code. The said section of said Code, as it stood at the time the contract of insurance involved in this proceeding was entered into, read, in part, as follows:

> "1608. Boards of school trustees and city boards of education shall have power, and it shall be their duty: * * * Third—To furnish, repair, and insure and in their discretion, rent, the school property of their respective districts, such insurance to be written in any solvent insurance company, doing business in this state, or in any mutual insurance company organized under the laws of this state."

[1-3] It would seem that the foregoing provision of the Political Code is susceptible of an interpretation which is at once simple and natural, and which is entirely relieved of the labored and involved reasoning insisted upon by the appellant as the proper means of arriving at its meaning. Boards of trustees of school districts possess no authority to place insurance of the school property of their respective districts other than granted to them by the foregoing section of the Political Code. Its mode is the measure of their power. It is a cardinal rule, applicable to the interpretation of statutes, that, in order to ascertain the intent of the Legislature in enacting the same, recourse must first be had to the language of the statute itself, and that if the words of the enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Sharon v. Sharon, 75 Cal. 1–28, 16 Pac. 345; Merkley v. Williams, 3 Cal. App. 268, 84 Pac. 1015; King v. Armstrong, 9 Cal. App. 368, 99 Pac. 527; Sacramento County v. Glann, 14 Cal. App. 780, 113 Pac. 360; Smith v. Union Oil Co., 166 Cal. 217, 135 Pac. 966. The obvious meaning to be given to the language of said section of the Political Code is this, that boards of school trustees are given power and it is their duty to insure the school property of their respective districts in any solvent insurance company doing business in this state, provided that, if they select a mutual insurance company to carry their insurance, it must be a mutual insurance company organized under the laws of this state. The question as to whether the mutual insurance company to which the choice of boards of trustees of school districts is thus confined is solvent or insolvent does not arise in this case, for the reason that the petitioner herein does not come within such limitation, and was therefore not qualified in either event to be awarded this insurance. It follows that the respondent herein, in her capacity of county superintendent of schools of San Bernardino county, properly refused to approve the petitioner's warrant for the premium upon its void insurance policy.

The judgment is affirmed.

We concur: MYERS, J.; LAWLOR, J.; LENNON, J.; WASTE, J.; SEAWELL, J.

193 Cal. 422

NATIONAL ENGINEERING CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 7865.)

(Supreme Court of California. April 1, 1924.)

1. Master and servant 🔑416—Award not invalid because not specifically terminating temporary disability compensation.

Though the Industrial Accident Commission finds an injured employee entitled to temporary disability compensation indefinitely, its order of award is not invalid because of its failure to specifically terminate its award at the end of 240 weeks from the injury, the maximum temporary disability period under Workmen's Compensation Act, § 9(b) 2(4); the award terminating by operation of law at the end of that period.

2. Master and servant 🔑419—Compensation award for permanent disability, though purporting to be final, may be changed to one for temporary disability.

Though the Industrial Accident Commission's award of permanent disability payment purports to be a "final decision," it, under Workmen's Compensation Act, § 20(d), having continuing jurisdiction over its orders, decisions, and awards, may reopen the matter, and, on further testimony showing a temporary disability for which payment would be greater than the permanent disability payment, change the award to one for temporary disability payment; the employee under section 9(b) 2(8) being entitled, not to both, but to the greater.

3. Master and servant 🔑419—Commission's finding on reopening compensation case held to amount to one that disability had recurred.

The finding of the Industrial Accident Commission, after reopening case, that employee's injury "caused a temporary total disability * * * continuing from * * * (a date subsequent to the previous award) indefinitely," *held*, in view of entire proceeding, to amount to one that the disability had "recurred"; a fact, under Workmen's Compensation Act, § 20(d), authorizing the Commission to increase the previous award.

4. Master and servant 🔑417(7)—Finding on evidence in compensation case conclusive.

The finding of the Industrial Accident Commission on a disputed question of fact cannot be disturbed when there is evidence in the record supporting its conclusion.

In Bank.

Certiorari by the National Engineering Corporation and another against the Industrial Accident Commission of California and another. Writ discharged, and award affirmed.

Geo. H. Moore, of Los Angeles, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

WASTE, J. This is a proceeding in certiorari, instituted by National Engineering Corporation and the Ocean Accident & Guarantee Corporation, Limited, of London, England, its insurance carrier, to review the action of the Industrial Accident Commission in the matter of the application of respondent J. C. Westhafer for compensation under the provisions of the Workmen's Compensation Act (St. 1917, p. 831). Westhafer was injured December 19, 1918, while employed as a pipefitter in the service of the Engineering corporation. It is admitted that the injury arose out of and in the course of his employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to his work. He fell a distance of some 20 feet, sustaining a serious fracture of the right femur and a fracture of the front of the skull. He was unconscious for 10 days, after which time the head injury was not particularly disabling, although it is asserted by respondents that throughout the entire pendency of the proceeding before the Commission he complained of headaches and pains in the head. The fractured leg proved to be of a serious nature. Westhafer was kept in the hospital from the date of his injury to August 30, when he was discharged. Two weeks later an abscess developed at the site of the fracture of the thighbone, which necessitated further treatment. Thereafter he was disabled on several occasions by recurrent abscesses of the bone, an ailment described by the physician as "recurrent osteomyelitis." Medical, surgical, and hospital treatment was furnished, and the insurance carrier paid Westhafer compensation benefits, other than such medical and hospital care, to April 13, 1921.

On January 4, 1922, Westhafer filed an application with the respondent Commission to have the extent of his disability determined. He represented that he was totally disabled from the date of his accident to March, 1920. The Commission found that the injury caused a permanent disability, consisting of shortening of the right leg and limited motion of the knee joint, which, for applicant's age—57 years—and occupation, was held to equal 27 per cent. of total disability. On April 24, 1922, Westhafer was accordingly awarded compensation for this permanent partial disability, for the period of 108 weeks, in the sum of $1,702.08. No special mention is made in these findings of the recurring abscesses of the bone from which the applicant was suffering, and which necessitated his return to the hospital for treatment, but the record shows that such condition of the applicant's leg was inquired into, and was considered, by the Commission. There was testimony indicating that the inflamed condition and the recurring abscesses were eliminated, or would probably subside in time. Westhafer applied for a rehearing, after the decision of the Commission, and claimed that the temporary disability, due to repeated hospitalization and treatment for the recurrent abscesses, entitled him to more than the permanent partial disability indemnity he had been allowed. The Commission granted the application, and on rehearing, took further testimony. After considering this evidence, it made the following finding:

> "It now appearing to the satisfaction of this Commission that the applicant's temporary disability would still entitle him to less compensation than that herein awarded for permanent disability, and that since the date of said award further payments have been made thereon so that the sum of $1,702.08 has now been fully paid, it is ordered that said findings and award of April 24, 1922, be and they are hereby confirmed and adopted as the final decision herein."

This finding and order of the Commission amounts to a determination that, under the provisions of section 9 (b) 2 (8) of the Workmen's Compensation Act (to be hereinafter referred to), and as between temporary and permanent disability payments, Westhafer was entitled to the amount already awarded by the Commission as the "greater of the two," and had not been prejudiced by the first award.

Following the second hearing, Westhafer appears to have had further trouble with his leg, necessitating his return to the hospital and further operations to relieve the condition. On March 14, 1923, he filed a petition for further compensation, upon the ground that he had sustained additional temporary disability since the period covered by the previous decision on rehearing, and that the temporary disability had now exceeded the permanent. The case was reopened and much additional testimony was taken concerning the condition of the applicant's injured leg since the last hearing. On July 19, 1923, the Commission entered its decision upon this claim for supplemental award for further disability. It found that the injury sustained by Westhafer caused temporary total disability, due to a swollen and ulcerous condition of the leg between the knee and ankle, continuing from September 13, 1922, indefinitely. It accordingly made a supplemental award in applicant's favor and against the insurance carrier of the employer, in addition to the compensation previously awarded under date of April 24, 1922, in the sum of $538.09, payable forthwith, and that, beginning as of May 11, 1923, applicant be paid the sum of $15.76 a week until the termination of disability and the further order of the Commission. It is this order and award which is attacked on this proceeding.

[1] It is first contended that the Industrial Accident Commission had no power to make an award for temporary disability covering a period beyond 240 weeks from the date of the injury; that to do so would be a violation of section 9 (b) 2 (4) of the Workmen's Compensation Act. The Commission concedes that it cannot award compensation for any temporary disability beyond the two hundred and fortieth week from the injury. The date of the order complained of is July 19, 1923, the last day of the two hundred and thirty-ninth week after the injury. While the Commission found Westhafer entitled to temporary disability compensation from September 13, 1922, indefinitely, the award would terminate, by operation of law, on July 26, 1923. The validity of the order is not affected by the failure of the Commission to specifically terminate its allowance as to that date. Southwestern Surety Insurance Co. v. Pillsbury, 172 Cal. 768, 773, 158 Pac. 762.

[2] It is next contended by the petitioners that the original award made on April 24, 1922, had become final, and that the Commission had no jurisdiction to reopen the case and make a supplemental allowance to the applicant. Section 20 (d) of the Workmen's Compensation Act provides that the Industrial Accident Commission shall have continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of the act, and may at any time, within 245 weeks from the date of the injury, upon notice and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it, upon good cause appearing therefor. It is further provided that such power shall include the right to review, grant or regrant, diminish, increase or terminate, within the limitations prescribed by the act, any compensation awarded, upon the ground that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated. Any such order, decision, or award will have the same effect as is provided in the act for the original orders, decisions, or awards of the Commission. The mere fact that in the order and award of October 19, 1922, the Commission purported to make such award its "final decision" avails nothing, for it could not, by such attempted adjudication, deprive itself of the jurisdiction vested in it by the statute. Section 9 (b) 2 (8) of the act provides that where an injury causes both temporary and permanent disability, the injured employee shall not be entitled to both a temporary and permanent disability payment, but only the greater of the two. This court has held that the power of the Commission, under this section, to allow a temporary disability payment in lieu of a permanent disability payment is one which, from the nature of the act to be accomplished, must be a continuing power and within the scope of the continuing jurisdiction of the Commission. Western Indemnity Co. v. Industrial Accident Comn. (Cal. Sup.) 216 Pac. 611. Consequently, the Commission, in the instant case, had jurisdiction to reopen the matter of the application of Westhafer for compensation, and to take further testimony and make such disposition of the matter as should be warranted by the facts developed on such re-examination.

[3, 4] The only remaining contention of the petitioners which we deem necessary to consider is the claim that there was no evidence and no finding in this case that Westhafer sustained "a new and further disability," a necessary situation, they argue, upon which to support the supplemental allowance. No special findings were made, but the ultimate fact found by the respondent Commission is that the injury sustained by the applicant "caused a temporary total disability due to a swollen and ulcerous condition of the leg between the knee and the ankle, continuing from September 13, 1922, indefinitely." Viewed in the light of the entire proceeding, this finding can be construed in no other way than as amounting to a finding that the disability of Westhafer, the person in whose favor the first and second awards were made, has "recurred." The situation thus presented justified the reopening of the case. Workmen's Compensation Act, § 20 (d). On the final hearing before the Commission, the testimony was devoted to the condition of Westhafer's leg, and his ability to work after the injury, and particularly during the period following the first rehearing. New conditions occurring since the original award were developed, and the supplemental award appears to be predicated thereon, which situation distinguishes this case from that considered in Georgia Casualty Co. v. Industrial Accident Comn., 177 Cal. 289, 170 Pac. 625, cited and relied on by petitioners. Evidence in the record supports the claim of the applicant that the injury sustained by him caused a temporary total disability following the period covered by the previous awards, and continuing indefinitely. This testimony was of a substantial kind, and justified the

conclusion reached by the Commission. It had full power to determine all the disputed questions of fact which arose, and its finding cannot be disturbed where there is evidence in the record which supports its conclusion.

The writ is discharged, and the award is affirmed.

We concur: LAWLOR, J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.; MYERS, J.

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65 Cal. App. 722

SOUTHERN PAC. LAND CO. v. DICKERSON. (Civ. 4182.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1924.)

1. Public lands 🔑25—Official township plats conclusive evidence of title under patent.

In a suit to quiet title to a tract of land to which plaintiff claimed title through patent, the issue being as to whether the land in question was part of a certain section in a certain township, it was not error to instruct, in the absence of any evidence impeaching them, that the official township plats were conclusive of the fact that the land in question was part of the section patented.

2. New trial 🔑39—Should be granted where instructions conflict as to material point.

Where there is a decided conflict in instructions on a material and vital point in the case, a new trial should be granted.

3. New trial 🔑66—Should be granted where proper instructions disregarded by jury.

Where the instructions are proper and legal, but disregarded by the jury as disclosed by the verdict, a new trial should be granted.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Southern Pacific Land Company against W. W. Dickerson. Verdict for defendant, and, from an order granting a new trial, he appeals. Affirmed.

See, also, 188 Cal. 113, 204 Pac. 576.

O. V. Willson, A. C. Verge, and J. B. Joujon-Roche, all of Los Angeles, for appellant.

Frank Thunen, of San Francisco, for respondent.

HOUSER, J. The Southern Pacific Land Company, a corporation, brought a suit against defendant Dickerson for the purpose of quieting title to and recovering possession of certain land in Imperial county, Cal., and for damages for withholding possession of said land. The answer of defendant specifically denied the material allegations of the complaint, and, in addition, interposed the defense of the statute of limitations and pleaded title by adverse possession. The cause was tried before the court sitting with a jury, and a general verdict was returned in favor of the defendant. Plaintiff made a motion for a new trial, based principally upon the insufficiency of the evidence to justify the decision; that the decision was against law, and on account of errors occurring at the trial. From an order granting a motion for new trial defendant appeals.

The controversy involves the ownership of certain real property described as being a part of tract 188 of township 13 south, range 14 east, San Bernardino meridian. It appears that a part of the grant made by the United States government to the Southern Pacific Railroad Company included section 5 of the said township, and the principal question to be decided in the suit was whether or not tract 188 was a part of said section 5. Plaintiff showed title to tract 188 through a United States patent therefor granted to plaintiff's predecessor in interest, and introduced in evidence copies of United States government official instructions and plats of the survey and the resurvey of the township, which showed that tract 188 was a part of section 5. Some years before the suit was commenced, defendant had filed two separate desert land entries on the land involved herein, but each of said entries had been rejected by the Commissioner of the General Land Office, and defendant's alleged adverse possession of the property rested entirely upon physical possession.

The following is one of the instructions given to the jury:

> "You are instructed that the official township plats in evidence are conclusive in this case, that the plat approved May 2, 1913, designated tract 188 of township thirteen (13), south range fourteen (14) east, S. B. M., as original section 5 of the same township and range, by the original survey of 1856.
>
> "You are further instructed that the patent No. 101 issued by the United States of America to Southern Pacific Railroad Company on November 9, 1915, is conclusive evidence in this case of title and right of possession in the patentee, and you are instructed that by the stipulation of counsel all right of Southern Pacific Railroad Company under said patent is vested in plaintiff Southern Pacific Land Company."

However, the jury was also instructed as follows:

> "You are instructed that if you believe from the evidence that the grant, under which the patent, read in evidence, was issued, did not include the particular tract of land involved in this action, then you must find for the defendant."

The following instruction was also given to the jury:

> "You are further instructed that the admitted possession by defendant of the land in suit, if at all times mentioned in the complaint, has been wrongful; that the measure of damages

for wrongful possession of said real property is the value of the use of said property during the period of said wrongful possession, which in this case must date from the acquisition of title and right of possession by plaintiff, to wit: March 6, 1912. You are therefore instructed to determine from the evidence the value of said use and occupation of said land by defendant from March 6, 1912, and give a verdict accordingly."

The case of Southern Pacific Land Co. v. Meserve, 186 Cal. 157, 198 Pac. 1055, was a quiet title suit involving the same tract as is here in litigation. In that case, as here, the defendants' only claim rested upon a desert land entry which, like the two claims of the defendant in the instant case, had been rejected by the Commissioner of the General Land Office. The evidence of plaintiff's title was identical with that introduced here, and defendants there made no attack upon either of the surveys or other evidence adduced by plaintiff. Among other things, the court, by Justice Shaw, said:

> "The evidence shows a straight chain of title to the plaintiff based on a patent from the United States to the Southern Pacific Railroad Company, executed on November 9, 1915. * * * The patent from the United States to the Southern Pacific Railroad Company included the particular tract in controversy as a part of tract 188 of township 13 south, range 14 east, San Bernardino meridian. * * * There is a presumption that official duty has been duly performed. Since the proper officers of the United States selected and listed this land as a part of the land covered by said grant and issued the patent accordingly, the patent itself is prima facie, and in this form of action perhaps conclusive, evidence that the land was included in an odd-numbered section according to the survey of 1856, the survey in force at the date of said acts, if that fact was necessary to the validity of the patent. If in a collateral attack, such as the one here made, the patent is conclusive upon this point, there is no more to be said. If it is only prima facie evidence of the fact, it is sufficient, for in that event it puts the burden on the defendants to prove the contrary, and they introduced no evidence on the subject. * * * Furthermore, the only interest which the defendants claim in defense was under a desert land entry made by Alvin R. Meserve in 1907, and the evidence shows that on appeal by Meserve to the Secretary of the Interior this entry was canceled on February 28, 1912, prior to the completion of said resurvey and prior to the issuance of the patent to the Southern Pacific Railroad Company. It would seem, therefore, that whatever may be the state of the title of the plaintiff, the defendants had no title whatever except such as comes from the bare possession at the time said resurvey was made and hence the same could not impair their rights. Under any view of the case, therefore, the finding that the title was in the plaintiff was fully sustained by the evidence."

Neither was there any direct attack made by the defendant here against either of the surveys. In the reply brief of appellant, wherein answer is made to the claim of respondent that error was committed by the trial court in permitting certain questions to be asked of witnesses attacking the validity of the several surveys, it is admitted by appellant that—

> "These questions did not attack the validity of the so-called survey; they simply show that the so-called survey was not a resurvey but a supplement to the resurvey of 1908 by which supplement certain claims were segregated and certain tracts of the resurvey of 1908 were described by a new number."

[1] Adopting, then, the rule announced in the Meserve Case that, in the absence of any evidence to the contrary, the surveys are conclusive, it would follow that no error was committed by the trial court in its instructions to the effect that the official township plats were conclusive of the fact that the land in question was a part of section 5.

[2, 3] It is conceded by counsel representing appellant herein that a decision is "against law" when it is contrary to the instructions. One of the instructions under consideration tells the jury that the plats are conclusive evidence that tract 188 is a part of section 5, and that plaintiff's title and right to possession under the patent, etc., are also conclusive. The second instruction informs the jury that, if they believe to the contrary of what they were informed in the former instruction was conclusive, they must find for defendant; and the third instruction tells the jury that the possession by defendant "at all times mentioned in the complaint has been wrongful," and that the jury must return a verdict against defendant for the value of the use of the property during the time defendant had possession of it. It is apparent that there is a decided conflict in the instructions to the jury upon a material and vital point in the case. The rule in such circumstances is that a new trial should be granted. Rathbun v. White, 157 Cal. 253, 107 Pac. 309; Sappenfield v. Main St. Ry. Co., 91 Cal. 48, 27 Pac. 590; Estate of Cunningham, 52 Cal. 465. Had the instruction been erroneous, its disregard by the jury would not constitute legal ground for granting a new trial. O'Neill v. Thomas Day Co., 152 Cal. 361, 92 Pac. 856, 14 Ann. Cas. 970; Lucas v. Walker, 22 Cal. App. 305, 134 Pac. 374, 379; Western Pacific Land Co. v. Wilson, 19 Cal. App. 343, 125 Pac. 1076. But where, as here, the instruction was proper and legal, its disregard by the jury, as shown by its verdict, constituted such a prejudicial error to plaintiff's rights that the granting of a new trial was manifestly correct and proper in the premises.

The order granting the motion for a trial is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

65 Cal. App. 771

BANK OF SUISUN v. FISKE et al.

(Civ. 2725.)

(District Court of Appeal, Third District, California. Feb. 25, 1924. Hearing Denied by Supreme Court April 24, 1924.)

1. Mortgages 🔑481 — Cross-complaint and findings in foreclosure held without variance and to show open account as basis of transaction.

In an action to foreclose a mortgage involving cross-complainants, right to surplus *held*, that findings and allegations of cross-complaint by one claiming an equitable mortgage evidenced by a deed to him to secure loans were without material variance and showed the basis of the entire indebtedness to be an open account augmented as such by successive notes.

2. Bills and notes 🔑430—Surrender of old secured note covering open account, and giving new, does not extinguish debt.

Where an original note, with mortgage security, was given to cover the amount of an open account never paid, the subsequent surrender of the old note and giving of a new one did not extinguish the debt.

3. Mortgages 🔑28—Conveyance of property, conveyed to wife after marriage, by wife alone, as security for debt, held an equitable mortgage.

Where a wife at her husband's request, signing alone, deeded land conveyed to her after marriage, to a creditor as security for a note which was signed by both husband and wife, and both continued to obtain further moneys and credits from the creditor, *held*, that the wife's deed was an equitable mortgage, enforceable by the creditor against the surplus, after foreclosure of a first mortgage, since the property is presumed conveyed to her as separate property, and the mortgage presumptively valid notice to the world.

4. Husband and wife 🔑267(2)—Deed by wife alone of community property inoperative.

A conveyance of community property made and executed by the wife alone is inoperative.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Suit by the Bank of Suisun against J. Allen Fiske and others to foreclose a first mortgage, in which William Pierce and Alden Ames filed cross-complaints claiming the surplus. From a judgment for William Pierce on his cross-complaint, Alden Ames appeals. Affirmed.

W. U. Goodman, of Fairfield, for appellant.

Gregory & Goodell, of San Francisco, for respondent.

PLUMMER, J. The plaintiff, the Bank of Suisun, began an action to foreclose a first mortgage upon certain lands and premises belonging to the defendant Fiske, situated in the county of Solano, upon which the respondent Pierce claims a second mortgage and the appellant Ames claims a lien by virtue of an attachment and judgment, second only to the lien held by the plaintiff. Foreclosure was had, and after the settlement of the amount due the Bank of Suisun there remained a surplus of $2,170.29. The right to this surplus gives rise to the present controversy now before this court. The respondent Pierce, to whom was awarded the sum just referred to, claims the same by virtue of a mortgage lien evidenced by certain deeds alleged as having been executed as security only. The appellant Ames, as just stated, claims the surplus by virtue of the judgment founded upon attachment proceedings instituted against the defendants Fiske, and to support his claim alleges that the lien claimed by the respondent Pierce is invalid. The trial court made lengthy findings of fact which, among other things, found that the respondent had an equitable mortgage second only to the lien of the plaintiff herein, and that as a holder of such second lien it was entitled to the fund remaining after the satisfaction of the plaintiff's claims.

While several causes are alleged by appellant as reasons why the judgment of the trial court should be reversed, only two of them need to be considered: First, that the findings are not supported by the pleadings; second, that the instrument executed by the Fiskes does not constitute a mortgage or give the respondent Pierce any lien upon or right to the surplus fund awarded him.

The appeal is upon the judgment roll alone. The pleadings, as they refer only to the controversy between the appellant and the respondent, are set out in the transcript, and the theory upon which the cause was tried is not disclosed to this court.

[1] Are the findings supported by the pleadings? Paragraph 2 of the respondent's cross-complaint alleges as follows:

> "That on the 28th day of March, 1916, the defendant, Elsie Latimer Fiske made, executed and delivered to the defendant Pierce that certain indenture which is annexed to this answer as 'Exhibit A' and hereby made a part hereof; that said indenture was made, executed and delivered as aforesaid as security for a balance due and payable upon an open account from defendants, Elsie L. Fiske and Jay Allen Fiske to defendant Pierce."

Finding 4 is as follows:

> "The court further finds that at the time said indenture 'Exhibit A' was executed and delivered, said Jay Allen Fiske and Elsie Latimer Fiske signed and delivered to said William Pierce a writing reading as follows, to wit:
>
> " '$5,290.00. Suisun, Cal., March 28, 1916.
>
> " 'For value received, two (2) years after date, we jointly and separately promise to pay

to the order of William Pierce the sum of five thousand two hundred ninety dollars with interest at the rate of seven per cent. (7%) per annum from date until paid. Interest to be paid semiannually and to be added to and become part of the principal if not so paid, and thereafter bear the same rate of interest. In the event of default of interest or principal for a period longer than sixty (60) days, both interest and principal to become immediately due. Interest and principal payable in United States gold coin. J. Allen Fiske.

" 'Elsie L. Fiske.

" 'This note is secured by the following: Deed, Elsie L. Fiske to William Pierce, of even date, covering sixty-three (63) acres of land, located in Green Valley, Solano County, California.' "

Finding 2, in relation to Exhibit A and the note to which we have referred is as follows:

> "That on the 28th day of March, 1916, the defendants Jay Allen Fiske and Elsie Latimer Fiske, wife of said Jay Allen Fiske, made, executed and delivered to said William Pierce that certain indenture, a copy whereof is annexed to the answer and cross-complaint of William Pierce herein in this action as 'Exhibit A' thereto, to which reference is hereby made, and which 'Exhibit A' is hereby made a part hereof by reference; that said indenture was made, executed and delivered as aforesaid, as security for a balance of money due owing and payable from said defendants Jay Allen Fiske and Elsie Latimer Fiske to said William Pierce.
>
> "The court finds that the promissory note dated March 28, 1916, for $5,290, was given by said Jay Allen Fiske and Elsie Latimer Fiske merely as evidence of an indebtedness in said amount then owing to said William Pierce, and that said indebtedness was secured by said indenture dated March 28, 1916, and the court finds that said note was canceled and surrendered up by said William Pierce upon a new promissory note being given him by said Jay Allen Fiske and Elsie Latimer Fiske, but the court finds that neither said note nor said indebtedness was fully paid or satisfied, and that said indenture continued and remained as security for the balance which remained owing to said William Pierce after said note for $5,290 was surrendered up by him."

After alleging the execution of Exhibit A, as set out in paragraph 2 of plaintiff's cross-complaint, there is an allegation that on or about the 25th day of June, 1917, a settlement of accounts was had between the defendants Fiske and the respondent Pierce, and it was then ascertained that the amount due Pierce, the respondent, was the sum of $10,600, and a note evidencing that amount was thereupon executed and delivered by the defendants Fisk to the respondent Pierce; that thereafter and on or about the 1st day of November, 1917, it is alleged that the indebtedness from the Fiskes to the respondent Pierce had increased to the sum of $12,000; and that thereupon a note in that sum was executed and delivered by the defendants Fiske to the respondent Pierce. It appears that as the successive notes were executed in the increased amounts, the previous notes for the lesser sums were surrendered. By reference to finding 2 it will be seen that the court found that the original note given for the sum of $5,290 was given to evidence the amount of an indebtedness then existing and the amount of money which was then owing from the defendants Fiske to the respondent Pierce, and that the Exhibit A referred to in the complaint was made, executed, and delivered as security for the payment of whatever money was due and owing from the defendants Fiske to the respondent Pierce. It further appears that the notes were not paid. The indebtedness was not paid, but successive notes were given to evidence the amount thereof.

By following the steps of this recital, it will be seen that there was an existing indebtedness at the time of the execution of the first note and also at the time of the execution of the deed given as a mortgage hereinbefore referred to, that the indebtedness appears to have been an open account and the notes were simply evidences of the amount due, that this account increased from time to time, and, as the amount owing was from time to time ascertained, the subsequent notes were executed and delivered. Upon this statement we do not see that there is any material variance between the allegation in the cross-complaint that the mortgage was given to secure an open account, and its transmutation into a form evidenced by a note in the sum of $12,000, and the findings of the court, which we have hereinbefore set forth. In other words, both the complaint and the findings when analyzed show that the basis of the entire indebtedness was an open account and was augmented as such and was from time to time evidenced in the total thereof by the successive notes given as hereinbefore referred to.

Upon this question we need only cite one authority. In Sather Banking Co. v. Briggs, 138 Cal. 724, on page 733, 72 Pac. 352, 355, the court says:

> "The general rule is that 'no change in the form of indebtedness or in the mode or time will discharge the mortgage. A mortgage secures the debt and not the note or bond or other evidence of it. No change in the form of the evidence or the mode or time or times—nothing short of actual payment of the debt, or an express release—will operate to discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note or giving a different instrument as an evidence of the debt, or by a judgment at law on the note merging the original evidence of indebtedness.' "

[2] The authorities are numerous to the effect that the cancellation and surrender of an old note and the giving of a new one do not extinguish the debt. In this particular it must be remembered that the original

note of $5,290 was given to cover the amount of the open account at the time the mortgage was executed and that the sum evidenced thereby has never been paid.

We think the foregoing statement shows clearly that there was no variance of any material consequence, and hence a resumé of the numerous authorities cited by appellant is unnecessary.

[3, 4] The next point made for reversal which we will consider is that the Exhibit A, herein referred to, did not and does not constitute a mortgage and valid lien because it was signed only by the defendant Elsie Latimer Fiske. It appears from the transcript that the 63 acres of land covered by the deed was conveyed to Elsie Latimer Fiske after she had become the wife of Jay Allen Fiske. Under this state of fact it is contended that, by reason of the provisions of section 172 of the Civil Code, the husband has the complete management and control of the community property, and that as the court found the property conveyed to Elsie Latimer Fiske was community property, her signature to the instrument in question did not give to it any vitality. The trial court found, however, that the mortgage in the form of a deed was given at the direction and procurement of the defendant Jay Allen Fiske; that the indebtedness was his indebtedness; and that he signed the note hereinbefore set out. The fact that Jay Allen Fiske did not sign the deed executed as a mortgage appears to have been the result of the belief that, as the property stood in the name of his wife, his signature was unnecessary.

A number of cases have been cited to the effect that a conveyance of community property made and executed by the wife alone is inoperative. This, of course, is a correct statement of the law, but the principle announced in such cases we think inapplicable to the questions herein presented for consideration. As just stated, the debt was the husband's debt. The note evidencing such indebtedness was signed by him. It had appended thereto an annotation that it was secured by the certain mortgage or deed given as a mortgage. The court finds that this mortgage or instrument was given at his request and upon his procurement. This brings the circumstances of this case directly in line with the following authorities. In Remington v. Higgins, 54 Cal. 620, it appears that one Remington agreed to sell to Higgins a parcel of land for the sum of $12,000, $300 in cash and the remainder to be secured by a mortgage on the premises. Conveyance was made of the premises to the wife of the defendant Higgins; she alone executed the notes and the mortgage. The husband paid the $300 and also a subsequent sum. In upholding the instrument as a valid mortgage in equity the court says:

> "The husband did not join in the execution of the notes or mortgage, but they were executed at his request and in pursuance of the agreement between himself and plaintiff. Both husband and wife took possession of the land, and have ever since occupied it. Subsequently the husband paid $108 interest on the debt; the balance not having been paid, plaintiff brings his action for a foreclosure."

The court then, in dealing with the defense set up, that under the provisions of section 167 of the Civil Code, which provides that as community property is not liable for the contracts of the wife, the mortgage is void, etc., and also the defense that the instrument created no lien, proceeded to discuss the questions presented and then held as follows:

> "We are of opinion that plaintiff has a lien upon the premises by way of equitable mortgage, to secure the unpaid portion of the purchase money and interest." * * * That "equity will treat that as done which the parties agreed to have done, and which ought to have been done."

This case is cited with approval in Peers v. McLaughlin, 88 Cal. 294, 26 Pac. 119, 22 Am. St. Rep. 306, where it is again said:

> "The principle is well settled in equity that a mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged."

In the more recent case of Beckwith v. Sheldon, 168 Cal. 742, 145 Pac. 97, Ann. Cas. 1916A, 963, the Supreme Court of this state, citing with approval the cases of Remington v. Higgins, supra, and Peers v. McLaughlin, supra, states the law as follows:

> "With regard to that part of the judgment which declares a lien on the property of the company, we need only say that, under the well-established principle of equity that that which ought to have been done will be deemed to have been done, it is held that where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same."

After the giving of the mortgage in the form of a deed executed by Elsie Latimer Fiske, the wife, the husband, Jay Allen Fiske, obtained further moneys and continued to obtain further moneys and credits until the amount due, at the time of the foreclosure proceedings had herein, the sum of $12,000 was due and owing by the Fiskes, both husband and wife, to the respondent Pierce. Upon such a showing there seems to us no question as to the duty of a court of equity in relation to the deed signed only by the wife, and that the holding could only be to the effect that the instrument constituted a mortgage.

Upon the record, the presumption would be that when the property in question was conveyed to the wife it was conveyed as separate property, and that her mortgage executed therein, even though signed by herself alone, was presumptively valid and a notice to all the world. The court, however, found that the property was community property, as herein stated, upon which was a valid and subsisting mortgage.

The foregoing are the only vital questions involved in this appeal, and, as we agree with the conclusion of the trial court, it is ordered that the judgment entered herein be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

65 Cal. App. 786

PEOPLE v. HAMIL. (Cr. 1154.)

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1924.)

1. Bastards 🔑17½—No proof of father's failure to provide for minor child.

Evidence on prosecution of the father of an illegitimate child, under Pen. Code, § 270, as amended by St. 1923, p. 592, for failure to provide for the child, *held* to constitute no proof of such failure; defendant having up to the time of indictment contributed for the child's support $7 per week out of his weekly earnings of $34, though he had a wife and three other children.

2. Bastards 🔑17½—Parent and child 🔑17(2)—For conviction of father of nonsupport of child, proof of mother's nonsupport necessary.

It was an excuse, preventing conviction of a father, under Pen. Code, § 270, of failure to support a minor child at a time prior to the going into effect of the amendment of 1923 (St. 1923, p. 592) relative to support of both legitimate and illegitimate children, that the child was being properly supported by the mother, then charged, equally with him, with the duty of providing for it.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Louis Hamil was convicted of failure to provide for a minor child, and appeals. Reversed.

Roy L. Daily, James C. Espey, and Walter J. Thompson, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction under the provisions of section 270 of the Penal Code, which prescribes a penalty for failure to provide for one's minor child.

Resolving all conflict in the testimony against the defendant, it appears that he is the father of a child which was born at the St. Elizabeth's Infant Hospital on October 8, 1922, to a young unmarried mother; that at all times during his acquaintance with the mother of this child, the defendant was married to another woman and that there were three children of that marriage; that the defendant was supporting his legitimate family; that he was earning his living by driving a laundry wagon at a salary of $34 a week at the time of the trial; that he gave to the mother of his illegitimate child, who is the prosecuting witness here, $50 or $60 before she went to the hospital for the birth of her child; that up to the time the prosecuting witness went to the hospital, which was four months before her child was born, she worked as a waitress and earned her living. After she left the hospital, on November 4, 1922, she resumed her work as a waitress and the defendant gave her $7 a week for the support of her child until about April, 1923, at about which time she began this prosecution. The indictment charges the defendant with failure to provide for the child on May 1, 1923. The prosecuting witness testified upon cross-examination:

> "Q. Now * * * when did the defendant discontinue giving you money for the support of the child? A. It was in April; I don't know exactly the date; but it was after I had sworn out a warrant for him. Q. When did you swear out this warrant? A. Well, I don't remember; it was some time in April, * * *"

She then testified that some time in April, 1923, the defendant came to her home to give her some money for the child; that on that night the health officers had called at his home for some purpose; that, thereafter, she telephoned to the defendant's wife. She was then asked:

> "Q. Now * * * did you make any demand on this defendant for any money after the time he was over to see you at the time the health officers were out at his place? A. No, I didn't exactly make any demand, I started—swore out a warrant then for him."

[1, 2] It is apparent, after a reading of the entire transcript, that there was no proof that the defendant failed to provide for the child. Furthermore, there was an entire absence of proof that the child was not being properly provided for by the mother. She was working, according to her testimony, and there is no proof that she was not able and willing to provide necessaries for her six months' old child; nor is there any proof of the amount of money required for the maintenance of the child.

No brief has been filed by the people and no attempt made to point out any evidence in the record upon these two vital elements in a prosecution of this kind under the statute applicable at the time the alleged offense was committed, or to defend, in any manner this judgment against the attack of the appellant. At the time of the alleged offense, it was the law of this state that the duty of providing for minor children rested equally upon father and mother. Ex parte Kendrick (Cal. App.) 212 Pac. 226. The change in the law effected by the amendment of 1923 to section 270 of the Penal Code did not go into effect until August 18, 1923, and the defendant was charged with failure to provide as of May 1, 1923.

As heretofore stated, it is uncontradicted in the record that the defendant, up to the time of the filing of the indictment against him had contributed to the support of this child about $7 a week, a reasonable sum, in view of the testimony that he had been earning $50 a week for a time, and, later, and at the time of the trial, he was earning only $34 a week; and that he had three children and his wife and himself to support, in addition to the child of the prosecuting witness. In view of this testimony, it would seem, that whatever the motive for this prosecution, it was not a desire to obtain support for the minor child.

There is also a complete failure of proof that the child was not being properly supported by its mother, who was also charged, equally with the defendant, with the duty of providing for its needs prior to the last amendment of the section of the Penal Code relative to the support of illegitimate children.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

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66 Cal. App. 38

RUDOLPH WURLITZER CO. OF CALIFORNIA v. CUTTING et ux. (Civ. 4593.)

(District Court of Appeal, First District, Division 2, California. Feb. 28, 1924.)

1. Principal and agent 🔑145(4)—Third party may hold either undisclosed principal or agent.

Where, at the time of a sale of a piano, seller did not know that married woman was principal and that her husband was acting as her agent, seller was entitled to hold for the purchase price either the principal, when discovered, or the agent.

2. Appeal and error 🔑187(2)—Joinder of principal and agent, not questioned below, not considered.

In action against principal and agent jointly, where no demurrer was interposed and no motion was made, based on the proposition that the plaintiff might not sue the principal and agent jointly, that question is not before the appellate court.

3. Sales 🔑176(1)—Delay in making repairs held not to constitute defense.

In action for purchase price of piano, delay of plaintiff in sending a mechanic to repair the piano was no defense, where no objection to the delay was made until the action was started.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by the Rudolph Wurlitzer Company of California against Henry C. Cutting and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

E. E. Keyes, of Oakland, and J. C. Thomas, of Visalia, for appellants.

Jesse A. Mueller, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover the unpaid balance alleged to be due on the sale by the plaintiff of a certain piano. The trial court awarded a judgment in favor of the plaintiff, and the defendants have appealed.

The judgment of the trial court was based on findings of fact, which included, among others, a finding:

> "That heretofore, to wit, on the 2d day of June, 1922, at the city and county of San Francisco, state of California, the said plaintiff sold to the said defendants one Wurlitzer piano (used) style AX, No. 38637, to be used at said Daisy Farm Inn, and at said time and said place the said defendant Henry C. Cutting, for and on behalf of both defendants herein, made, executed, and delivered to the said plaintiff an agreement in writing, by which the said defendants agreed to pay for said piano the sum of twelve hundred fifty and $^{00}/_{100}$ ($1,250.00) dollars; that a copy of said agreement is annexed to the amended complaint on file herein and marked Exhibit A.
>
> "4. That at the time of the entering into of the agreement above referred to the said plaintiff agreed to install said instrument in the Daisy Farm Inn and to furnish service for the purpose of keeping said instrument above referred to in repair and adjustment, and that the said plaintiff did so install said instrument and did furnish said service to the said defendants whenever so requested by them."

The Exhibit A referred to in the findings commences:

> "San Francisco, June 2, 1922.
>
> "I promise to pay to the order of the Rudolph Wurlitzer Company of California, a corporation. * * * I admit receipt of said instrument in good order, and I agree to keep the same in good order. * * * I agree that there is no warranty that said instrument is sound or merchantable. * * * I also agree that the Rudolph Wurlitzer Company shall not be bound by any agreements or representa-

tions not contained in the foregoing, which I have read and understand.

"Henry C. Cutting.

"Witness: Francis M. Madsen."

On the trial the plaintiff called an outside salesman, Mr. Carr, who testified that he called on Mr. Cutting at the Daisy Farm Inn and also at Mr. Cutting's office in the Security Bank Building in Oakland. Mr. Carr testified that the Daisy Farm Inn was a restaurant, and that it had, among other appurtenances, a dancing floor. He further testified that on June 2d, Mr. and Mrs. Cutting went with him into the store owned by the plaintiff, and that, after the musical instruments were exhibited to Mr. and Mrs. Cutting, Mr. Cutting made the remark that the instrument mentioned in the findings "would be most satisfactory in our place." Later on the same day the sales contract above referred to was signed, and a few days later the musical instrument was put in place in accordance with the terms of the sales contract. The subscribing witness, Francis M. Madsen, was called as a witness, and testified that he was present on June 2, 1922, and took part in exhibiting the instruments to Mr. and Mrs. Cutting; that in the conversations held Mr. Cutting stated that the instrument was to be installed at the Daisy Farm Inn in Oakland. He further stated that the instrument was first examined by Mr. Cutting on one occasion; that nothing was done until Mrs. Cutting was brought over later; that, when she stated she liked the instrument designated in the writing, Mr. Cutting decided to take it, and Mrs. Cutting decided to take it, although the witness could not say that any particular words in that behalf were used by either the husband or his wife. The plaintiff also called as a witness Mr. Cutting. He testified that his codefendant, Mrs. Cutting, was the owner of Daisy Farm Inn. The property formerly stood in the name of Mr. Cutting until 1915 or 1916. In November, 1918 or 1919, he converted a building that was then a barn into a café. In the year 1922 Mr. Cutting stated that his wife was managing the place and that he used to do what he could in assisting in the management. He hired employees. The musical instrument as installed had ten slot boxes, so that the instrument might be used by the guests of the house dropping coins in the slots.

When the defendants came to introduce their testimony, they offered witnesses to the effect that Mrs. Cutting was the owner of the personal property contained in the Daisy Farm Inn, and that the title to real estate stood in her; but they offered no testimony to the effect as to whether the condition of the title was ever at any time called to the attention of the plaintiff in this case until the date of the trial, or that she objected to the presence of the machine in her house.

[1, 2] There is no testimony, other than that stated above, showing that at the time the written instrument was signed the plaintiff knew that Mrs. Cutting was principal and Mr. Cutting was acting as her agent. Under such a state of facts the plaintiff was entitled to hold either the principal, when discovered, or the agent. 31 Cyc. 1574. No demurrer was interposed, and at no stage of the proceedings was any motion made, based upon the proposition the plaintiff might not sue the principal and agent jointly. That question, therefore, is not before us.

[3] Complaint is made to the effect that at times the piano was out of order; on one occasion that Mr. Cutting notified the plaintiff on Thursday that the instrument was out of order, and that the plaintiff did not send a mechanic until the Tuesday following. The record does not disclose the exact date of the incident. The defendants made no objection to the delay until they were sued for the price of the instrument. As the matter appears on the face of this record, the delay in making repairs does not constitute a defense to the action. The findings are supported by the evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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65 Cal. App. 666

PLATNAUER v. BOARD OF SUP'RS OF SACRAMENTO COUNTY et al.

(Civ. 2773.)

(District Court of Appeal, Third District, California. Feb. 21, 1924. Hearing Denied by Supreme Court April 21, 1924.)

1. Justices of the peace 🔑3—Township and city justice's offices distinct.

Under Pol. Code, § 4015, and section 4236*l*, as added by St. 1921, p. 794, Code Civ. Proc. § 103, as amended by St. 1923, p. 1011, the offices of township justice of the peace and city justice of the peace are distinct, with differences in qualification, salary, and jurisdiction of the officers; so the fact that the territory of a judicial township, which has a justice of the peace, is identical with the territory of a city, is no reason for not filling the office of city justice of the peace.

2. Justices of the peace 🔑2—City justices' courts permissible in cities having freeholders' charters not providing for municipal courts.

Const. art. 11, § 8½, subd. 1, declaring it competent for the freeholders' charter of a city to provide for a municipal court, and declaring that when such court has been established there shall be no other court inferior to the superior court, does not prevent the Legislature from providing for city justice court in a city operating under a freeholders' charter, which makes no provision for a municipal court.

3. Mandamus ⇨76—Lies to compel an officer to fill a vacancy in office is specially enjoined by law.

Performance of the duty specially enjoined by Code Civ. Proc. § 103, as amended by St. 1923, p. 1011, on a county board of supervisors, to fill by appointment vacancy in office of city justice of the peace, can under section 1085 be compelled by mandamus.

4. Mandamus ⇨23(2)—Elector and taxpayer proper party plaintiff to compel performance of duty specially enjoined on officer.

An elector and taxpayer is a proper party plaintiff in mandamus to compel an officer to perform a duty specially enjoined on him by law.

5. Constitutional law ⇨68(1)—Necessity for city justice's court legislative question.

The necessity for a city justice's court in addition to a township justice of the peace is a question for the Legislature, not the courts.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by R. Platnauer against the Board of Supervisors of the County of Sacramento and the members thereof. Judgment for plaintiff, and defendants appeal. Affirmed.

J. J. Henderson, Dist. Atty., and W. V. Cowan, Asst. Dist. Atty., both of Sacramento, for appellants.

R. Platnauer, of Sacramento, in pro per.

FINCH, P. J. Plaintiff was granted a peremptory writ of mandate, directing the defendants to appoint a justice of the peace for the city of Sacramento. The defendants have appealed.

Plaintiff alleged that he is a taxpayer and a qualified elector of the city of Sacramento; that for more than 20 years he has been admitted to practice law in the state of California; that he presented and filed a petition, signed by taxpayers and electors of the city of Sacramento, requesting defendants to appoint him justice of the peace of said city; and that plaintiff demanded of defendants that they appoint some competent person justice of the peace of said city, but that they refused and still refuse to appoint any person to such office. From the pleadings and the stipulations of the parties it appears that one of the judicial townships into which the county of Sacramento is divided is designated Sacramento township, and is identical in boundaries with the city of Sacramento; that a justice of the peace for said judicial township was elected at the last general election and is now acting as such; that for a number of years there has been no incumbent of the office of city justice of the peace of the city of Sacramento; and that said city is a city of the second and one-half class.

Section 4015 of the Political Code provides:

> "The board of supervisors of each county, as public convenience may require, shall divide their respective counties into townships for the purpose of electing justices of the peace and constables; provided, however, that in the establishment of townships that may be hereafter established no incorporated city shall be divided so as to lie partly within one township and partly within another."

The county of Sacramento is a county of the seventh class, and the city of Sacramento has a population of more than 20,000. Section 4236*l* of the Political Code, as added by St. 1921, p. 794, provides:

> "For the purpose of regulating the compensation of township justices and constables in counties of the seventh class, townships shall be classified on the basis of population. * * * Incorporated cities having a population of twenty thousand or more, shall be known as townships of the first class. * * * Townships of the first class shall have one justice," whose salary is fixed at "three thousand six hundred dollars per annum."

Section 103 of the Code of Civil Procedure, as amended by the Legislature of 1923 (St. 1923, p. 1011), provides:

> "There shall be at least one justice's court in each of the townships of the state, for which one justice of the peace must be elected. * * * In every city of the first and one-half class there must be seven justices of the peace, and in every city of the second class there must be two justices of the peace, and in every city of the second and one-fourth, second and one-half, second and three-fourths, third and fourth classes there must be one justice of the peace, to be elected in like manner, by the electors of such cities or towns, respectively; and such justices of the peace of cities shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justice's courts. Said justices of the peace of cities and justice's courts of cities shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city, and generally exercise all powers, duties and jurisdiction, civil and criminal, of police judges, judges of police courts, recorder's courts or mayor's courts, within such city.
>
> "No person is eligible to the office of justice of the peace in any city of the first, first and one-half, second, second and one-fourth, second and one-half, second and three-fourths or third class, who has not been admitted to practice law in this state. * * * Every city justice of the peace in any city of the second and one-half class shall receive a salary of four thousand dollars per annum. * * * Where the number of city justices herein fixed for any city exceeds the number elected at the last general election, the board of supervisors of the county in which such city is situated shall, as soon as is practicable after this amendment

takes effect, make appointments in the manner provided by law, to fill such vacancies."

[1-5] From the foregoing it clearly appears that the offices of township justice of the peace and city justice of the peace are distinct entities, though having certain jurisdiction in common. The fact that Sacramento township and the city of Sacramento embrace the same territory is a mere incident. In other counties a city of the same class may constitute a part only of a judicial township. City justice's courts are given broader jurisdiction than those of townships. No one is eligible to the office of city justice of the peace, except in the fourth class, who has not been admitted to practice law. No such qualification is required of a township justice. The salary of the justice of the peace of Sacramento township is not the same as that of a justice of the peace in a city of the second and one-half class.

The freeholders' charter of the city of Sacramento (Stats. 1921, pp. 1919, 1963) provides for a police court with jurisdiction of all misdemeanors, of proceedings for violation of the charter or of any ordinance of the city, and of the examination and commitment of persons charged with offenses triable in the superior court. It is competent, in freeholders' charters, to provide, in addition to police courts, for the establishment of—

> "municipal courts and judges thereof, with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts and judges thereof. * * * When such municipal court has been established, there shall be no other court inferior to the superior court." Const. art. 11, § 8½, subd. 1.

The Sacramento charter makes no provision for a municipal court. The Constitution in no manner restricts the power of the Legislature to provide for city justice's courts in cities operating under freeholders' charters which make no provision for municipal courts. Graham v. Mayor, etc., of Fresno, 151 Cal. 465, 91 Pac. 147. Since the Legislature has made such provision and has expressly directed boards of supervisors to fill existing vacancies, it is the plain duty of appellants to appoint some competent person to the office. The writ of mandamus—

> "may be issued * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office." Code Civ. Proc. § 1085.

The writ may issue to compel an officer to fill a vacancy. City of San Diego v. Capps, 32 Cal. App. 461, 163 Pac. 235; Commonwealth v. Livingston, 171 Ky. 52, 186 S. W. 916; Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829. An elector and taxpayer is a proper party plaintiff in such a proceeding. High's Extraordinary Legal Remedies (3d Ed.) § 431; Conn v. City Council, 17 Cal. App. 705, 121 Pac. 714, 719; Frederick v. City of San Luis Obispo, 118 Cal. 391, 50 Pac. 661; Commonwealth v. Livingston, supra. Whether there is any necessity for a city justice's court in addition to that of the township is a question which must be addressed to the Legislature, and over which the courts have no jurisdiction.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

65 Cal. App. 625

KLEIN-SIMPSON FRUIT CO. v. HUNT, HATCH & CO. (Civ. 4478.)

(District Court of Appeal, First District, Division 2, California. Feb. 21, 1924.)

1. Trover and conversion 🔑1—"Loan" cannot rest on conversion by borrower without owner's consent.

A "loan," as defined by Civ. Code, §§ 1884, 1902, presupposes an agreement by the borrower to return the same or a similar thing at a future time, and excludes any obligation to pay for the thing borrowed, which is the subject of special agreement, but in both cases an agreement is necessary, and neither can rest on a conversion by one terming himself a borrower without the owner's consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loan.]

2. Principal and agent 🔑159(1)—Principal held not entitled to recover value of materials taken by agent and delivered to another principal for whom obtained.

Where an agent obtained from his principal, without the latter's consent, materials for work done for another, though expressly directed by the latter to obtain them elsewhere, the principal could not recover the value thereof from such other, even if the agent were agent for both; he being presumed to have knowledge of the limitations of his agency.

3. Trover and conversion 🔑40(4)—Finding defendant borrowed materials from plaintiff held contrary to evidence.

In an action for the value of materials taken from plaintiff, without his knowledge or consent, by defendant's agent without authority, the court's finding that a loan was made *held* contrary to the evidence, notwithstanding evidence of a local custom as to borrowing such materials, where there was no evidence of a custom authorizing the taking thereof without the owner's knowledge or consent.

4. Account stated 🔑4—Statements of claims for materials taken by defendant's agent from plaintiff held not statements of account.

An agent's statement of a purported personal claim against his principal and rejected by him for "settlement of box material loaned," and subsequent unapproved statements in varying amounts by the owner of such box material, which claimed that the materials, which were taken from it without its consent by the agent, were loaned, *held* not statements of account between the owner and principal.

5. Account stated 🔑1—Essential elements stated.

Essential elements of a statement of account are an agreement that the items are correct, and a promise, express or implied, by the debtor to pay the amount thus found correct.

6. Account stated 🔑8 — Prior negotiations merged.

When an account is stated by agreement on the amount and a promise to pay it, a new contract, into which all prior negotiations are merged, is created, and the creditor must recover on the account as stated, if at all.

7. Account stated 🔑6(1)—Assent to correctness of items cannot be inferred from specific objection or refusal to state account.

An implied assent to the correctness of items of an account cannot be inferred from a specific objection or refusal to state the account.

8. Account stated 🔑5—Presupposes complete adjustment of accounts and absolute acknowledgment of certain sum due.

An account stated presupposes an absolute acknowledgment or admission of a certain sum due, or a complete adjustment of accounts between the parties, the striking of a balance, and an express or implied assent to the correctness of such balance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

9. Limitation of actions 🔑146(2)—Open account, barred by statute, not relieved therefrom by oral statement of account.

An open account, barred by the statute of limitations, cannot be relieved from such bar by an oral statement of the account; no acknowledgment or promise being sufficient evidence of a new or continuing contract taking the case out of the operation of the statute, unless contained in a writing signed by the party to be charged. Code Civ. Proc. § 360.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Klein-Simpson Fruit Company against Hunt, Hatch & Co. Judgment for plaintiff, and defendant appeals. Reversed.

Fred L. Dreher, of San Francisco, for appellant.

George L. Stewart, of San Francisco, for respondent.

NOURSE, J. Plaintiff commenced this action on October 15, 1918, by filing a complaint setting forth two separate causes of action. The first cause of action is a simple cause for conversion. The complaint alleges that during the month of May, 1914, the defendant was operating a packing house at the town of Los Mochis, state of Sinaloa, Mexico, and was engaged in the business of buying and packing tomatoes and shipping them to the markets of the United States; that one Bosworth was then the general agent in Mexico of the defendant; that plaintiff was then the owner of a certain quantity of wooden box materials, designated as shook, stored at the town of Los Mochis, and in the safe-keeping, custody, and control of one Scally; that during said month of May, 1914, the defendant, through its agent Bosworth, knowing the relation between plaintiff and Scally, employed the latter to superintend the packing house of said defendant in Los Mochis; that during said month of May the said Bosworth and Scally, acting as agents of the defendant, converted and appropriated to the use of defendant a quantity of said shook to plaintiff's damage in the sum of $1,232.94; that owing to a state of insurrection which then existed in the state of Sinaloa the said Scally was unable to communicate with plaintiff, and the plaintiff remained in ignorance of the facts above stated until the month of October, 1916; and that upon learning of said conversion plaintiff immediately demanded of the defendant a return of like materials for the materials so taken and used, but the defendant refused to comply with this demand, and thereupon plaintiff demanded payment for the materials taken. The allegations in the second cause of action, in direct contrast with those of the first, are that Scally, while acting as agent for the defendant, as well as agent for the plaintiff, loaned the shook in question to the defendant according to a local trade custom prevalent in that community by which local packers borrowed from others box material during the packing season, with the understanding that they would either return and restore like material to the lender within a reasonable time or pay the reasonable value thereof to the lender. The other allegations of this cause of action are similar to those found in the first cause, and need not be repeated.

The defendant interposed a demurrer to this complaint, setting up, among other things, the bar of the statute of limitations to both causes of action. This demurrer was sustained, and, within time, an amended complaint was filed. In this amended complaint the charge of conversion was abandoned, and the first cause of action therein is similar to the second cause found in the original complaint, except that the allegations relating to the local custom eliminated the element of reasonable time, and set forth the custom as one calling upon the defendant to replace materials "when it was able so to do," and that, in the event that defendant failed to make return, plaintiff, at its option, might charge the reasonable value thereof. It was then alleged that, owing to the state of rebellion existing in the territory, and the consequent interruption of freight communication with the United States, the defendant was able to return the shook in the month of December, 1916, but failed to do so. (It is not alleged that the return could not have been made sooner.) It was alleged that on account of defendant's failure to return the shook in December, 1916, plaintiff charged said materials to defendant's account in January, 1917, and thereupon demanded payment from the defendant. As a second cause of action defendant alleged that on the 11th day of January, 1917, the defendant "was and still is indebted" to the plaintiff in the sum sued for "on an account for goods, wares, and merchandise * * * sold to defendant and to be paid for at San Francisco." It is not alleged when the goods were sold or when the indebtedness accrued. The third cause of action is based upon an account stated, alleged to have been made in the month of September, 1916, at San Francisco, between plaintiff and defendant for the sum of $1,232.94. (It will be noted that in this cause of action the plaintiff depends upon a statement of an account made in September, 1916, for the same item which in the previous causes of action the complaint alleged were charged to the defendant in January, 1917, the same date at which it was charged the defendant became indebted to the plaintiff. It should also be noted that in the original complaint it was alleged that plaintiff's first knowledge of the loss of the shook was on or about October, 1916; and that, in the amended complaint, it was alleged that the charge was made against defendant because of his failure to return the shook in December, 1916.) Defendant's demurrer to the amended complaint having been overruled, it filed its answer denying the allegations of the complaint relating to the loan of the shook in May, 1914, and specifically pleaded the statute of limitations to the three causes of action. The answer also denied that a charge for the materials was made against the defendant in January, 1917, that the defendant was indebted to the plaintiff in any sum in January, 1917, or at any other time, and in answer to the third cause of action specifically denied that in the month of September, 1916, or at any other time, an account was stated between the parties, or that the defendant agreed to pay plaintiff any sum for the shook in question.

In findings directed specifically to the first cause of action, the court found that in the month of May, 1914, defendant operated a packing house at Los Mochis; that Bosworth was the general agent in Mexico for the defendant; that in the month of May plaintiff was the owner of the shook in question, which Bosworth borrowed from plaintiff, and which defendant used for its own purposes. It also found that during this time there existed at Los Mochis a custom by which packers borrowed box materials from each other, with the understanding that they should return or replace said loan when able to do so from supplies receives from the United States, and that in the event of their inability to do so, they should make a return in kind or the value of the same would be charged to the borrowing party. It also found that defendant could have returned the shook to the plaintiff in the month of December, 1916; that it failed to do so, and that on January 11, 1917, plaintiff charged defendant's account the reasonable value thereof, amounting to $1,232.94. In findings directed specifically to the third cause of action, the court found that in the month of September, 1916, at San Francisco, a settlement of account was reached between plaintiff and defendant whereby defendant was charged with the sum of $1,232.94; and, as the findings of fact appearing in the transcript are segregated and designated as covering the first cause of action and the third cause of action separately, and as no findings are shown to have been made covering the second cause of action, we assume that that cause was abandoned, or that it at least was not carried into the judgment. Upon the findings above noted judgment was entered for $1,232.94, with interest from December 2, 1916, and from this judgment defendant appeals.

The facts of the case material to the opinion are that in May, 1914, Bosworth, acting as general agent for the appellant, employed Scally to take charge of appellant's interest in the packing of tomatoes in Los Mochis under an express authorization that, if the packing boxes left by Bosworth in appellant's packing house were inadequate, Scally should purchase what was needed from the United Sugar Company, a corporation having box material in the same town. Scally took charge of appellant's interest, but he was not at any time during the period in question the agent or representative of the respondent. In fact, the respondent did not have any agent at Los Mochis during the time in question. This all appears from the testimony of Scally, who was called by the respondent. His testimony also shows that during the month of May, 1914, he found that he was short of boxes necessary for the season, and, without any express authority from his employer, and without the knowledge or consent of the respondent, he sent an employee to the Los Mochis agricultural union, where respondent had stored a quantity of shook, and obtained from the custodian thereof some of the respondent's materials, which were then made into boxes and used for the shipment of appellant's tomatoes. He did not notify the respondent that he had taken these materials until September, 1916, at which time he also sent a notice through the mail to Bosworth, who was not then an employee of the appellant.

This notice was lost in transit. At the end of the packing season in 1914 Scally had made a complete report of his operations as agent of the appellant showing the purchase of a certain amount of shook from the United Sugar Company, but not showing that any material had been acquired from the respondent. Soon thereafter he made claim upon Bosworth that he personally had furnished some shook which was used in the packing and shipment of appellant's tomatoes. This seems to have been the attitude of Scally for a period of about two years while negotiations were had between him and the appellant. The first direct knowledge which the appellant had of any claim outstanding for the use of shook used in May, 1914, at Los Mochis came to it through Scally in September, 1916. At that time, as in his conversation with Bosworth, he claimed that he personally had furnished the shook which was used by him at Los Mochis. At that time he filed a written statement of account of his services as agent for the appellant, showing the moneys which he had received and paid out for appellant's account during the packing season of 1914. To this account was attached another reading:

> "Hunt, Hatch & Co. to J. P. Scally. Due settlement of box material loaned to be paid or returned, at warehouse at Los Mochis, Mex. Loaned during May, 1914. * * *"

In a letter accompanying this account Scally stated that he had furnished the shook in question, and that he would like to have it returned to him in kind, and requested that shipment be made to him so that it would reach him at Los Mochis by December 15, 1916.

As this claim was presented to the appellant by Scally at a time when he and the appellant were having some controversy over the settlement of their personal accounts, the appellant refused to approve the account, and insisted upon Scally obtaining the approval of Bosworth before giving further consideration to it. Thereupon Scally approached Bosworth, requesting him to approve the account which he had presented to the appellant. Bosworth refused to approve Scally's claim, because, as he said, he did not believe it was a just claim, or that the shook had actually been delivered to the defendant, and the appellant so notified Scally. All these transactions were had between appellant and Scally upon the latter's representations that he had furnished the shook and that appellant was under obligation to either return the same to him or pay him the reasonable value. This was the condition of the controversy until February 14, 1918, when, for the first time, respondent herein made claim upon the appellant for payment of the shook in question. The amount of this claim was $906.31. No evidence was offered to prove the correctness of this account, and it does not appear what was done about it, or whether it was treated as an account stated. However, on August 10, 1918, another claim was made by the respondent in the sum of $1,232.94. Here again no attempt was made to prove the correctness of this account, and as was the case with the letter of February 14, 1918, it was not pleaded or treated as a statement of account between the parties.

[1-3] From the statement of the facts it is apparent that Scally obtained the shook from the possession of respondent's custodian by conversion and not by a loan. It is shown in the pleadings, and appears from the evidence as well as from the briefs, that the materials were taken from the warehouse without respondent's knowledge or consent. A loan as defined by sections 1884 and 1902 of the Civil Code presupposes an agreement between the parties by which the borrower is to return either the same or a similar thing at a future time. An obligation to pay for the thing borrowed if not returned within a certain time is no part of a loan, but is the subject of a special agreement. In both cases an agreement of the parties is necessary, and neither the loan nor the obligation to pay can rest upon a conversion by one who terms himself a borrower without the owner's consent. All the facts appearing in the evidence go to prove the allegations of the original complaint that Scally converted the property without the knowledge or consent of the owner. There is no evidence of any nature which sustains the finding that a loan was made. Some suggestion has been made in the briefs that Scally was the agent of both the respondent and appellant. The evidence does not support this position, but, even if it were so, it would not help respondent's case, because, as agent for both parties, he would be presumed to have knowledge of the limits of his agency, and it is not disputed that he was expressly authorized and directed to procure what shook he found necessary from parties other than the respondent. The finding of the trial court, therefore, that in the month of May, 1914, the appellant, through its agent Bosworth, borrowed and procured the shook from respondent is directly contrary to the evidence. All the evidence shows without conflict that Scally obtained the materials without authority from his principal and without the knowledge or consent of the owner. There is no evidence of any nature tending to show that those materials were borrowed from the respondent, and the respondent's position is not helped by the evidence relating to the local custom. This custom, as appears from the evidence, was that, in cases of emergency, box materials might be borrowed by one shipper from another, to be returned during the season or paid for at the end of the season. There is no evidence of any custom authorizing one shipper to take materials from the custody of another

without his knowledge or consent. As to the first cause of action, therefore, it is apparent that respondent failed to make any proof of the essential allegations of a loan in accordance with the local custom.

[4] The evidence relating to the third cause of action shows what purports to be an account stated between Scally personally and the appellant in the month of September, 1916. The appellant rejected the account, and refused to consider it, unless Scally would present the approval of Bosworth. Bosworth refused to approve the account, and nothing further was done in regard thereto between September, 1916, and February, 1918, when the respondent herein addressed a letter to the appellant inclosing a claim for $906.31. This statement might have ripened into a statement of account between the parties, if it had been supported by proof, but no attempt was made to do so. The same may be said as to the statement of account in the sum of $1,232.94, dated August 10, 1918. There is a marked difference between the three statements which were presented. The one presented by Scally personally in September, 1916, made no charge of any nature. It merely contained an itemized list of the quantity of pieces claimed to have been loaned. Neither the cost nor the value thereof was stated. The statement of February, 1918, in the total sum of $906.31, listed the materials furnished at 1½ cents and 1¼cents, and added an additional claim of $123.90 to cover freight charges at the rate of 50 cents. The statement of August 10, 1918, charged the same quantity of material at the rate of 2 cents instead of at the rate of 1½ and 1¼ cents, and included the item of freight charges estimated at $.556 instead of at the rate of 50 cents. It is quite evident, therefore, that even the respondent has not treated any one of these statements as a statement of account between the parties.

[5, 6] The essential element of a statement of an account is an agreement between the parties that the items contained therein are correct and a promise, either express or implied, on the part of the debtor to pay the amount thus found to be correct. When an account is thus stated, a new contract is created into which all prior negotiations are merged (Gardner v. Watson, 170 Cal. 570, 150 Pac. 994), and the creditor must recover upon the account as stated or not at all (Duerr v. Sloan, 40 Cal. App. 653, 655, 181 Pac. 407). Here the respondent sued upon an account claimed to have been stated in September, 1916, and recovered judgment on a statement made in August, 1918, which was essentially different from the former account.

[7, 8] In addition to this the evidence is without conflict that the appellant did not at any time agree to the correctness of the account of September, 1916, but that at all times after its presentation had insisted that the account was incorrect, and that it would give it no further consideration until Scally had obtained Bosworth's approval of the items of the account. Where reliance is placed upon an implied assent that the items of an account are correct, such assent cannot be inferred from a specific objection or refusal to state the account.

> "An account stated presupposes an absolute acknowledgment or admission of a certain sum due, or an adjustment of accounts between the parties, the striking of a balance, and an assent express or implied to the correctness of the balance. If the acknowledgment or admission is qualified, and not absolute, or if there is but an admission that something is due, without specifying how much, there is no account stated; nor does an account stated exist if there is but a partial settlement of accounts, without arriving at a balance, or if there is a dissent from the balance as struck." 1 R. C. L. p. 211, § 9; 1 Cal. Juris. p. 195, § 52.

Thus, where the party to whom an account was presented replied that he expected to receive funds at an early date, and that he would then endeavor to adjust the account agreeably, it was held that no account was stated. Craig v. Lee, 36 Cal. App. 335, 337, 171 Pac. 1089.

[9] Finally, if we are to assume that the account of August 10, 1918, upon which the judgment was rendered was an account stated, it was barred by the statute of limitations. If any liability attached to the appellant, it arose out of the conversion of the materials by Scally while acting as appellant's agent. The period of limitations to enforce such a liability expired before the respondent had presented any claim to the appellant. This feature of the case is controlled by the well-established rule found in Auzerais v. Naglee, 74 Cal. 60, 67, 15 Pac. 371, 373, where the court say:

> "An open account already barred by the statute of limitations cannot be relieved from the bar of such statute by an oral statement of such account, for the reason that under our Code (Code Civ. Proc. § 360) no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing signed by the party to be charged thereby."

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

65 Cal. App. 634

MUEHLEBACH v. PASO ROBLES SPRINGS HOTEL. (Civ. 4657.)

(District Court of Appeal, First District, Division 1, California. Feb. 21, 1924. Hearing Denied by Supreme Court April 21, 1924.)

1. Innkeepers 🔑11(11)—Innkeeper liable under statute as depositary for hire.

By Civ. Code, §§ 1859, 1860, as amended by St. 1895, p. 49, the strict rule of the common law that an innkeeper was an insurer of the property of his guest was changed to that of a depositary for hire.

2. Bailment 🔑14(1)—Depositary for hire must use ordinary care for preservation of the thing deposited.

A depositary for hire under Civ. Code, § 1852, must use at least ordinary care for the preservation of the thing deposited.

3. Innkeepers 🔑11(4)—Hotel keeper liable for servant's theft of valuables deposited in safe.

Where a guest at a hotel deposited valuables in a hotel safe which were stolen by a servant who was charged with safeguarding the same and who had access thereto, the hotel keeper being a bailee or depositary for hire was liable therefor under the rule that, if a duty of the master be violated, he is liable whether he or his servant was guilty of the breach, even though the servant acted contrary to instructions without his master's consent, fraudulently or criminally.

4. Principal and agent 🔑159(1)—Rule as to principal's liability to third persons for negligence of agent stated.

A principal is liable to third persons, following Civ. Code, § 2338, not only for the negligence of its agents in the transaction of the business of the agency, but likewise for the torts or other wrongful acts committed by such agent in and as a part of the transaction of such business.

5. Innkeepers 🔑11(4)—Statute does not exempt innkeeper from liability for wrongs of servant.

Civ. Code, § 1860, relating to the liability of an innkeeper as a bailee or depositary for hire, does not exempt an innkeeper from liability to third persons for his own wrongs or the wrongs of his servant committed in and as a part of the transaction of the business of the principal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Carl A. Muehlebach against the Paso Robles Springs Hotel, a corporation. Judgment for defendant, and plaintiff appeals. Reversed.

Byrne & Lamson, of San Francisco, for appellant.

H. S. Young and F. A. Denicke, both of San Francisco, for respondent.

ST. SURE, J. This is an action by a guest against an innkeeper to recover damages in the sum of $2,100, the alleged value of jewelry deposited for safe-keeping, stolen by innkeeper's servant, who was specially intrusted with the care and safeguarding of the property.

The complaint contains three counts: The first charges defendant with conversion; the second charges defendant with employing a dishonest clerk who wrongfully converted the property to his own use; and the third charges that defendant undertook to keep the property safely, guaranteed the honesty of the servant, and was guilty of gross negligence in the premises. The answer denied these charges. Trial was had before the superior court without a jury. The trial court found, in part, as follows:

That on or about the first day of March, 1920, plaintiff was the owner of and entitled to the possession of certain personal property (jewelry described).

That on or about March 1, 1920, plaintiff was a guest of said defendant at the hotel conducted and operated by it at Paso Robles, Cal.; that in a conspicuous place in the room which he occupied and to which he was assigned in said hotel by the said defendant, was posted by the said defendant a sign in the words following, to wit: "The management of this hotel has provided a safe for the protection of guests and will not be responsible for any valuables unless deposited therein," and that pursuant to said notice plaintiff delivered said personal property to said defendant through the clerk employed for that purpose for safe-keeping to be deposited in said safe, and the said clerk thereupon so deposited said personal property in said safe.

That said defendant employed one Charles E. Ingersoll to whom it intrusted, among other duties, the duty of safeguarding personal property deposited in said safe; that said employee was given the key to said safe and had access thereto and to the personal property placed in the same; that it was the duty of the said employee to safeguard said personal property by keeping same in said safe, and to deliver the same to the plaintiff upon demand; that said personal property was, on the third day of March, 1920, taken from said safe by Charles E. Ingersoll, the said clerk employed by said defendant, and placed in charge of said safe with access thereto, who thereupon wrongfully converted the said personal property to his own use and absconded therewith; that the whereabouts of the said Charles E. Ingersoll is now and ever since said March 3, 1920, unknown to this defendant; that said property has never been returned to this defendant and this defendant has never had possession thereof since the same was so taken from said safe as aforesaid.

That prior to the commencement of this

action plaintiff demanded of said defendant the return of said personal property, but that said defendant not having the same was unable and failed to deliver possession thereof or any portion thereof to plaintiff.

These findings are supported by undisputed evidence. The trial court further found that defendant did not convert said property to its own use; that plaintiff had not been deprived of said personal property by the gross or any carelessness, or gross or any negligence or any improper conduct of the defendant. The court made no finding relative to the value of the property.

Upon such findings the trial court gave judgment in favor of the defendant and against the plaintiff for costs of suit. Plaintiff appeals from the judgment.

Counsel for appellant says in the "foreword" of his opening brief that the first question presented to this court for decision is:

> "Does the purported restriction of the innkeeper's liability by section 1860 of the Civil Code apply only to the innkeeper's common-law insurer's liability, or does it protect the innkeeper from the torts of his employees acting in the course of their employment?"

Argument presented in the briefs shows some confusion in the minds of counsel relative to the liability of an innkeeper for the loss of valuables deposited in a hotel safe. It therefore seems necessary to refer to the common-law rule and also the history and effect of the legislation upon the subject in this state. In 1850 our Supreme Court, in Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303, said:

> "An innkeeper, like a common carrier, is the insurer of the goods of his guests, and is bound to keep them safe from burglars and robbers without, as well as from thieves from within, his house; but he can be held to this strict liability only for such goods as are brought into his house by travelers in the character of guests."

In Pinkerton v. Woodward, 33 Cal. 557, 600 (91 Am. Dec. 657) the Supreme Court said:

> "But the preponderating weight of authority, from the time of the decision in Calye's Case, 8 Coke, 32, to the present time, is in favor of the rule that he [innkeeper] is liable as an insurer."

In Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655, the court said:

> "His liability extends to wearing apparel, jewelry, money, and even to the horses, wheat, butter and other articles of bulk belonging to the guest, if received by the innkeeper into his care and within his place of entertainment. This is the rule of the common law, enforced in the days of Lord Coke, and long prior, and ever since, as well in England as in this state." Churchill v. Pacific Improvement Co., 96 Cal. 490, 31 Pac. 560.

When the California Codes were adopted on March 21, 1872, the Civil Code contained, as it does now, an article entitled "Innkeepers." Section 1859 then read:

> "An innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn."

In construing this statute, in Churchill v. Pacific Improvement Co., 96 Cal. 490, 492, 31 Pac. 560, 561, the Supreme Court said:

> "The rule stated in section 1859 is simply declaratory of the common law."

As originally enacted section 1860 read:

> "If an innkeeper keeps a fireproof safe, and gives notice to a guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or injury to such articles, if not deposited with him, and not required by the guest for present use."

In Deering's Annotated Codes and Statutes (Civ. Code, 1886) we find the following code commissioner's note under section 1860 of the Civil Code as it appears in its original form:

> "This section affords an opportunity for innkeepers by their own acts, to relieve themselves to a certain extent from what might be termed the extreme stringency of the rule in the text of the preceding section (section 1859), and from the rigor with which it was always enforced as seen from the decisions quoted there. This means of defense is afforded by and rests alone in the statute. The cases of Purvis v. Coleman, 1 Bosw. 322, 21 N. Y. 110, and Gile v. Libby, 36 Barb. 70 (N. Y.), are on this point."

Both of these sections, as originally enacted, are based upon sections of Field's Draft, Civil Code, and the citations contained in the code commissioner's note are early New York decisions construing the New York law of 1855 (Laws 1855, c. 421) entitled "An act to regulate the liability of hotel keepers," which law contains provisions somewhat similar to those contained in section 1860 of our Civil Code. In passing upon the law of 1855, the New York Court of Appeals, in Wilkins v. Earle, supra, at page 179, says:

> "The rigorous rule of the common law has been to some extent modified in this state by statute. The proprietor of a hotel may now provide a safe, to be kept at the office, and notify his guests of the fact, and that they may deposit their money, jewels or ornaments therein, by posting a notice in the room of the guest; and his neglect to deposit such articles, relieves the proprietor from liability for loss."

This provision of the New York law still exists in an amended form in section 200, General Business Law; Consolidated Laws,

c. 201 (Birdseye C. & G. Consolidated Laws of New York), and it is well to keep in mind that the New York statutes do not purport to create the fundamental law or even to declare it, but they assume the strict rule of the common law; nor have the New York statutes changed or attempted to change the common-law liability of the innkeeper.

The Legislature of California amended both sections 1859 and 1860, and both amendments went into effect March 12, 1895 (St. 1895, p. 49). Section 1859 was amended to read as follows:

> "The liability of an innkeeper, * * * for losses of or injuries to personal property, other than money, placed by his guests, * * * under his care, is that of a depositary for hire; provided, however, that in no case shall such liability exceed the sum of one hundred dollars for each trunk and its contents, fifty dollars for each valise or traveling bag and contents, and ten dollars for each box, bundle, or package and contents, so placed under his care, unless he shall have consented in writing with the owner thereof to assume a greater liability."

Section 1860 was amended to read:

> "If an innkeeper * * * keeps a fireproof safe, and gives notice to a guest, * * * either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest, * * * that he keeps such a safe and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein, nor in any case more than the sum of two hundred and fifty dollars for any or all such property of any individual guest * * * unless he shall have given a receipt in writing therefor to such guest."

Both sections 1859 and 1860 were again amended in 1921 (St. 1921, p. 149); but the text, so far as concerns the basic liability of innkeepers, remains unchanged.

[1] It is quite clear that by the amendment of 1895 the strict rule of the common law, which declares that an innkeeper is an insurer of the property of his guest, has been changed in this state, and that, as now stated in section 1859, the liability of an innkeeper is that of a depositary for hire. And as to such liability the provisions contained in the proviso attached to section 1859, and likewise the provisions of section 1860, are but modifications or limitations of the new rule.

[2] Admittedly, then, under the facts and the law, the respondent here became a bailee or depositary for hire. A depositary for hire must use at least ordinary care for the preservation of the thing deposited. Section 1852, Civ. Code. The question of negligence of respondent in the hiring of Clerk Ingersoll is disposed of by the trial court's negative finding in that regard, which finding is not attacked on appeal. This brings us to the crucial point, the one upon which the decision in this case must turn. Appellant presents the proposition in this wise:

> "If he [respondent] puts a servant in charge of the property and delegates to that servant the duty of keeping the property locked up and of safeguarding it, and delegates to him the duty 'to take care of those boxes and see that nobody gets in there' (Tr. fols. 112–114), and that servant then steals the property himself, thereby breaching the master's duty which has been delegated to him, it necessarily follows as a legal conclusion that the master is liable under the doctrine of respondeat superior as set forth in section 2338 of our Civil Code."

It is respondent's contention that "it is settled law that a master is not liable for the willful or malicious torts of a servant because a servant so acting 'steps aside' from his employment, performing an act for his own gain and not related to the employment."

[3] In the briefs of respective counsel, particularly in the authorities cited therein, there is much discussion and argument as to the meaning of the term "scope" or "course of employment." It would seem that the term is not capable of precise definition, although many attempts have been made to define it. The question of what is within and what is without the "scope" or "course of employment," what is and what is not an independent tort of the servant, cannot be referred to any very definite rule.

The facts in the case at bar relative to the point under discussion are, as shown by the findings, clear and undisputed. They bring this case fairly within the rule of those cases holding that, if a duty of the master be violated, he is liable alike whether he or his servant was guilty of the breach, and this, it appears, is so even though the servant acted contrary to instructions, without his master's consent fraudulently or criminally. "The rule is based on the fact that as to the particular transaction the agent had exceeded his authority, actual or apparent. Whether in doing so the agent has been guilty of a breach of faith with his principal, or has committed a crime, is of no controlling moment as affecting the responsibility of the principal to third persons injured thereby." Otis Elevator Co. v. First National Bank, 163 Cal. 31, 40, 124 Pac. 704, 708 (41 L. R. A. [N. S.] 529).

Respondent cites the following California cases as supporting his contention: Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154; Riordan v. Gas Consumers' Association, 4 Cal. App. 639, 88 Pac. 809; Baker v. Kinsey, 38 Cal. 631, 99 Am. Dec. 438; Hopkins v. Western Pacific R. Co., 50 Cal. 190; Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223;

Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 144 Pac. 961, L. R. A. 1915C, 712.

In Walsh v. Hunt, the Supreme Court was considering the act of an agent to whom an executed note and mortgage had been left for delivery. The agent altered the figures evidencing the principal sum and the rate of interest. The court held that the agent was a mere bailee for delivery. The Supreme Court mentions this case in Otis Elevator Co. v. First National Bank, supra, and says that it is not "at all in point on this matter." In Rahmel v. Lehndorff it was held that an innkeeper was not liable for an assault and battery committed by a waiter in a dining room upon one of his guests. This case is distinguished in Ruppe v. City of Los Angeles, 186 Cal. 400, at page 403, 199 Pac. 496, 497, where the Supreme Court says:

> "Something, perhaps, should also be said as to the statement in the second sentence quoted from Rahmel v. Lehndorff, that 'the wrongful act must be one which the servant is empowered under some circumstances to do.' If this be taken to mean that the act must be one which the servant is authorized under some circumstances to do, the statement is undoubtedly too narrow."

A simple illustration is given, and the court goes on to say:

> "In other words, while the master has not empowered the servant to break the law in the sense that he has authorized him to do so, he has empowered him in the sense that he has intrusted him with the performance of a duty in whose performance it is possible for him to break the law."

In Riordan v. Gas Consumers' Association the District Court of Appeal, at page 643 (88 Pac. 811), uses this very significant language:

> "The question, generally, is whether the servant at the very time of the alleged act of negligence, had departed from his employment, or whether he departed from or neglected a duty in the line of his employment. In the first case the principal is not responsible for the servant's acts, and in the second case he is responsible."

In Baker v. Kinsey the court held that an action to recover damages for the bite of a vicious dog belonging to the toll keeper cannot be maintained against the owner of the bridge if it appears that the defendant did not keep or harbor the dog in person, and did not authorize or require him to be kept, and did not know that the dog should be kept for the conduct or protection of the business in which the owner of the dog was employed. Hopkins v. Western Pacific R. Co. was an action for damages for construction of a railroad. In the syllabus to the decision appears this statement:

> "A railroad company is not responsible for the acts of its employees in creating a nuisance by using a culvert under its railroad near the residence of the plaintiff, for the purposes of a privy."

Stephenson v. Southern Pacific Co. was a case where an engineer backed his engine toward a street car crossing the railroad track with the simple intent to frighten passengers on the street car. A frightened passenger, believing herself in danger, jumped from the street car and was injured. Held that the act of the engineer was not done in the scope of his employment. In Copelin v. Berlin Dye Works & Laundry Co., jewelry was left in a suit of clothes delivered to the driver of one of the defendant's wagons for the purpose of having the clothes cleaned. The jewelry disappeared. It was held that the cleaning company was not chargeable as an involuntary or gratuitous bailee so as to be liable for the theft of the jewelry. The court pointed out that the cleaning company assumed no duty of safekeeping the jewelry and delegated no such duty to its servants, and hence the court held that the theft was not within the scope of the employment.

Respondent also cites a number of cases from other jurisdictions. We will review only the leading ones. Merchants' National Bank v. Guilmartin, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322, was a case involving the question of whether a bank was liable for a theft of a safe deposit by a cashier. It was a gratuitous bailment. The bailee owed only a slight degree of care to the bailor. Apparently the cashier of such a deposit was not intrusted with the property or charged with any such duty in respect to it, for the court said:

> "The cashier had nothing to do about it except suffer it to remain in a safe place of deposit."

As some of the authorities put it, he had access to it but was not intrusted with it. Therefore the principal was not liable. The court further said upon the degree of care:

> "The law as disclosed by the authorities seems to consider that, in the case of a gratuitous special deposit, there is consideration enough in the bare custody of the property to insure its being kept without gross negligence, but not enough to bind the bank as an absolute insurer of its servant's honesty."

Foster v. Essex Bank, 17 Mass. 478, 9 Am. Dec. 168, was another case of gratuitous bailment. It was held that the bank was not liable for stolen goods where due care has been used. The deposit was kept under the supervision of the depositor, he having the key.

Davis v. Hotel Chelsea (Sup.) 186 N. Y. Supp. 75, was a case where a hotel clerk stole valuables, and it was held that there was no showing of negligent employment by the master. The facts stated in the opinion of the court show that the chief clerk was not in the hotel at the time of the theft and "that the clerk who did the stealing had no key to either the safe or the inside compartment" and there was no negligence "in view of the uncontradicted testimony that said clerk had no keys whatever to the safe."

The case of Firemen's Fund Insurance Co. v. Schreiber, 150 Wis. 42, 135 N. W. 507, 45 L. R. A. (N. S.) 314, Ann. Cas. 1913E, 823, is interesting. The opinion was given by a divided court, four to three. The main opinion denied the liability for damage to an automobile taken out by an employee after he had left work for the day, upon the ground that he was not acting within the scope of his employment. In the main and dissenting opinions numerous authorities are quoted and discussed upon the subject of the master's liability for the servant's wrong done in the course or period of his employment. The majority opinion seems to indicate that the rule adopted by our Supreme Court in Otis Elevator Company v. First National Bank of San Francisco, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529; Kohn v. Sacramento Electric, Gas & Railway Co., 168 Cal. 1, 141 Pac. 626; Johnson v. Monson, 183 Cal. 149, 190 Pac. 635, and Ruppe v. Los Angeles, 186 Cal. 400, 402, 199 Pac. 496, is not deemed applicable to the facts under consideration. But in discussing Merchants' National Bank v. Guilmartin, supra, the court says:

> "The idea of absolute responsibility for the act of the servant, as if done by the master, or liability at all, except based on some fault as regards trusting the bailment to the control of the servant * * * was repudiated. * * * The court held, for liability, the wrongful act must be attributable to some negligence of the master, or some negligence or some other fault of the servant in doing the act the master employed him to do."

In the vigorous dissenting opinion is found this language by Mr. Justice Kerwin:

> "No one would claim but that the bailee himself would be liable had he done the acts complained of here. And it is settled in this state and many others, and is not disputed in the majority opinion, as I understand it, that the agent, when charged by the bailee with the duty of protecting property, stands in the place of the bailee and his acts are chargeable to the bailee"—citing authorities from Wisconsin, North Carolina, Illinois, Maine, Alabama, Indiana, Massachusetts, Mississippi, Tennessee, New York, Minnesota, Texas and Ohio.

The facts in all of the cases cited by respondent are wholly different from the facts in the instant case. It might well be argued that none of them called for the application of the doctrine of agency followed in this state. None of them contained such a showing as this (quoting from the finding of the trial court):

> "That said defendant employed one Charles E. Ingersoll to whom it intrusted among other duties the duty of safeguarding property deposited in its safe; that said employee was given a key to said safe, and had access thereto and to the personal property placed in the same; that it was the duty of said employee to safeguard said personal property by keeping same in safe, and of delivering the same to the plaintiff upon demand."

[4] A principal is liable to third parties not only for the negligence of its agents in the transaction of the business of the agency, but likewise for the torts, or other wrongful acts committed by such agent in and as part of the transaction of such business. This statement is a paraphrase of section 2338 of our Civil Code, which reads:

> "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

In Otis Elevator Co. v. First National Bank, 163 Cal. 31, at page 39, 124 Pac. 704, 707 (41 L. R. A. [N. S.] 529) it was the duty of the agent to do the banking for his principal, that is, to deposit checks and cash checks for him and to make out checks and to present them to him for his signature. The agent forged checks and cashed them at the bank. It was held that the principal was liable to third parties for the act of the agent. The court said:

> "It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business. Story on Agency, § 452; Shearman & Redfield on Negligence, § 65; Civ. Code, § 2338. After declaring this to be the rule Story says: 'In all such cases the rule applies respondeat superior;' and it is founded upon public policy and convenience, for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency."

In Kohn v. Sacramento Electric, Gas & Railway Co., 168 Cal. 1, 141 Pac. 626, the doctrine of estoppel was invoked. A case where bonds of a corporation, secured by a trust mortgage, each on its face being made payable to bearer and bearing the certificate of the trustee that it was one of the series of bonds secured by such mortgage, were feloniously taken by an officer of the trustee and pledged for his individual purposes, while the same were in the custody of the trustee upon a special trust. Our Supreme Court cited the case of National Safe Deposit, etc., Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, and quoted with approval the following language from the opinion delivered by Mr. Justice Day:

> "The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not intrusted the agent with the document, and therefore is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that, when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in the case like the present, the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends largely beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present, and the estoppel arises. The distinction is not new. On the one side are cases like Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988, where an agent or servant simply had access to a document remaining in the possession of the owner; on the other cases like Pennsylvania R. Co.'s Appeal, 86 Pa. 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset."

Again the doctrine of estoppel was applied by our Supreme Court in Green v. Caribou Oil Mining Co., 179 Cal. 787, 178 Pac. 950. A case where a secretary of a corporation who was the transfer officer of stock and who was intrusted with the duty of issuing valid stock certificates, forged and issued certain stock certificates for his own private gain. The corporation was held liable for damages, and the court said, in speaking of the case of Havens v. Bank of Tarboro, 132 N. C. 214, 43 S. E. 639, 95 Am. St. Rep. 627, and after citing that case with approval:

> "It was added that where the secretary issued the certificate and delivered it to a third party who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificate were truthful and not false and fraudulent, and the company having confided to him the trust of executing the business, the agent was held out to the public as competent, faithful, and worthy of confidence; and that though he deceived both his principal and the public by forging and issuing false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong should suffer the loss."

Johnson v. Monson, 183 Cal. 149, 151, 190 Pac. 635, cites Otis Elevator Co. v. First National Bank, supra, with approval, as does also the recent case of Ruppe v. City of Los Angeles, 186 Cal. 400, at page 402, 199 Pac. 496. Quoting from the opinion in the latter case:

> "The rule is elementary that a master is responsible for the acts of his servant done in the course of his employment, even though those acts be unauthorized or contrary to the master's explicit instructions. As between the master and third persons, the acts of the servant done as a part of the doing of that which he is employed to do are as if done by the master himself, and the question of authority as between the master and servant to do the particular acts is quite immaterial. Cooley on Torts (3d Ed.) vol. 2, pp. 1016–1030; Civ. Code, § 2338; Rounds v. Delaware, etc., Co., 64 N. Y. 129, 21 Am. Rep. 597; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 39, 41 L. R. A. (N. S.) 529, 124 Pac. 704; Johnson v. Monson, 183 Cal. 149, 190 Pac. 635."

[5] Further discussion or citation of authority seems unnecessary. We are convinced, under the findings and the law, that the respondent in the instant case is clearly liable for the tortious act of its servant. We do not wish to be understood as construing section 1860, Civil Code, or interpreting its language. However, we will say in passing that we think it is obvious, whatever bearing said section may have upon the innkeeper's liability as a bailee or depositary for hire, the statute was never intended to, nor does it, exempt the innkeeper from liability to third persons for his own wrongs or the wrongs of his servant committed in and as a part of the transaction of the business of the principal.

At the risk of becoming tiresome we reiterate that our conclusion herein is reached by applying the law as we find it to the particular facts of the case.

The judgment is reversed.

We concur: TYLER, P. J.; SHORT, Justice pro tem.

66 Cal. App. 64

KOHN v. KEMPNER et al. (Civ. 2652.)

(District Court of Appeal, Third District, California March 1, 1924. Hearing Denied by Supreme Court April 28, 1924.)

Costs 🔑254(1)—Respondent cannot recover cost of copy of transcript on appeal.

Cost of copy of transcript on appeal cannot be recovered by respondent, under Code Civ. Proc. § 1027, as a necessary disbursement.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Morris Kohn against Philip Kempner and others. From an order striking out an item of costs on motion to tax costs, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Louttit & Stewart, of Stockton, F. I. Lemos, of Hayward, and Rose, Silverstein & Collier, of Oakland, for respondents.

GLENN, Justice pro tem. In the above action, as originally prosecuted, plaintiff secured judgment in the trial court. An appeal was taken under the alternative method, but the judgment was affirmed. Kohn v. Kempner et al., 59 Cal. App. 621, 211 Pac. 805. Subsequently plaintiff herein (respondent on the original appeal) filed a memorandum of costs, included in which was an item for the sum of $32, paid by him to the stenographic reporter and the clerk of the court for a copy of the transcripts on appeal in said cause. Upon motion to tax costs this item was stricken out. The appeal is from said order.

The costs of the transcript on the original appeal was incurred and paid by appellant therein (respondent here); but it is now claimed in support of this appeal that:

> "It was just as necessary for the respondent on that appeal to have these transcripts before him in defending the judgment and resisting the contention of the appellants herein as it was for the appellate court to have the same transcripts before it in determining the sufficiency and validity of the judgment attacked."

In support of this position appellant relies upon that portion of section 1027 of the Code of Civil Procedure which provides that:

> The party entitled to costs * * * may recover all amounts actually paid out by him in connection with said appeal. * * *"

Reliance is also placed on Estate of Prager, 167 Cal. 737, 141 Pac. 369, wherein the remittitur had issued without providing for the respondent (who had prevailed on the appeal) recovering costs. The remittitur was recalled for the insertion of this provision. No other question was involved, and none decided. In referring to that portion of section 1027, Code of Civil Procedure, above quoted, the court said:

> "We shall not attempt, at this time, a definition of the items covered by this comprehensive language."

We assume that it is upon this that appellant relies. It is apparent, however, that the court expressly left the matter open for future consideration.

Doubtless it is convenient for each party to an appeal to have a copy of the transcript before him in preparing his briefs to be presented to the appellate court, but the fault with appellant's argument lies, not in the lack of *necessity*, but in the lack of *provision in the statute for reimbursement*, therefor. The statute determines the necessity, not the individual. Presumably, each side has a copy of the pleadings, and, having participated in the trial, must be fairly acquainted with the evidence in the case, and herein lies the difference between the position occupied by a litigant and that of the appellate court. While the item here involved is small, it must be remembered that there are cases where the transcript covers many hundreds of pages, and, if one of the litigants, of his own volition, may order, and have furnished to him for his individual use, a copy of the transcript on appeal, then it follows that all the other parties to the action must be accorded the same right, and where there are numerous conflicting interests involved, each represented by different counsel, the expense would be of some considerable moment. So far as we are advised, such an item has never been recognized as a necessary disbursement, allowable as costs to be taxed against the opposing side. The case of Sime et al. v. Hunter, 55 Cal. App. 157, 202 Pac. 967, seems to be conclusive on the point.

The order appealed from is affirmed.

We concur: FINCH, P. J.; HART, J.

66 Cal. App. 48

LANNING v. TALMAGE. (Civ. 2750.)

(District Court of Appeal, Third District, California. Feb. 29, 1924.)

1. Appeal and error 🔑1011(1)—Findings of trial court, supported by evidence, though conflicting, must be held supported by evidence.

It is for the trial court to consider all the conflicting evidence, as well as the admitted facts and circumstances, and make its findings thereon, and if on appeal such findings are supported by evidence, even though that evidence is in conflict with evidence introduced by the opposite party, it is the duty of an appellate court to hold such finding properly supported.

2. Specific performance 🔑97(1) — Changing manner of possession and making improvements, without readiness and ability to pay purchase price, does not justify specific performance.

The mere fact that plaintiff changed his manner of holding land after the execution of an alleged oral agreement with defendant for its purchase, and made improvements on the land, *held* not to justify specific performance, in the absence of payment of the purchase price, or readiness and willingness and ability to pay, in the event of a decree for specific performance.

3. Appeal and error 🔑1011(1) — Appellate court will uphold finding based on conflicting evidence, if testimony on which it is based is not inherently improbable.

Where the trial court found on conflicting testimony that an alleged oral agreement for sale of land did not exist, and there was nothing in the record to show that defendant's testimony was inherently improbable, the appellate court could not hold that the finding was not supported by the testimony, notwithstanding its opinion that the trial court should have accepted the statement of plaintiff.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Suit by W. T. Lanning against Frank Talmage. From an adverse judgment, plaintiff appeals. Affirmed.

James D. Fairchild, of Yreka, for appellant.

Taylor & Tebbe, of Yreka, for respondent.

PLUMMER, J. Plaintiff appeals from an adverse judgment of the superior court of Siskiyou county in an action prosecuted by him for specific performance of an alleged oral contract to convey real property situated in the town of Dunsmuir, in the county of Siskiyou.

The complaint alleges that on or about the 26th day of February, 1921, the plaintiff and defendant entered into an oral contract whereby the defendant promised and agreed to sell plaintiff certain described lots for the sum of $2,800; that thereafter a certain portion of said lots was sold for the sum of $700, and the money was received by the defendant; and that the balance due on said lots as the purchase price thereof was the sum of $2,100. It is further alleged that thereafter, and on or about the 12th day of April, 1921, the plaintiff and defendant entered into a written contract for the erection of a building to cost in the neighborhood of $15,000, and that the purchase price of the lots herein referred to, to wit, the sum of $2,100, was to be counted in as a part of the payment by the defendant to the plaintiff for the erection by the plaintiff of the building just referred to. It further appears from the allegations that said building was partly erected, that certain payments were made thereon, and that on or about the 7th day of August, 1921, when said building was partly completed, it was destroyed by fire.

On the part of the plaintiff it is contended that the $2,100 is the purchase price of the lots alleged to have been bought by the plaintiff from the defendant, and was counted in as part of the payments made by the defendant to the plaintiff on account of the erection of the building agreed to be erected by the plaintiff for the defendant prior to its destruction by fire, and on the part of the defendant it is claimed that no such item was considered in the matter of payment, but that the defendant had paid to the plaintiff a sum considerably in excess of the amount which was due from the defendant to the plaintiff on account of his work and material furnished on the building being erected by the plaintiff for the defendant at the time of its destruction by fire. It is further claimed on the part of the plaintiff that the oral contract for the purchase of the lots and premises from the defendant by the plaintiff, and for which specific performance of the contract and conveyance of said premises by the defendant to the plaintiff herein is sought, was fully executed; that the plaintiff had gone into possession of the premises under said oral contract, and had made valuable improvements thereon with the knowledge and consent of the defendant. On the part of the defendant it is contended that the plaintiff had gone into the possession of the premises in controversy under a lease some years previously at the rental of $20 per month, and that whatever improvements were made upon said premises were made by the plaintiff upon his own responsibility, and without the knowledge, consent, or acquiescence of the defendant whatsoever. The value of the improvements made by the plaintiff was also controverted.

The transcript shows that the action involved an ascertainment of the standing of the account between the plaintiff and the defendant by reason of the contract entered into between the plaintiff and the defendant for the erection of the $15,000 building hereinbefore referred to. The testimony goes into and has to do with the different items of payment made from time to time on the $15,000 building erected by the plaintiff for the defendant from the date of the beginning of the work up to the time of its destruction by fire. In casting this account, and ascertaining the amount due from the defendant to the plaintiff, and the amount paid by the defendant to the plaintiff, the trial court came to the conclusion that the defendant had paid to the plaintiff, and for and on account of the plaintiff's use and benefit, the sum of $1,992 in excess of the amount of money due and owing from the defendant to the plaintiff for and on account of the work and materials furnished by the plaintiff in the erection of the said $15,000 building, not counting in items of credit for and on account of the alleged purchase by the plaintiff from the defendant of the premises involved in this action; in other words, that the defendant had paid to the plaintiff in cash the sum of $1,992 in excess of the amount due to him from the defendant at the time of the destruction of the building which the plaintiff was erecting. It is further found by the court that, if the improvements made by the plaintiff upon the premises occupied by him and belonging to the defendant did amount in value to the sum of $1,500, there was still due in cash from the plaintiff to the defendant the sum of $492 on account of excess payment.

[1] The plaintiff controverted some of the payments claimed to have been made by the defendant for the use and benefit of the plaintiff; but, such findings being supported by the evidence, it is not the province of an appellate court to hold to the contrary. The plaintiff also contends that the value of the building at the time of its destruction was in excess of that admitted by the defendant and found by the court; however, as the court has found payments in excess of the value of the building upon sufficient testimony to support the finding, we are not at liberty to disregard the same.

The appellant begins his argument by the following statement:

> "By eliminating all the evidence in which there is a direct conflict, and considering the substance of the admitted facts and circumstances this is a case which calls for equity to grant us the relief prayed for."

This is exactly what an appellate court is not permitted to do. It is for the trial court to consider all the conflicting evidence, as well as the admitted facts and circumstances in the case, and make its findings thereon, and if upon appeal such findings are supported by evidence, even though that evidence be in conflict with evidence introduced by the opposite party, then and in that case, it is the duty of an appellate court to hold such finding properly supported.

[2] In the case at bar the defendant in his testimony introduced fully all the items constituting the different payments made by him, the purposes for which they were made, and the aggregate amount thereof is simply a matter of calculation. The trial court had a right to accept such testimony, and upon a review thereof we cannot find anything inherently improbable in the testimony so introduced by the defendant, and therefore no reason why the findings of the court in such particulars are not based upon sufficient evidence. If the findings of the court in this particular are true, that the plaintiff at the time of the beginning of his action owed the defendant between $400 and $500 on account of excess payments made in cash by the defendant for the uses and purposes of the plaintiff, not counting in the alleged purchase price of the premises involved in this action, then and in that case, irrespective of the existence or nonexistence of an oral contract of sale by the defendant to the plaintiff and purchase by the plaintiff of the defendant of the premises so claimed to have been purchased by the plaintiff from the defendant, a conveyance thereof could not and would not, at the present time, be decreed by a court of equity, for the simple reason that the payment of the purchase price thereof by the plaintiff to the defendant has not been made. The mere fact, if it be a fact, that the plaintiff changed his manner of holding such premises after the alleged oral agreement, and made improvements thereon, would not be sufficient to justify a court of equity in upholding such an agreement and decreeing full specific performance, unless it also appears that the plaintiff has paid the purchase price agreed upon, or at least is ready and willing, and prepared upon specific performance being decreed, to pay to the defendant the amount of such purchase price.

[3] It further appears that the contract for the erection of the $15,000 building referred to in this opinion was a written contract, in which no mention is made of the oral agreement set out in plaintiff's complaint. The making of the oral agreement herein referred to is denied by the defendant, and the testimony set forth in the transcript upon that question is conflicting. On the part of the plaintiff it is testified that the oral agreement was made for the sale of said property in controversy by the defendant to the plaintiff for the sum of $2,800, and that subsequent thereto a certain portion thereof was sold for the sum of $700, leaving $2,100 still due. On the part of the defendant it is testified that no such agreement was made, that he did on his own account sell a certain portion of said premises for $700, and that at one time he did tell the plaintiff that he would sell him the premises in controversy for the sum of $2,500. Upon this conflicting testimony the court finds that there never was any oral agreement between the plaintiff and defendant for the sale and purchase of the premises involved in this action; that the defendant "did at one time state to plaintiff that plaintiff could purchase said property for the sum of $2,500, but the plaintiff never agreed to purchase said property or to pay the defendant the sum of $2,500, or any other sum." Upon this question it was the duty of the trial court to make its finding, and the trial court having found that there never was any oral agreement of sale and purchase, and there being nothing in the record to show that the testimony of the defendant is inherently improbable, this court cannot on appeal hold that the finding of the trial court is not supported by the testimony, even though we were of the opinion that the trial court should have accepted the statement of the plaintiff in preference to the testimony of the defendant.

It is not the province of the appellate court to weigh the evidence, but only to decide whether as a matter of law it is sufficient to support the findings; and if there was any substantial evidence to support the findings, it is the duty of the appellate court to uphold them. Southern Cal. Co. v. Amalgamated Assn, 186 Cal. 604, 200 Pac. 1; West v. Visalia Abstract Co., 53 Cal. App. 467, 200 Pac. 351. A long list of cases might be cited to this effect, but this principle of law is so thoroughly settled that further citations are unnecessary.

No legal reason appearing why the judgment of the trial court should be disturbed, it is hereby ordered that the same be and it is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

66 Cal. App. 75

WRIGHT v. SERIMIAN et al. (Civ. 4616.)

(District Court of Appeal, First District, Division 2, California. March 4, 1924.)

1. Work and labor ⚷9—Facts held to entitle plaintiff to judgment for reasonable value of labor and materials furnished.

Where, in an action for value of services and materials, undisputed facts showed that plaintiff, with knowledge and consent of defendants, performed labor and furnished materials upon and for defendant's building, and had not been paid, though defendants promised to pay, a judgment for plaintiff was proper.

2. Appeal and error ⚷1039(13)—Variance if it existed held not prejudicial where defendants knew entire transaction from beginning.

A variance between the pleading and proof, in that the complaint proceeded on a quantum meruit, and the proof showed an express agreement to pay for portion of labor and materials, was not prejudicial to defendants, where the entire transaction was known by them from the beginning.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Leslie T. Wright against Martin Serimian and another. Judgment for plaintiff, and defendants appeal. Affirmed.

C. K. Bonestell, of San Francisco, for appellants.

W. B. Good, of Selma, and Johnston & Jones, of Fresno, for respondent.

NOURSE, J. Plaintiff sued and recovered judgment for $1,421.20 upon a complaint alleging that at the special instance and request of the defendants he had performed labor and furnished materials in the reconstruction and repair of a building owned by the defendants, and that the reasonable value of such labor and materials was the sum for which he recovered judgment. The complaint contains a great many more words than are necessary, but the essential allegation of employment, performance, reasonable value and failure to pay are present. The answer denies all these allegations. Upon the trial the defendants admitted the falsity of their denials, and the trial court found them to be untrue.

[1] The only excuse for the appeal from the judgment is that some of the work was performed by the respondent under an express agreement made with him and one Stone, who was the original contractor or superintendent of construction in the employ of the appellants. It is pointed out that during the course of the work Stone, owing to some dispute with the appellants, stopped the work and instructed respondent to do the same; that thereafter, upon the urgent request of the appellants and their express promise to pay to him the reasonable value of all the work and materials which he had performed and used under Stone's direction, the respondent continued with the work to its completion. It was shown, however, by the respondent that before he performed any labor on the premises a bid was submitted to the appellants for their approval and that it was only upon their solicitation that he entered upon the work.

Aside from the technicalities of the manner of employment and the authority of Stone—that is, as to whether he was an agent of the appellants or an independent contractor—the undisputed facts remain that the respondent, with the knowledge and consent of the appellants, performed labor and furnished materials upon and for the building of the appellants and for which he has been paid nothing, that the judgment represents the reasonable value of the labor and materials; and that the appellants on numerous occasions promised to pay, but that they have not done so. These facts are all conceded upon this appeal.

[2] There is some argument on the part of the appellants that there is a variance between the pleading and proof, in that the complaint proceeded upon a quantum meruit, whereas the proof showed an express agreement to pay for a portion of the labor and materials furnished. But in this case, where the entire transaction was known by the appellants from the beginning, it is clear that, if there was any variance between the pleading and proof, it was not of such a nature as to mislead the appellants, and thus, if any error occurred, it was not prejudicial to them.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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65 Cal. App. 670

PETERSON v. BOARD OF SUP'RS OF SOLANO COUNTY. (Civ. 2734.)

(District Court of Appeal, Third District, California. Feb. 21, 1924. Hearing Denied by Supreme Court April 21, 1924.)

1. Drains ⚷13—Reclamation district is not special commission or municipal corporation within Constitution.

A reclamation district created by special act which includes a part of a city is a public agency or arm of the state, and is not a special commission given jurisdiction of municipal affairs in contravention of Const. art. 11, § 13.

2. Drains ⚷1—City of sixth class not authorized to reclaim private lands.

Neither under Deering's Gen. Laws, Acts 2371, 2372a, nor Municipal Corporation Bill, § 862, subd. 11, has a city of the sixth class any authority to reclaim private lands, but this power is vested in the state as part of its police power, and the creation of districts is the means of exercising this power of assessment; Pol. Code, § 3488, not being applicable.

3. Drains 🔑13—How reclamation district created stated.

Reclamation districts in cities of the sixth class may be created as provided by Pol. Code, § 3446, or by act of Legislature; section 3488 relating to cities of the first class and certain tide lands containing no inhibition against the creation of a reclamation district by special act.

4. Municipal corporations 🔑57—Functions of cities of sixth class stated.

The municipal functions of cities of the sixth class relate to public safety, public health, maintenance of streets, lights, and the enforcement of general police powers, and they do not in any sense embrace the reclamation or improvement of private property.

5. Drains 🔑2(1)—Defining boundaries of reclamation district by streets of municipality held not to affect validity of special act.

The validity of a special act creating a reclamation district is not affected by the fact that it defines the boundaries by streets and alleys of a municipality or that it includes the streets and alleys within its exterior boundaries; the defining of boundaries not conferring on the district any political or police power over such highways.

6. Municipal corporations 🔑64—Cities of sixth class not immune from general laws.

Cities of the sixth class are not immune from the effects of general laws passed by the Legislature.

7. Statutes 🔑97(3)—No constitutional limitation on creation of reclamation districts by special act.

There is no constitutional limitation on the creation of reclamation districts by special legislative act.

8. Municipal corporations 🔑73—Reclamation of private property held not "municipal purpose" within Constitution.

Const. art. 11, § 12, providing that the Legislature shall have no power to impose taxes on a municipality or on the improved property thereof for municipal purposes does not inhibit the Legislature from establishing a reclamation district within the exterior boundaries of a city; the reclamation of private property not being a municipal purpose, even though the city may be benefited thereby.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Purposes.]

9. Drains 🔑73—Assessment not vitiated by failure to assess all lands within exterior boundaries of district.

Failure to assess all lands within the exterior boundaries of a reclamation district does not vitiate the assessment.

10. Drains 🔑76—That opportunity to appear at hearing not embraced held not to affect validity of proceeding.

Where notice and opportunity was duly given to appear at proceedings for the assessment of benefits for a reclamation district established by special act, the fact that the opportunity to appear was not embraced did not affect the validity of the proceedings.

11. Statutes 🔑61—Conclusively presumed Legislature took all necessary steps and gave fair opportunity for hearing.

It is conclusively presumed that the Legislature, in passing a special act establishing a reclamation district, took all necessary steps and gave all parties the opportunity to be heard.

Appeal from Superior Court, Solano County; Percy S. King, Judge.

Application by Isabelle Peterson for writ of review of the proceedings of the Board of Supervisors of the County of Solano, confirming assessment for reclamation purposes. From a judgment denying the writ, petitioner appeals. Affirmed.

Leo J. McEnerney, of San Francisco, for appellant.

Arthur C. Huston and Harry L. Huston, both of Woodland, and Brantley W. Dobbins, Dist. Atty., of San Francisco, for respondent.

PLUMMER, J. This is an appeal from the judgment of the superior court of the county of Solano, denying a writ of review of the proceedings of the board of supervisors of the county of Solano, whereby assessment No. 1 for reclamation purposes was confirmed and authorized to be levied upon certain real property in the city of Benicia, including the property owned by the petitioner.

By an act of the Legislature approved June 3, 1921 (St. 1921, p. 1611), a reclamation district was created, to be called and known as the Benicia reclamation district. The boundaries of said district are described as follows:

> "All those lots and portions of lots, streets and alleys and portions of streets and alleys lying within and being a part of the city of Benicia, county of Solano, state of California, as such city is shown and delineated on a map of said city of Benicia filed in the office of the county recorded of the county of Solano on the tenth day of March, 1921, and recorded in Book four, page 45 of Maps which said lots and portions of lots, streets and alleys and portions of streets and alleys, all lie within a territory bounded as follows: [Here follows description of the property referred to, which includes something over 25 blocks lying within the exterior boundaries of the city of Benicia]."

By section 2 of the act just referred to the management and control of said Benicia reclamation district is made subject to the provisions of article 1 of chapter 1 of title 8 of part 3 of the Political Code, relating to swamp and overflowed lands and reclamation districts and the amendments thereto. Three trustees were provided for. The principal place of business was designated as the city of Benicia. The funds of the district were to be deposited in the county treasury of the county of Solano. Provision was made for the adoption of by-laws by the district. All the rights and powers conferred by law upon reclamation or swamp land districts were conferred upon the district organized by said act; in fact, it appears to be the intent and purport to confer upon the Benicia reclamation district all and singular the powers conferred by law upon and exercised by other reclamation and swamp land districts.

By reason of the conclusion at which we have arrived upon the main issues presented for consideration in this cause, the preliminary objection urged by respondent, that certiorari is not the proper proceeding to test the validity of the acts of the board of supervisors of the county of Solano in levying an assessment upon the property included in the district, will neither be considered nor passed upon herein.

It is insisted by the appellant that the act creating the Benicia reclamation district vests in the district functions and powers conferred upon the city of Benicia by the Municipal Corporation Bill and by the General Laws of the state:

> "That the jurisdiction over reclamation within the city of Benicia is vested in the municipal authorities; that the act creating the Benicia reclamation district vests in a special commission jurisdiction over the municipal functions of the city of Benicia in contravention of section 13, art. 11, of the Constitution; that the act creating the Benicia reclamation district delegates to a special commission the power to levy assessments for a municipal purpose and therefore is in contravention of section 12, art. 11, of the state Constitution; that the act creating the Benicia reclamation district is an act attempting to regulate the affairs of the city of Benicia by a special law and hence in violation of section 6, art. 11, of the Constitution of California; that the act creating the Benicia reclamation district is in violation of subdivision 33, § 25, art. 4, of the state Constitution in that it is a special and local law relating to and dealing with a subject wherein the general law can be made applicable; that the assessment levied by the supervisors places the entire cost of reclamation upon only a part of the land benefited, and it is therefore confiscatory and in violation of section 13 of article 1 of the Constitution of the state of California, and section 1 of the Fourteenth Amendment to the Constitution of the United States; that, if the act creating the Benicia reclamation district be construed as giving to the board of supervisors the power to determine the benefits, then the assessment is unconstitutional in that it was levied without giving petitioner a hearing or opportunity of hearing as to the inclusion of her lands within the assessment district."

As some of the foregoing objections apparently overlap, we shall not attempt to consider them seriatim.

[1] Many definitions have been given of the kind and character and the appellation properly applicable to a reclamation district, but in no instance has such an organization ever been called a special commission or a municipal corporation, but it is now generally spoken of, and we may therefore assume legally known and designated, simply as a public agency or an arm of the state. From which it follows that the contention of the appellant that a special commission or person or superbody has been created to interfere with or exercise control over the municipal affairs of the city of Benicia is wholly untenable. Whatever is done is the act of the state of California, and is not the act of a special commission by a corporation, company, association, or individual within the meaning and intent of those words as they appear in section 13 of article 11 of the Constitution of the state.

[2, 3] Nor can we follow the argument of the appellant in the interpretation sought to be given to section 3488 of the Political Code. As we read that section it vests no power in municipal corporations of the sixth class to reclaim private lands. That section, as amended, specifies that the provisions of the Political Code therein enumerated shall be applicable to any land situated within the limits of municipalities of the first class only and to tide lands within two miles of other incorporate cities or towns which are subject to overflow.

There are two methods of creating reclamation districts—one as provided by section 3446 of the Political Code, and the other by act of the Legislature. It may be further observed that there is nothing contained in section 3488, supra, preventing or inhibiting the creation of a reclamation district by special act of the Legislature. It is only when the district is organized under section 3488 that the municipality has the same power over it as is exercised by county officers over districts organized under the other provisions of the Political Code.

Subdivision 11 of section 862 of the Municipal Corporation Bill (Sts. 1883, p. 93, as amended), relied upon by appellant, does not, as we read the subdivision, vest cities of the sixth class with any power to assess city lots or improve the same by raising the level thereof, filling up depressions therein, or conferring any power whatever, save and except the building of breakwaters, jetties, seawalls, or embankments to protect the city from the incursion of outside waters. There is nothing in the subdivision conferring the authority to make the costs of the improvements and the filling up of the lots a burden to be borne by the lots and premises improved. The limitation of the powers conferred by this subdivision are set forth in the case of City of San Pedro v. Railroad Co., 101 Cal. 336, 35 Pac. 993. They are therein defined as being the same as the powers possessed by a natural person, which do not include the powers of levying and collecting special assessment for local improvements.

Nor do we find anything in the Act 2371 or in 2372a (Deering's Gen. Laws) which carries in the Municipal Corporation Bill or the laws creating cities of the sixth class any power to do or perform the work sought to be accomplished by the special act of the Legislature creating the Benicia reclamation district. Those acts relate to public improvment work or utility or improvements necessary or convenient to carry out the objects, purposes, and powers of the municipalities. There is nothing in either one of these acts vesting the town of Benicia with the power to reclaim private lands. We agree with respondents that this power is vested in the state of California. The creation of districts is the means of exercising this power of assessment. That the city of Benicia is vested with the same powers as the reclamation district finds no support either in the statute, codes or decisions.

[4-6] We do not need to enter upon a discussion of the municipal functions pertaining to cities of the sixth class. Suffice to say that those functions relate to public saftey, public health, maintenance of streets, lights, and the enforcement of general police powers. They do not in any sense embrace the reclamation or improvement of private property. Again, in considering whether the act in question trenches upon the municipal powers of the city of Benicia, it must be borne in mind that there is nothing in the act which purports to give the district any power whatever to change the grades of streets, interfere with the grades of streets, laying out streets, abandon streets, or exercise any political or police power within the boundaries defined as the reclamation district created by the act. The defining of boundaries is not a conferring of power. If the exterior boundaries of the district created had been set out by metes and bounds so as to indicate the territory included within the district, it would have sufficed and conferred exactly the same power upon the officials of the reclamation district as is conferred by the description chosen to be given by the Legislature. Contrariwise, the description chosen by the Legislature confers no more power than if the district had simply been described by giving the metes and bounds of the exterior lines thereof. Within every reclamation district, whether organized under the provisions of the Political Code or by special act of the Legislature, are public highways (which we may now say are both improved and unimproved), and it can scarcely be contended that the creation of these districts are invalid because there are public highways within their exterior boundaries. If this is true, the validity of the act creating the Benicia Reclamation District is not affected by the mere fact that there are or may hereafter be streets, lanes, or alleys within its exterior boundaries. It may also be stated that cities of the sixth class are not immune from the effects of general laws passed by the Legislature. See Ex parte Braun, 141 Cal. 208, 74 Pac. 780.

[7] Neither is there any constitutional limitation to the creation of reclamation districts by special acts of the Legislature. This statement of the law has been definitely and firmly established in our jurisprudence by the many decisions of our courts having to do with this question. People v. Levee District No. 6, 131 Cal. 30, 63 Pac. 676; Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. On pages 406 and 407 of the volume just cited (105 Pac. 277) will be found a very full and careful analysis of what constitutes a reclamation district, of what it is, of what it is not, and of the power of the Legislature to create such districts, and also many answers to the constitutional objections urged by appellant against the act creating the Benicia reclamation district. The opinion in the Sherman Case, supra, is such a complete answer that a mere reference thereto is sufficient. To the same effect is the case of People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207.

[8] What we have said answers in part the contentions of the appellant that the act creating the Benicia reclamation district is violative of the provisions of section 12 of article 11 of the state Constitution. That section provides that the Legislature shall have no power to impose taxes upon counties, cities, towns, or other public municipal corporations or upon the improved property thereof for county, city, town, or other municipal purposes, etc. If the reclamation of private property within the exterior boundaries of the city of Benicia were a municipal purpose, then and in that case the objection would be good, but it is not a municipal purpose; as we have shown, a reclamation district is not a county, a city, a town, or a public municipal corporation. That part of the section has no application, but the remainder of the section simply prohibits the levying of taxes upon the inhabitants or property thereof for county, city, town, or other municipal purposes.

That the improvement of private property within the city of Benicia may be a benefit to the municipality does not render the reclamation or improvement thereof a municipal purpose. As the private property is reclaimed, its value will be increased and may, through taxes levied thereon, correspondingly inure to the benefit of the municipality, but that in no wise changes the purpose of the act in question, to wit, reclamation pure and simple. As we read the act, we do not see that it in any way interferes or authorizes any interference with any municipal improvement, money, property, or effects whatever. The money raised by assessment on the district does not belong to the municipality, nor is it raised with the intent and purpose of being devoted to anything coming within the powers of the municipality. Section 13, of article 11 does not, as we read the section, in any manner create a barrier to the provisions of the act creating the Benicia reclamation district. The act in question, as we have heretofore shown, does not delegate to any special commission, private corporation, company, association, or individual power to make, control, appropriate, supervise, or in any way interfere with any improvement, money, or property of the city of Benicia, nor does it give the Board of supervisors of the county of Solano or the trustees of the Benicia reclamation district any power to trench upon or interfere with any of the things mentioned in said section 13. The Legislature by said section 13 is given power to provide for the supervision of reclamation and conduct in such a manner as it may direct the affairs of reclamation districts, irrigation districts, and drainage districts organized or existing under any law of the state. These provisions are entirely separate. The Legislature, in providing for the Benicia reclamation district, is only doing what it is empowered to do under and by virtue of the powers conferred by section 13 of article 11 of the state Constitution herein considered. If the act in providing for the regulation of said Benicia reclamation district infringed upon any of the prohibitory provisions contained in said section 13, then, of course, to that extent the act of the Legislature would be void, but in view of the fact that the Benicia reclamation district is an entity, and agency or arm of the state, as distinct and separate from the city of Benicia, as a municipality, as though they were in separate and distinct parts of the state of California, it is readily perceived that their powers do not conflict, even though they do actually cover and include a portion of the same territory. Their identities are distinct and their constitutional powers and limitations are also distinct and separate.

[9] We may state again that the reclamation of swamp and overflowed lands of the state of California, whether privately or publicly owned, is a state work and comes within its general police powers. The power of the state to provide for the reclamation of lands by imposing special assessment or creating machinery through which special assessments are imposed and collected is so firmly established by the decisions of this state that we do not need to give this question further consideration. The objection that all the lands within the exterior boundaries of the Benicia reclamation district have not been assessed, whether benefited or not benefited, is fully answered by the following decisions: Reclamation District No. 3 v. Goldman, 65 Cal. 640, 4 Pac. 676; Los Angeles County F. C. District v. Hamilton, 177 Cal. 126, 169 Pac. 1028; In re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Miller & Lux v. Sacramento & San Joaquin Drainage District, 182 Cal. 252, 187 Pac. 1041.

[10, 11] Objection was also made that the assessment is void in that private property is taken without an opportunity to be heard. A reference to the transcript, folios 100 to 119, shows that notice was given and opportunity afforded to appear and make objections to the proceedings taken and had for the assessment of the lands included within the district just as provided by the various sections of the Political Code incorporated into and made applicable for the government of the district in question by the act creating the same. The petitioner was given the full opportunity to be heard upon the question of benefits and, as provided by law, an opportunity to have her objections thereto heard by the board of supervisors and also by action in the superior court. The fact that such opportunity was not embraced does not affect the validity of the proceedings. The district was created by an act of the Legislature, and, as stated by the court in the case of People v. Sacramento Drainage District, supra, it is conclusively presumed that the Legislature took all necessary steps and gave full opportunity to all parties to be heard. As stated by respondent, the matter of fixing the boundaries was a legislative matter, and the hearing as to the apportionment was had before the board of supervisors. The opportunity to be heard was given. No further requirement is necessary. Being of the opinion that no constitutional reasons have been shown why the act of the Legislature creating the Benicia reclamation district should be held void or that any of the acts of the board of supervisors of the county of Solano in relation thereto are other than as authorized by law, it follows that the judgment of the trial court should be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; SHIELDS, Justice, pro tem.

66 Cal. App. 84

HUCK v. RATHJEN. (Civ. 2753.)

(District Court of Appeal, Third District, California. March 4, 1924.)

Waters and water courses ⚷227—Irrigation district not "political subdivision" within election law authorizing contest.

Irrigation district, organized under St. 1897, p. 254, and amendments thereto, is not political subdivision of county, and contest of right of person elected director thereof is not authorized by Code Civ. Proc. § 1111.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Political Subdivision.]

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Election contest by Frank W. Huck against Charles Rathjen. Judgment for defendant, and plaintiff appeals. Affirmed.

Levinsky & Jones, of Stockton, for appellant.

Crittenden & Hench, of San Francisco, for respondent.

FINCH, P. J. This is an election contest instituted under the provisions of section 1111 of the Code of Civil Procedure to determine whether the plaintiff or the defendant was elected to the office of director of an irrigation district organized under the provisions of the California Irrigation District Act. Stats. 1897, p. 254, and amendments thereto. The defendant's demurrer to the complaint was sustained without leave to amend, and judgment was entered in favor of defendant for costs. Plaintiff has appealed from the judgment.

The parties are agreed that the only question raised by the appeal is whether a contest of the right of a person declared elected to the office of director of an irrigation district is authorized by section 1111. That section provides:

> "Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein."

The question is whether an irrigation district is a "political subdivision" of a county. Respondent relies on the case of Hertle v. Ball, 9 Idaho, 193, 72 Pac. 953, which held that such a contest would lie. The Idaho statute provided that "the election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested." This language is much more comprehensive than that of section 1111. In considering the provisions of the California Water Storage District Act (Stats. 1921, p. 1727) in Tarpey v. McClure (Cal. Sup.) 213 Pac. 983, 989, it is said:

> "The act does not violate section 24 of article 1 or section 1 of article 2, in that it denies to any but landowners the right to vote at district elections. * * * 'By this and like provisions, the Legislature is not dealing with elections, with suffrage, or with the ballot, within the meaning of the Constitution and the election laws of the state. The formation of this and similar districts is a function pertaining purely to the legislative branch of the government. * * * Wherefore, it may do so by giving such persons as it may think best an opportunity to be heard.' Potter v. Santa Barbara, 160 Cal. 349, 355, 116 Pac. 1101, 1103. The decisions of the Idaho court to the contrary, based upon the view that these districts are political subdivisions of the state, are out of harmony with the decisions of this state."

Appellant cites the Tarpey Case, and argues that, because not a political subdivision of the state, "an irrigation district must be and is a political subdivision of a county." It is clear from the context, however, that what was meant by the language used is that an irrigation district is not a political subdivision at all.

Section 23 of the California Irrigation District Act provides that precinct election officers shall count the votes cast and execute certificates showing the result thereof, in a manner similar to that provided by the general election laws of the state, and deliver the returns, including the ballots, to the secretary of the board of directors; "and if any person be of the opinion that the vote of any precinct has not been correctly counted, he may appear on the day appointed for the board of directors to open and canvass the returns, and demand a recount of the vote of the precinct that is so claimed to have been incorrectly counted." The complaint alleges that at the time of canvassing the returns the "board of directors counted the ballots cast at said election." Respondent contends that, even if it be conceded that section 1111 authorizes a contest in a case of the character here involved, the superior court under that section and the board of directors under section 23 of the irrigation act would have concurrent jurisdiction, and that, since the board of directors has exercised jurisdiction by recounting the ballots and declaring the result, such determination is a bar to plaintiff's contest herein. In support of his contention respondent cites McGregor v. Board of Trustees, 159 Cal. 441, 114 Pac. 566. Such contention need not be considered, however, because it clearly appears that an irrigation district is not a political subdivision of a county, and that a contest of the right of a person declared elected to the office of director thereof is not authorized by the provisions of section 1111.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

66 Cal. App. 795

REYNER v. BRICHETTO. (Civ. 2754.)

(District Court of Appeal, Third District, California. March 4, 1924.)

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Election contest by F. D. Reyner against John N. Brichetto. Judgment for defendant, and plaintiff appeals. Affirmed.

Crittenden & Hench, of San Francisco, for appellant.

Levinsky & Jones, of Stockton, for respondent.

PER CURIAM. This is an election contest instituted under the provisions of section 1111 of the Code of Civil Procedure to determine which one of the parties was elected to the office of director of an irrigation district organized under the provisions of the California Irrigation District Act. Stats. 1897, p. 254, and amendments thereto. The facts are in all respects the same as those in the case of Huck v. Rathjen (Cal.App.) 225 Pac. 33, this day affirmed.

The judgment is affirmed.

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66 Cal. App. 41

McGRATH v. KAELIN et al. (Civ. 4801.)

(District Court of Appeal, First District, Division 1, California. Feb. 29, 1924.)

1. Judgment ⚷772—Length of lien on after-acquired property.

A judgment lien attaches when the judgment is docketed and continues for five years from such docketing, and does not continue for five years from the time of subsequently acquiring land, under Code Civ. Proc. § 671, in view of Civ. Code, § 2911, and Code Civ. Proc. §§ 336, 685.

2. Statutes ⚷181(2)—Literal construction not followed if absurd.

The intention of the Legislature controls if it can be reasonably drawn from the language used, to the rejection of a more literal construction which would result in inconsistency or absurdity.

3. Statutes ⚷225—Statutes relating to same subject construed together; "pari materia."

A statute is construed with reference to the whole system of which it is a part, and all statutes which relate to the same subject-matter, briefly called statutes "in pari materia," are construed together, and they are all compared and harmonized, if possible, to ascertain the legislative intent and to give them effect accordingly.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In pari Materia.]

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by E. D. McGrath against Joseph R. Kaelin and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Dutton, Seccomb & McDonough, of Oakland, for appellant.

Edward R. Eliassen, of Oakland, for respondents.

TYLER, P. J. This action is one brought by plaintiff to establish an interest in certain real property by reason of an alleged judgment lien.

The amended complaint sets forth the following facts: On the 19th day of August, 1915, one J. H. W. Riley recovered a judgment of foreclosure and sale of certain real property against one Wallace Clark and his wife, Illma. This judgment was entered on the 23d day of August, 1915. Thereafter, on the 16th day of September following, a deficiency judgment in said cause was entered and docketed in the office of the clerk of the court in favor of Riley and against the Clarks for the sum of $711.05, which judgment, it is alleged, has never been paid or satisfied and has been in full force and effect continuously up to the time of the commencement of the action. Thereafter, on or about the 10th day of September, 1917, and while such judgment was enforceable, Wallace Clark purchased and became the owner in fee of the real property here in question, with full knowledge by defendants in the instant case. It is then alleged that the judgment against Clark and his wife became and was on said 10th day of September, 1917, a lien against said real property. Further allegations are to the effect that defendants herein claim an estate or interest adverse to the plaintiff which is inferior to and subject to the judgment lien. The mode or manner of the acquisition of such interest is not pleaded. The assignment by Riley of his interest in said judgment to plaintiff is then alleged, and the complaint prays for the usual relief.

Defendant Kaelin and his wife demurred to the amended complaint upon various grounds. The demurrer was sustained, and, plaintiff declining to amend, judgment was entered in favor of respondents. The plaintiff appeals.

In paragraph V of their demurrer respondents urged that the deficiency judgment is defectively pleaded, since it cannot be ascertained from the recitals how it was continued in full force and effect, and in paragraph VII thereof they alleged that the cause of action upon which plaintiff and appellant relied was barred by the provisions of section 336, subd. 1, of the Code of Civil Procedure. This brings us to the controlling issue raised by the pleadings, namely, whether or not a lien existed at the time this proceeding was instituted.

The judgment against the Clarks upon

which the alleged lien is based was, as above recited, docketed September 16, 1915. The present action was commenced on March 3, 1921. It is the contention of the appellant that the lien continued for five years from the time of the acquisition of the after-acquired property by Clark on December 10, 1917. Respondent, on the other hand, insists that it expired or ceased to exist at the expiration of five years from the docketing of the judgment, namely, September 16, 1920, some six months prior to the filing of the complaint. It is conceded that the declaration in the amended complaint to the effect that the judgment had up to the time of the commencement of the action been in force and effect is based upon the construction which appellant claims should be given to section 671 of the Code of Civil Procedure. Unless it can be said, therefore, that the section warrants such construction, the lien is barred and extinguished. That section provides as follows:

> "Immediately after filing the judgment roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him (noting thereon the hour and minutes of the day of such entry), and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for five years. * * *"

Appellant argues that under this section a judgment lien once attaching continues for five years, and that, as the lien could not attach to after-acquired property until its acquisition by the judgment debtor, the lien should continue for five years after such acquisition.

[1-3] We do not consider this the proper interpretation to be given to the section. Even assuming that it is susceptible of such construction, it is a rule of statutory interpretation that the intention of the Legislature controls if it can be reasonably drawn from the language used, to the rejection of a more literal construction which would result in inconsistency or absurdity. To find such intent is the object of all interpretation. A statute will be construed, therefore, with reference to the whole system of which it is a part, and all statutes which relate to the same subject-matter, briefly called statutes in pari materia, are construed together. They are all compared, and harmonized if possible, to ascertain the legislative intent and to give them effect accordingly.

Other Code sections deal with the subject in question. Section 685, Code of Civil Procedure, provides, in substance, that a judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by a judgment for that purpose founded upon supplementary pleadings; but nothing in this section is construed to revive a judgment for the recovery of money which shall have been barred by limitation. Section 2911 of the Civil Code declares that a lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. By section 336 of the Code of Civil Procedure an action upon a judgment or decree must be commenced within five years.

Reading all the sections together, it appears manifest that the lien attaching to specific property by virtue of a judgment is extinguished and ceases to exist at the end or five years from the docketing of such judgment, unless the latter has been kept alive and is enforceable. A judgment becomes a lien simply by force of the statute, and depends for its existence upon the statute. It ceases to operate as a lien five years after rendition, where no valid execution has been issued within that time; it being only enforceable as long as the debt remains a valid and enforceable obligation. A purchaser, therefore, from a judgment debtor after the expiration of five years from the entry or docketing of the judgment, or such other period of limitation as the statute may prescribe, takes the land discharged from the lien unless it has been preserved by some exception in the statute.

For the reasons given, we are of the opinion that the demurrer was properly sustained.

The judgment is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

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66 Cal. App. 66

CARROLL v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO.
(Civ. 4836.)

(District Court of Appeal, First District, Division 1, California. March 1, 1924.)

Bail 🔑75 — Forfeiture in misdemeanor case held proper, though counsel appeared.

Forfeiture of bail was proper in a misdemeanor case, where defendant did not appear, though his counsel, who furnished bail, did appear, where the district attorney duly applied for and obtained an order requiring defendant's attendance for identification, under Pen. Code, §§ 977, 1043, 1148, 1193.

Application by James M. Carroll for certiorari to review an order of the Police Court of the City and County of San Francisco forfeiting bail. Writ denied.

James A. Himmel, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Asst. City Atty., both of San Francisco, for respondent.

TYLER, P. J. Application for writ of certiorari. From the petition it appears that on or about April 22, 1923, one Charles Johnson was arrested in San Francisco, charged with the commission of a certain misdemeanor. Thereafter, and on the following day, he was admitted to bail in the sum of $100, and petitioner herein furnished and deposited this amount with the bond and warrant clerk of such city. On April 25th the case was called for trial, and defendant appeared with his counsel and answered ready. The matter was continued on such day, and thereafter and from time to time until the 18th day of May, 1923, when, the defendant having failed to appear, the police judge, over the objection of petitioner herein, declared the bail forfeited, and ordered that a bench warrant issue for the arrest of the defendant.

It is claimed that the judge exceeded his jurisdiction and authority in ordering the bail so furnished by the petitioner to be forfeited, for the reason that he was defendant's counsel, and that he represented him when the case was called for trial, and, the charge being a misdemeanor, it was not incumbent upon defendant to be personally present; the court having full authority in such case to proceed to trial without him. The sole question, therefore, presented by the petition, is whether the record shows a breach of any of the conditions of the bail justifying the order forfeiting the same.

Section 977 of the Penal Code provides that if the indictment or information be for a felony the defendant must be personally present, but if for a misdemeanor he may appear upon the arraignment by counsel. Section 1148 of the same Code declares that if the defendant is charged with a felony, he must, before the verdict is received, appear in person; if for a misdemeanor, a verdict may be rendered in his absence. Section 1193 permits judgment to be pronounced against him in his absence. In construing these sections our Supreme Court has held that the mere absence of a defendant at the trial charged with a misdemeanor does not constitute a breach of the bail bond, and that a court has no power to enter a default thereon and declare the recognizance forfeited, as such a defendant so charged is not required under the provisions quoted to be present at the trial. People v. Ebner, 23 Cal. 159; People v. Budd, 57 Cal. 349.

In reaching this conclusion the Supreme Court in the Budd Case had under consideration section 1043 of the Penal Code. The portion of the section referring to misdemeanor cases provides in substance that, while the trial may be had in the absence of the defendant, whenever his presence is necessary for the purpose of identification, the court may upon application of the district attorney, by order or warrant, require his personal attendance; but no such application was made in that particular case. Here, however, the return to the writ shows that the district attorney duly and regularly moved and applied for an order requiring the personal attendance of the defendant at the trial for the purpose of identification, and that an order was accordingly made that he appear for such purpose. By the undertaking defendant was required at all times to hold himself amenable to the orders and process of the court, and, if convicted, to render himself in execution of the judgment. The record shows that the defendant failed to comply with the order made, for which reason the bail was forfeited. Under such circumstances, as indicated in the Budd Case, we are of the opinion that the court was justified and had full power to make the order in question.

For the reasons given, the writ is denied, and the writ heretofore issued is discharged.

I concur: ST. SURE, J.

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66 Cal. App. 18

CITY OF SACRAMENTO v. SIMMONS.
(Civ. 2705.)

(District Court of Appeal, Third District, California. Feb. 28, 1924.)

1. Limitation of actions ⟹34(3)—Action by city against former commissioner brought within year after expiration of office held not barred; "action on a liability created by statute."

An action by a city against a former commissioner of public health and safety, brought within a year after the expiration of defendant's term of office, to recover moneys paid him by the county as local registrar of vital statistics, *held* an action on an obligation created by law within the three-year statute of limitations (Code Civ. Proc. § 338), and not barred.

2. Municipal corporations ⟹172—Charter held not to require city commissioner to account for fees collected as local registrar of vital statistics for state.

Provisions of the charter of the city of Sacramento that no officer of a city shall hold any salaried office, position, or employment in the national, state, or county government, nor receive any benefit or advantage from or by reason of any dealings or services for the city, fixing salaries, creating a department of public health, providing for its supervision by health officer, prescribing his duties and requiring him to keep all vital records for the city, *held* not to obligate a commissioner of public health and safety to account to the city treasurer for fees paid him by the county treasurer for discharging the duties of local registrar of vital statistics for the state.

3. Municipal corporations 🔑172—Fees collected by commissioner as local registrar of vital statistics for state not "public moneys" of city.

Fees paid to a commissioner of public health and safety by the county treasurer on certificates of the state registrar of vital statistics for discharging the duties of local registrar, pursuant to St. 1915, pp. 576, 586, §§ 4, 20, *held* not "public moneys" within the meaning of the Charter of Sacramento, § 96, for which the commissioner was liable to the city treasurer; "public moneys" meaning money or funds belonging to the city, moneys which are owing or payable to the city in its corporate capacity, such as assessments, license fees, or moneys derived from the sales of property, wharfage charges, and such like.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Money.]

4. States 🔑44—Local officers acting as registrar of vital statistics for state are to that extent state officers.

To the extent that local officers of a city act as local registrars of vital statistics for the state they are acting as state officers.

5. States 🔑44—It is within power of state to make local officers state officers for particular purposes, and provide fees for same.

It is within the power of the state to utilize local officers in different localities, and make them state officers for particular purposes, and direct fees to be paid for such services by the respective counties.

6. Municipal corporations 🔑172—Commissioner's want of legal authority to act as registrar of vital statistics held not to entitle city to fees paid him.

That a city commissioner of public health and safety was not legally authorized to act as public health officer or local registrar of vital statistics for the state, or that there was no reason why another acting under him as registrar should have turned the fees over to the commissioner, *held* not to give the right to the city to recover of him fees paid for such services, or fees so turned over to him.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the City of Sacramento against G. C. Simmons. Judgment for plaintiff, and defendant appeals. Reversed.

Elliott & Atkinson, of Sacramento, for appellant.

Robert L. Shinn, of Sacramento, for respondent.

PLUMMER, J. This is an appeal by the defendant from a judgment entered against him in the superior court of the county of Sacramento in favor of the plaintiff in the sum of $3,194.25. It appears from the pleadings and stipulation of facts in this action that the defendant was, from the 1st day of July, 1915, to the 30th day of August, 1920, a duly elected, qualified, and acting commissioner of the city of Sacramento, and during that period of time was the head of the department of public health and safety of said city; that, while acting as the head of such department, there was paid to the defendant for acting as local registrar of vital statistics the sum of $1,659.75, and that between the 16th day of December, 1918, and the 12th day of May, 1920, there was paid to said defendant by W. J. Hanna, the sum of $1,534.50, collected from the county treasurer of the county of Sacramento for acting as local registrar of vital statistics during the said period of time; that none of said money was paid over by the defendant to the city treasurer of the city of Sacramento; that no part of the said money was used by the defendant for personal or individual purposes, but was all expended by him for purposes which said defendant, as commissioner, considered as coming within the purview of his department. These expenditures, however, were unauthorized by any vote of the commissioners of the city of Sacramento and do not appear to have been ratified by them, although such expenditures were from time to time regularly reported by the defendant as such commissioner.

The action by the plaintiff is prosecuted upon the theory that the moneys collected by the defendant while acting as registrar of vital statistics were and are public moneys belonging to the city of Sacramento, and that as such the defendant was not entitled thereto, and that his expenditures of the sum were not in any manner authorized by law. On the part of the defendant it is insisted that the fees collected by the defendant from the county of Sacramento were and are not public moneys; that such moneys belonged to the defendant individually; that the expenditures made by him were for purposes beneficial to the city of Sacramento; and that, if such moneys were in fact public moneys, the city is now estopped from bringing action for their recovery.

[1] As this action was begun within one year after the expiration of the defendant's term of office, and as the defendant would have until the expiration of his term of office to pay over such moneys, if they belonged to the city of Sacramento, we think the statute of limitations has not run in this case.

An obligation to pay money to the city treasurer is an obligation created by law, and section 338 of the Code of Civil Procedure provides that an action upon a liability created by statute is not barred until the lapse of three years. Under the rule laid down in People v. Van Ness, 76 Cal. 121, 18 Pac. 139, the defendant would have up to and including the last day of the expiration of his term of office within which to turn over the funds collected by him, if such funds constituted moneys belonging to the city of Sacramento.

However beneficial the expenditures of the money herein referred to made by defendant were, we do not find anything in the city charter authorizing such expenditures by the commissioner of public health and safety of his own volition. Omitting the smaller items, $803 appears to have been expended for the upkeep of automobiles used in the transportation of employees of the health department; $1,057 expended through the medium of the local department of the American Red Cross; $835 for milk furnished sick and under-nourished children, and $582 for ice to preserve food for the poor of the city. It remains to determine whether the moneys collected and received by the defendant, as aforesaid, should have been turned over by him to the treasurer of the city of Sacramento. This involves a study of the city charter.

The city charter, as it existed during the period of time referred to, provided for the election of five city commissioners. Five departments were established, the third being the department of public health and safety, to which the defendant was assigned. Section 11 of the city charter provided for the appointment of certain officers who should be appointed by and hold office at the pleasure of the city commissioner, under whose supervision the department came. Under this section the defendant was empowered to appoint a health officer.

Section 13 of the charter reads:

> "No salaried officer of the city, elective or appointive, except as in this charter provided, shall hold any salaried office, position or employment in the national, state or county government."

Section 14 specifies that:

> "No officer, clerk, assistant or employee shall receive any commission, money or thing of value, or derive any profit, benefit or advantage, direct or indirect, from or by reason of any dealings with or services for the city by himself or others, except his lawful compensation as such officer, clerk, assistant or employee."

Section 15 of the charter fixes the salary of each commissioner as follows:

> "The salary of each commissioner shall be thirty-six hundred dollars ($3,600) per annum. * * * All salaries shall be payable in equal monthly installments, and shall be in full compensation for all duties and services performed by all officers and employés of the city."

Section 96 of the charter reads as follows:

> "All public moneys collected by any officer or employé of the city shall be paid into the city treasury, without any deduction on account of any claim for fees, commissions or any other cause or pretense; and the compensation of any officer, employé or other person so collecting money, shall be paid by demands on the treasury, duly audited as other demands are audited and paid."

Section 110 reads:

> "There shall be a department of public health and sanitation under the administrative control of the commissioner of public health and safety. Said commissioner and department shall have supervision of all matters pertaining to the sanitary conditions of the city and the health of its inhabitants."

Section 111 is to this effect:

> "The principal officer and executive of said department shall be a health officer who shall be appointed by the commissioner."

Section 114 requires:

> "The health officer shall see to it that the laws of the state and ordinances of the city relative to public health and sanitation and all rules, regulations, orders and requirements of the health department are promptly enforced."

Section 116 of the charter specifies that the secretary of the health department shall keep a record of the transaction of the department, including all vital records, or death or cemetery records, belonging to the city. Also a complete record of all births and deaths within the city, and interments in both public and private cemeteries.

Section 4 of the act of the Legislature, approved May 19, 1915 (St. 1915, p. 575), entitled an act to provide a central bureau for the preservation of records of marriages, births, and deaths, and to provide for the registration of all births and deaths, the establishment of registration districts, and to create the offices of state and local registrars of vital statistics, provided that, in cities having a freeholders' charter, the health officer shall act as local registrar and perform all the duties thereof.

Section 20 fixes the fees of local registrars, and further specifies that the state registrar shall quarterly certify to the treasurers of the several counties the number of births and deaths properly registered, with the names of the local registrars and the amounts due to each at the rate fixed therein.

In pursuance of this act of the Legislature the defendant (so far as the record shows not having been appointed a health officer) from the date the said act went into effect, down to and including a portion of the year 1918, acted as local registrar of vital statistics, and thereafter, and until the expiration of the defendant's term of office, one W. J. Hanna acted as such local registrar.

[2] We do not see that section 13 of the charter, to which our attention has been called, has any application. It is simply prohibitive, in that it is designed to prevent a city officer from holding any office or employment under the national, state, or county government.

Section 14 of the charter, to which our attention has been directed, is confined in its application to dealings with or services for the city, and does not relate to or have any bearing upon acts or services performed by any officer, clerk, assistant, or employee outside of and not connected with dealings or services for the city.

Section 15, in its concluding sentence, which we have heretofore quoted, makes the salaries paid full compensation for duties and services performed by all officers and employees of the city. It does not extend to or include services which are not for the city or within the purview, intent, meaning, or jurisdiction of the municipal functions of the city of Sacramento.

[3] Much of the argument in this case is centered around section 96 of the charter hereinbefore set forth. That section directs that all public moneys collected by any officer or employee of the city shall be paid into the city treasury, without any deduction on account of any claim for fees, commissions, or any other cause or pretense, etc. The question naturally occurs, What is meant by the term of public moneys collected by any officer or employee of the city? In 32 Cyc. 1248, the following definition appears of public moneys:

> "The meaning of the term in any particular case is governed by the context and the intent with which it is employed. As used in the statutes of the United States, money of the government, received from the public revenues or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same wherever it may be."

In Myers v. Kiowa County Commissioners, 60 Kan. 189, 56 Pac. 11, it is held that the term "public moneys" used in relation to counties, means the same as county funds. In other words, the public moneys of the city of Sacramento, as used in this section, we think, means money or funds belonging to the city of Sacramento, moneys which are owing and payable to the city in its corporate capacity, such as taxes, assessments, license fees, if any, moneys derived from sales of property, wharfage charges, and such like. It does not include fees for services performed in behalf of an agency outside of and distinct from any of the municipal functions of the city of Sacramento. The person designated by the enactment of the Legislature to perform the services of collecting vital statistics and transmitting the same to the state registrar is acting under the authority thereof, and is not in any wise accountable to the municipality of Sacramento for any failure whatever to perform such duties. It is provided by said act that the state registrar shall certify to the county treasurers of the respective counties the number of births, deaths, etc., and the amount of money to be paid to the local registrar. We find nothing in the charter which requires the local registrar to collect this compensation. It is no part of the duties of either the health officer of the city of Sacramento or of the commissioner of public health as the same are set forth in the city charter.

[4, 5] The act in question simply makes different officers in different localities local state registrars of vital statistics, and, to the extent that they are discharging such duties, they are acting as state officers. They are state officers performing state functions, and are under the exclusive jurisdiction of the state registrar of vital statistics. The compensation provided for this service is in no wise connected with any function exercised as a municipal officer. The charter provision, we think, has reference to the performance of duties incident to the municipal office in question, and does not extend to matters which are entirely separate and distinct therefrom. The power of the state to utilize different officers in different localities and make them state officers for this purpose and direct fees to be paid for such services by the respective counties is upheld in the case of Boss v. Lewis, 33 Cal. App. 792, 166 Pac. 843. We find nothing in the city charter which brings this case within the decision of the Supreme Court in the case of County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324; County of Kern v. Fay, 131 Cal. 547, 63 Pac. 857; County of Alameda v. Cook, 32 Cal. App. 165, 162 Pac. 405. In the case of County of Humboldt v. Stern, supra, the decision of the court is explicit and particular in limiting the compensation claimed to acts performed for the county. It quotes the act of the Legislature applicable as follows:

> "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided." St. 1897, p. 572, § 215.

And then says:

> "This provision is a legislative declaration that the officers shall not receive any compensation from the county other than the salaries therein named for any services they may render it, either in the line of their official duty or otherwise."

The court was not considering acts or services rendered to the state of California or to any other municipality, power, or person outside of the county of Humboldt, but was only determining that the compensation provided for covered all acts that should be performed for the county of Humboldt, and the county of Humboldt alone.

In the case of County of Kern v. Fay, Supra, the court had to do with that provision of the law which allowed the sum of $10 to be taxed as costs for fees in suits instituted by the district attorney to foreclose school land certificates. The section relating to salaries of the county of Kern contains the following provisions:

> "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided." St. 1893, p. 507, § 216.

And then further on, in defining the duties of the district attorney, contained the following language:

> "On the first Monday of each month file, with the auditor, an account, verified by his oath, of all moneys received by him in his official capacity during the preceding month, and at the same time pay them over to the county treasurer." Id. p. 381, § 136.

In bringing the foreclosure suits for the county of Kern, Fay was acting in his official capacity as district attorney of the county of Kern, and under the above provisions he necessarily was required to pay all the fees to the county treasurer collected by him while acting in such capacity.

In the Matter of Dodge, Assessor of the County of San Francisco, v. San Francisco, 135 Cal. 512, 67 Pac. 973, we find such officer acting under a provision of the law which reads as follows:

> "The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county within twenty-four hours after receipt of the same." St. 1899, p. 364, § 34.

The question before the court was as to the right of Dodge to retain fees for collecting poll taxes. The court held that the collection of poll taxes was a part of his official duties as assessor of the city and county of San Francisco, and that under the charter he was required to pay all such fees and moneys into the city treasury.

In the case of County of Alameda v. Cook, supra, which had to do with the fees allowed by act of Congress to county clerks in naturalization proceedings, in holding that the county clerk was not entitled to retain such fees, the court called attention to the fact that Cook was acting as ex officio clerk of the superior court; that section 4232 of the Political Code read that his salary, which was fixed, should be in full compensation for all services of every kind and description rendered by him either as county or as ex officio clerk of the superior court, and also to section 4290 of the same Code, which required the clerk to collect for the use of his county and pay into the county treasury on the first Monday of each month the fees " 'now or hereafter, allowed by law in all cases, except where such fees, or a percentage thereof', were allowed to him or were made a charge against the county." The fees allowed by the act of Congress in naturalization proceedings (U. S. Comp. St. § 4372) were held to be fees "allowed by law," and as such the county clerk was required to pay them into the county treasury on the first Monday of each and every month after their collection. The charter of the city of Sacramento contains no such provisions as appeared in the law controlling the decisions of the cases above cited and the cases which follow the rule set forth therein.

We do not see that section 110, in providing that there shall be a department of public health and sanitation under the administration and control of the department of public health and safety, has any bearing upon the issues now being considered. The compilation of figures by the state of California showing the number of deaths has nothing to do with public health, the healing of the sick, or preserving the lives of the living, nor has it to do with sanitary activity. The remainder of the section shows what is meant by the first sentence of section 110 of the charter to which our attention has been called, to wit, the matter of sewage disposal, defective drainage, abatement of nuisances, the correct preparation, manufacture, and sale of articles intended for human consumption, quarantine requirements, and the prevention of the spread of infectious or communicable diseases. It has nothing to do with the compilation of figures which meet either a public need or satisfies a morbid curiosity.

Section 114 of the charter is simply along the same lines in requiring the health officer of the city to see that the laws and ordinances relative to public health and sanitation and the rules of the health department are promptly enforced.

Section 111, as far as it has any bearing upon the issues before us, simply provides that the health officer shall be appointed by the commissioner of public health and safety.

Section 116 of the charter has only to do with municipal duties to be performed by the secretary of the board of health. That the city of Sacramento provides for keeping its own record of vital statistics has nothing to do with the activities conducted along somewhat similar lines by the state of California. The concluding clause of that section sets forth the intent and purpose of the charter in confining the work of the secretary to such other duties "relative to the health and sanitation of the city as may be required of him."

[6] This résumé of the charter shows that matters of public health and sanitation within the city of Sacramento which are matters of general concern to all the people therein were very carefully safeguarded and provided for, and further that there is nothing in the charter as heretofore stated which requires any officer of the city to do or perform any act such as the state seeks to have done under the act of the Legislature of

May 19, 1915. Everything provided for in that act is a state function, wholly dissimilar and unconnected with any act required of any officer by the city charter of the city of Sacramento. The health officer of the city of Sacramento is one position, and that of local registrar of vital statistics of the state of California is another. The fact that one person performs the functions of both officers does not change the situation in any particular or make the two one. That the defendant may not have been legally authorized to act as public health officer (not having been appointed to that position) or to collect money from the county of Sacramento for his services to the state does not give to the city of Sacramento any title to the money so collected, nor does the fact that there has been no reason shown why W. J. Hanna, while acting as local registrar of vital statistics of the state of California, turned over to the defendant the fees collected by him give to the city of Sacramento any title to such moneys. In other words, if the moneys involved in this action were not properly collected or legally payable to the persons who collected the same, that is the concern of the county of Sacramento and not of the city.

Being of the opinion that there was nothing in the city charter during the period involved in these proceedings or in the general laws of the state which required the defendant to turn over to the city treasurer of the city of Sacramento compensation collected by him from the county of Sacramento through the agency of the state of California for discharging the duties of local registrar of vital statistics for the state of California, we conclude that the judgment of the trial court herein should be and the same is hereby reversed.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 29

WEBBER v. BANK OF TRACY. (Civ. 4626.)

(District Court of Appeal, First District, Division 1, California. Feb. 28, 1924. Hearing Denied by Supreme Court April 28, 1924.)

1. Warehousemen 🔑45—Ordinary care required of bank as safety depositary.

As to contents of safe deposit boxes in bank's safe deposit vault, bank is bailee for hire, bound to use ordinary care in safeguarding property.

2. Bailment 🔑11—Limit of bailee's obligation stated.

In absence of stipulation between parties, limit of bailee's obligation is exercise of ordinary care, and he is not insurer of property against theft.

3. Bailment 🔑11—Bailee must exercise care of ordinarily prudent person.

Bailee must exercise degree of care which ordinarily prudent person bestows on his own property of like description.

4. Bailment 🔑11—Standard of ordinary care depends on time, place, custom, business, and kind of article.

Standard of ordinary care by bailee depends on time and place, influence of custom and business, and kind of article.

5. Negligence 🔑4—Ordinary care required.

One failing to exercise ordinary care is guilty of ordinary negligence.

6. Warehousemen 🔑47—Burden on owner of contents of safe deposit boxes in burglarized vault to prove bank's negligence.

In action against bank for value of contents of safe deposit boxes in burglarized vault, burden was on plaintiff to prove defendant's failure to use ordinary care in safeguarding property.

7. Warehousemen 🔑45—Bank held not negligent in guarding safe deposit boxes.

Country bank's failure to install burglar alarm or employ night watchman, absence of telephone system, inadequate locks and eye bolts on back door of building, frosted windows, etc., obscuring view of vault door, etc., *held* insufficient basis for inference of negligence in guarding contents of safe deposit boxes in burglarized vault.

8. Warehousemen 🔑45—Negligence held not proximate cause of burglary of safe deposit vault.

Bank's failure to install burglar alarm or employ night watchman, absence of telephone system, inadequate locks and eye bolts on back door, frosted windows, etc., obscuring view of vault door, etc., *held* not proximate cause of burglary of safe deposit vault.

9. Negligence 🔑136(9)—Question for court.

Negligence is question of law for court only when facts are, in no event or view of case, susceptible of inference of negligence sought to be deduced.

10. Negligence 🔑119(7)—Fact must be proved as averred.

Negligence is always a question of fact, to be alleged and proved as averred.

11. Negligence 🔑134(1)—Mere conjecture insufficient evidence.

Averment of negligence cannot be supported by mere conjecture or surmise, but must be made referable to some specific cause or defect.

12. Negligence 🔑5—Not imputed from methods in business.

Negligence cannot be imputed from methods in general use in any business.

13. Bailment 🔑11—Standard of care established by testimony on custom and usages of business.

Standard of ordinary care by bailee is established by competent testimony on custom and general usages of business.

14. **Negligence 🔑3—Degree of care required.**

No one is held to higher degree of care than fair average of his profession, business, or trade.

15. **Negligence 🔑4—Standard of care.**

Standard of due care is conduct of average prudent man.

16. **Bailment 🔑11—Jury cannot say that usual way of caring for property is negligent.**

Juries must determine responsibility for individual conduct, but cannot say that usual and ordinary way of caring for property intrusted to bailee is negligent.

17. **Warehousemen 🔑45—Negligence held not inferable from failure to keep safe deposit boxes behind stronger door of vault.**

Bank's negligence in caring for contents of safe deposit boxes in burglarized vault *held* not inferable from failure to keep them behind stronger door of vault, especially where bank was accustomed to use boxes for its own money and bonds.

18. **Warehousemen 🔑45 — Bank taking precautions of similar banks to guard safe deposit boxes not liable for loss from burglary.**

Country bank conforming to practice of all other such banks in state in towns of like population and character in maintaining safe deposit vaults in building as good or better than ordinary country bank building with usual interior arrangement, and protecting vault by doors similar to those of other such banks in similar sized communities, *held* not liable for loss of contents of safe deposit boxes by burglary, though it had neither night watchman nor burglar alarm, which no such bank in state had up to time of burglary.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Charles S. Webber against the Bank of Tracy. From a judgment for plaintiff and an order taxing costs, defendant appeals. Reversed.

Crittenden & Hench and Creed, Jones & Dall, all of San Francisco (Esmond Schapiro, of San Francisco, of counsel), for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

Morrison, Dunne & Brobeck and Edward Hohfeld, all of San Francisco (H. A. Judy, of San Francisco, of counsel), amicus curiæ.

ST. SURE, J. This is an action by plaintiff for himself and as assignee of 21 claims, against the Bank of Tracy, for the value of the contents of safe deposit boxes, kept in the safe deposit vault of the Byron branch of said bank, which were burglarized on January 26, 1920. The complaint alleges that the bank was guilty of negligence and want of ordinary care in the protection of the safe deposit boxes and the preservation of the property contained therein. After trial by jury, a verdict was had in plaintiff's favor on 18 claims, amounting to $12,322.14; from the ensuing judgment for that amount, defendant appeals.

The facts are undisputed. The town of Byron, Contra Costa county, has a population of about 250, and is the center of a peaceful farming community. Its entire business section comprises a single street on the main line of the Southern Pacific Railroad. There is but one 2-story building in the place, and all the buildings, with the exception of the bank, are of wood. Until 1911 there was no bank nearer Byron than at Antioch on the northwest about 14 miles away, and at Tracy on the south, about 15 miles away. In 1911 the Bank of Tracy instituted a branch at Byron and assigned to it $25,000 working capital. The bank building was of concrete, with 18-inch walls, and the vault was constructed of the same material of the same thickness, with iron doors, "fire-proof and thief resisting." The front door and windows were of the ordinary business type. The rear door and window were protected by iron gratings. The grating over the rear door is described as a "barred door." It was made of iron and was a "lattice work hung by two hinges on two steel pins which were anchored in the cement wall. It was fastened * * * with a padlock on the inside of the grating." There was also a heavy wooden door across which on the inside was an iron bar. On either side of the bank building are wooden structures, and in the rear is a high board fence. A vacant lot adjoining the bank premises gave access to the rear of the bank building. Trees near said fence obscured the back door through which entrance to the steel vault doors was effected. No burglar alarm, bell, or other warning device was installed in the bank. There was no watchman for the same; the only peace officer in the community lived on the same street as the bank and within 65 feet of it. From the front of the bank the upper portion of the vault door could be seen by looking through the window, over the top of grill work surmounting frosted glass and wooden base. The whole partition was probably 5 feet high. Several trains passed on the main line during the night, and there was generally some switching there also. The street lighting system of the town was by popular subscription, and as funds were low the lights were used only occasionally. There was no telephone service out of the town after 6 or 7 o'clock in the evening. No one slept in the buildings on either side of the bank. Defendant had rented yearly on an average of 100 safe deposit boxes at an annual rental of $2 per box; the total income therefrom approximating $200 per annum. Defendant was accustomed to, and did, on the night of the robbery, use one of the safe deposit boxes for some of its own coin and Liberty Loan bonds. The safe deposit vault was burglarized by unknown persons by the use of the oxyacetylene torch and flame. With one possible exception this was the first bank robbery accomplished by such means in the United States, but following in the same year there were four other similar bank robberies in California. The oxyacetylene flame will cut through solid steel at least 26 inches thick. The precautions taken by the defendant for the safety of its box renters and the contents of such safe deposit boxes were similar and at least equal to those taken by all other banks in similar and even larger communities in California. Up to the time of the robbery no bank in any community in California with a population of less than 1,000 had a burglar alarm on its safe deposit vault, or kept a private watchman.

Defendant alleges as its first point for reversal that the evidence is insufficient to justify the verdict on any count.

[1-5] The relation between these parties was that of bailor and bailee. The defendant was a bailee for hire. It devolved upon defendant to use ordinary care in the safeguarding of plaintiff's property. Cussen v. Southern California Savings Bank, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221. In the absence of any stipulation between the parties, the limit of a bailee's obligation is the exercise of ordinary care, and he cannot be said to be an insurer of the property against theft, if he has exercised such care. Perera v. Panama Pacific International Exposition Co., 179 Cal. 63, 175 Pac. 454; Copelin v. Berlin Dye Works, etc., Co., 168 Cal. 715, 144 Pac. 961, L. R. A. 1915C, 712. In general it may be said that a bailee is required to exercise that degree of care which an ordinarily prudent person bestows upon his own property of a like description. The standard of ordinary care must, of necessity, vary with time and place, since what might be ordinary care at certain times and in certain localities might, at different times and at other places, amount to but slight care. The influence of custom and business must also be considered in determining what is ordinary care, as in certain businesses or trades disposition may be made of property or goods by a man of ordinary prudence which, under other circumstances, would certainly be open to the charge of gross negligence. Moreover, what would be the exercise of ordinary care with regard to articles of a certain kind, might be far from such with regard to those of a different sort. When one is wanting in the exercise of ordinary care, he is said to be guilty of ordinary negligence.

It would seem that the ordinary care required of a bank in a case like this is that the construction of the bank building and the methods of protection and the general conduct of its business should conform to those of banks in similar communities. Chilberg v. Standard Furniture Co., 63 Wash. 414, 115 Pac. 837, 34 L. R. A. (N. S.) 1079; Ketterer v. Armour & Co., 247 Fed. 921, 160 C. C. A. 111, L. R. A. 1918D, 798; Battelle v. Mercantile Warehouse Co., 139 App. Div. 649, 124 N. Y. Supp. 135; Jones v. Hatchett & Bro., 14 Ala. 743; Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Pioneer Fire Proof Construction Co. v. Caroline Sandberg, Adm'x, etc., 98 Ill. App. 36; Burns v. Sennett & Miller, 99 Cal. 363, 33 Pac. 916; Hennesey v. Bingham, 125 Cal. 627, 58 Pac. 200; Longuy v. La Société Française, 52 Cal. App. 370, 198 Pac. 1011.

[6-8] Before proceeding with a consideration of the evidence we will advert to the charges made by plaintiff in his complaint against the defendant. It is alleged that the defendant was negligent and failed to use ordinary care in safeguarding the property. It was incumbent upon plaintiff to sustain the burden of proving these charges. As was said in Perera v. Panama Pacific International Exposition Co., 179 Cal. 63, 175 Pac. 454, it was incumbent upon the bailor to introduce evidence from which the jury might legitimately infer that the loss or theft was due to the lack of ordinary care on the part of the bailee. An examination of the record discloses an utter lack of such affirmative proof. Plaintiff's counsel beg the question by arguing that "no care at all appears to have been used by the bank in safeguarding its safe depositors." We look in vain for the proof. Take, for example, the charges of omission made against defendant, such as the failure to install a burglar alarm or employ a watchman; there is no evidence to support the conclusion that either of such omissions was a negligent omission. The same may be said with reference to every other charge made by plaintiff. But, say counsel for plaintiff, "we do not contend that any one of these elements would necessarily in itself be conclusive upon the question of reasonable care, but we do contend that all of them taken together constitute a very strong case of gross negligence." A complete answer to this contention is that the evidence is as barren of any proof which would support any "element" in plaintiff's case as it is with respect to the omission of the burglar alarm or watchman. In this connection counsel call our attention to what they term a combination of circumstances such as no telephone system, inadequate locks and eye bolts on back door, inadequate street lighting system, trees and high board fence screening rear premises from observation, frosted windows, grill work, obscuring the view of vault door, shades on windows, noise of passing trains, and the like. Such circumstances furnish no sufficient basis for any inference of negligence. Furthermore,

even though such combination of circumstances be deemed negligence, it cannot be maintained that such negligence was the proximate cause of the burglary; the connecting links between the negligence and the burglary are wholly lacking. Union Investment Co. v. San Francisco Gas & Electric Co., 168 Cal. 58, 141 Pac. 807; Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 Pac. 480. The view we have herein expressed upon the question of the proof of negligence is fully supported by the opinion of Mr. Justice Myers of the Supreme Court in the recent case of Marovich v. Central California Traction Co. (Cal. Sup.) 216 Pac. 595.

[9] Plaintiff cites a number of cases holding that one doing a safe deposit business is a bailee for hire and is bound to use ordinary care, which is conceded. It is urged that the material facts in this case are in dispute, and therefore the question of negligence was one for the jury. We have gleaned from the record and stated herein all of the facts. We accept the rule as stated in Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 195 Pac. 398, 16 A. L. R. 275, that—

> "It is only when the facts of a given case are not in any event or in any view of the case susceptible to the inference of negligence sought to be deduced therefrom that the question of negligence becomes one of law for the sole consideration of the court rather than one of fact for the determination of the jury."

[10, 11] It is apparent that counsel for plaintiff err in the application of this rule. Negligence is always a question of fact to be alleged and proved as averred. It cannot be supported by mere conjecture or surmise, but must be made referable to some specific cause or defect. As was well said in Perera v. Panama Pacific International Exposition Co., supra, at page 67 (175 Pac. 456):

> "It is true, of course, that evidence of facts and circumstances from which want of ordinary care may reasonably be inferred is sufficient to support a conclusion of negligence, in which event the question of negligence is one for the jury. But the difficulty here is that the facts and circumstances shown by the evidence furnish no sufficient basis for any such inference."

[12-16] Negligence is not to be imputed from methods in general use in any business. The standard of ordinary care is established by competent testimony upon the custom and general usages of the business. Absolute protection against bank burglary, in small communities, is unattainable. Indeed, one witness, a safe manufacturer, said in this case "there is no such thing as a burglar-proof safe. * * * By theft-resisting I mean the safe gives reasonable protection." No man is held by law to a higher degree of care than the fair average of his profession, business, or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in the bailee is the same, and however strongly they may be convinced that there is a better, no jury can be permitted to say that the usual way and ordinary way is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall, in effect, dictate the customs or control the business of the community. Bertha Zinc Co. v. Martin's Adm'r, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999. Counsel for plaintiff would have defendant an insurer, which most emphatically it is not.

[17] Counsel for plaintiff further insist that negligence is inferable from the fact that the safe-deposit boxes were not kept behind a stronger door of a vault maintained by defendant. Merchants' Bank of Vandervoort v. Affholter, 140 Ark. 480, 215 S. W. 648, is cited in support of such proposition. An examination shows that this was a case where Liberty bond subscription cards designating registered bonds, together with purchase price of bonds were deposited with the bank, the bank having ordered coupon instead of registered bonds, was liable to subscribers for money advanced, upon the theft of the bonds from the bank vaults, whether it was acting as agent of subscribers or as promoter of loan drive, since having accepted funds for purchase of bonds it was responsible to subscribers either for return of money or for delivery of bonds designated in subscription contract. Here the bank had a special duty to perform and was intrusted with the money with which to purchase the bonds. It undertook to purchase the bonds and safely keep them. The case is not at all in point. Besides, in the instant case the facts show that defendant was accustomed to and did use the safe deposit boxes for some of its own coin and Liberty bonds.

[18] While plaintiff has wholly failed to affirmatively show negligence, defendant has shown by undisputed evidence, that in maintaining its safe deposit vaults it conformed to the practice and conduct of all other country banks in California, situated in towns of like population and character. Briefly, this evidence shows, without conflict or contradiction, that the bank building was as good or better than the ordinary country bank building in California; that the interior arrangement of the bank was the ordinary and usual arrangement; that the bank vaults were protected by doors similar in all respects to those in other banking institutions in California in similar sized communities; that no bank in California, up to the time of the robbery, in a community of less than 1,000 inhabitants, had either a night watchman or a burglar alarm.

Believing, as we do, that the evidence wholly fails to sustain the verdict, we are of the opinion that the judgment must be reversed. The order of the trial court taxing costs, made after judgment, from which the defendant also appeals, naturally falls with the main case. We consider it unnecessary to consider other points raised by defendant.

Judgment reversed.

We concur: TYLER, P. J.; SHORT, J., pro tem.

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65 Cal. App. 762

CLIFFORD et ux. v. FLESHMAN et al.
(Civ. 2664.)

(District Court of Appeal, Third District, California. Feb. 23, 1924.)

1. Vendor and purchaser 🔑299(4)—Promptness in paying installments held not waived by settling suit for those past due.

Vendor *held* not to have waived, as matter of law, right to forfeit contract for default in payment of installments when due by having started an action to forfeit and having settled the same on payment of installments due to date.

2. Vendor and purchaser 🔑299(3)—Waiver of stipulation making time of essence of installment contract must be pleaded.

In view of Civ. Code, § 3275, waiver of stipulation in installment contract making time of the essence of the contract is a matter of defense, which must be pleaded in an action to forfeit.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by D. O. Clifford and another against C. C. Fleshman and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellants.

George Cosgrave, of Fresno, for respondents.

PLUMMER, J. Plaintiffs began this action to quiet title to portions of three lots situated in the Blackstone Park addition to the city of Fresno. The complaint is in the ordinary form of an action to quiet title, the plaintiffs resting upon a certain agreement of purchase held by them with the owners of the property. The prayer of the complaint is that the defendants be required to set forth the nature of their claim to the premises, that it be adjudged that the defendants have no title thereto, and that the title of the plaintiffs to the premises be quieted. The answer filed by the defendants consists of simple denials of the allegation of complaint, and an allegation that the plaintiffs entered into a contract with one C. C. Fleshman for the purchase of the property mentioned in plaintiffs' complaint, and that said Fleshman thereafter assigned and sold all his right, title, and interest therein to the defendant D. Lillian Clark. The action was tried principally upon an agreed statement of facts from which it appears as follows:

That on or about the 18th day of February, 1920, the plaintiffs entered into a contract of sale and purchase with C. C. Fleshman, the grantor of the defendant D. Lillian Clark, for the property mentioned in plaintiffs' complaint; the price agreed upon in the contract being $5,125, payable as follows: $500 in cash; $125 on March 18, 1920; $125 on April 18, 1920; $125 on May 18, 1920; $125 on June 18, 1920; and thereafter $50 per month, payable on the 18th day of each and every month, together with the interest thereon, at the rate of 7 per cent. per annum, payable monthly, until the full payment of the contract price mentioned above. These payments appear to have been made up to and including the 18th day of March, 1921; no payments having been made on the 18th day of April, 1921, nor on the 18th day of May, 1921. The plaintiffs on or about the 31st day of May, 1921, wrote the defendants as follows:

"Fresno, California, May 31, 1921.

"Mr. C. C. Fleshman, 1627 Patterson Avenue, Fresno, California—Dear Sir: You are hereby notified that pursuant to the terms of that certain contract dated February 18, 1920, between D. C. Clifford and Maude A. Clifford, as sellers, and C. C. Fleshman, as buyer, for the sale of the real property in the county of Fresno described as the north 50 feet of lots 14, 15, 16, and 17 in block 8 of Blackstone Park addition to the city of Fresno, the said sellers elect to cancel and terminate the same because of nonperformance of the terms thereof, on the part of buyer." Signed by Cliffords and George Cosgrave, attorney for the Cliffords.

It also appears that on or about the 12th day of June, 1921, the plaintiff wrote a second letter to the defendants, stating that they would insist upon prompt payment of the installments as they became due. Thereafter, and on the 22d day of June, 1921, the plaintiffs in this action began suit against the defendants to have the contract herein referred to declared forfeited. The cause was set for trial some time during the early part of November, 1921. On the 15th day of November, 1921, this case was settled by the defendant Clark paying to the plaintiffs all of the payments then due, to wit, seven monthly installments, accumulated interest, street assessment, and taxes. The action herein referred to was thereupon dismissed.

Another monthly installment of $50 became due on the 18th of November, 1921. This installment was not paid, and on the 7th day of December, 1921, the action which is now before this court on appeal was begun by the plaintiffs for the purposes hereinbefore stated. The plaintiffs had judgment, and the defendants appeal.

The stipulation as to the facts, in addition to what we have set forth, recites as follows:

> "At the time set for the trial (of the first action herein referred to) a settlement was made by a payment of all delinquencies and the parties restored to their rights under the contract—the defendant Lillian Clark restored to her rights under the contract. The payment was made by Mrs. Clark on the 15th day of November. The payment due November 18th was not paid. The first installment of taxes on the property for the fiscal year of 1921–1922 was allowed to become delinquent. On December 9, 1921, the sum of $50 was posted by the defendant Lillian Clark and duly tendered by the defendant. The installment of taxes due at the time was $17.17. The $50 was tendered after the beginning of this action, but before summons was served upon the defendant Clark."

The appellants center their attack principally upon findings numbered 6 and 7 of the trial court, which are to the effect, first, that the defendants have not performed the terms thereon, but have failed and neglected to make the payment of the purchase price required by said contract, and that the plaintiffs have at all times duly performed all the terms thereof; and, second, that the plaintiffs have elected to terminate said contract, and that the defendants, by reason of nonpayment, have forfeited their rights to the same and that the contract is terminated and ended. The contract provides that, in the event of a failure on the part of the buyer to keep or perform any of the terms, conditions, or covenants to be performed by the buyer, the sellers shall, at their option, cancel and terminate the agreement, and the sellers shall be relieved from all obligation in law and in equity to convey the premises, and the money theretofore paid shall be kept and retained by the sellers, etc. It is also specified that time is of the essence of the agreement.

[1] The stipulated facts show that the terms and conditions of the contract were not complied with, but the appellants, in their argument before this court, insist that the provision as to time being of the essence thereof was waived by the plaintiffs by reason of their having accepted payment of the amount due on November 15th, and their dismissal on that date of their action theretofore begun, to have the contract canceled and their title to the premises involved quieted. The plaintiffs and respondents insist that no such waiver is shown, but, on the contrary, that their actions show an insistence upon prompt compliance with all the terms and conditions thereof.

At the time of the beginning of the action, in June, 1921, only three installments were due. On the 31st day of May, 1921, when the letter referred to was sent to the defendants, only two installments were delinquent. It thus appears that no considerable time elapsed after the installments became due before the plaintiffs began insisting upon their rights. There is no testimony concerning any of the payments falling due prior to April 18, 1921, but the inference would be that the terms of the contract had been complied with just as agreed upon to that date; in other words, there had been no "course of conduct" by the plaintiffs in accepting payment of installments up to that date from which the trial court might infer a waiver of any of its terms. As above stated, the payment of seven installments was accepted when the suit was finally settled, four of which accrued after the date of the beginning of the action. There was but one payment, however, and only one acceptance. Does this establish a course of conduct justifying this court as a matter of law in holding that the stipulation as to time was waived by the plaintiffs? The leading case in this state on this question, where the subject of waiver is fully considered, is that of Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. In that case it appears from the statement of facts set forth in the opinion that "14 payments in succession had been accepted after maturity and without objection or protest of any kind." It also appears that there was an allegation in the pleading to the effect that each of these payments was accepted by Templeman without objecting thereto on the ground that plaintiff had not complied with his contract. In the opinion in the Templeman Case we find also the following:

> "We find" no case "that goes so far as to hold that the mere acceptance of one payment after its maturity will waive the right to declare a forfeiture if default occurs in subsequent installments. In Lent v. Burlington, etc., Co., 11 Neb. 201, 8 N. W. 431, the court on this point says: 'The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and as to those following the provisions of the contract are left to operate with unimpaired force.'"

To the same effect are a number of cases cited. The court then said that in the Templeman Case much more appears. A payment of $50 was due on the 5th day of every month after November, 1901, and that not one of the payments was made on the day it became due, except the first. Interest fell due each month, but nothing was demanded, nor were any objections raised on that score. After the acceptance of the last sum paid, 24 additional payments of principal and interest fell due and were not paid; Boone remaining in possession and Templeman apparently acquiescing in the continuance of the contract, giving no notice to the contrary, nor doing anything inconsistent therewith for still another period of 14 months. The court held that this laid a foundation for a waiver not necessarily absolute and permanent, yet of such a character as only could be restored by giving a definite and specific notice of an intention to that effect, citing a number of cases adhering to such rule.

In De Bairos v. Barlin, 46 Cal. App. 665, 190 Pac. 188, the Supreme Court, in its order denying a rehearing, reported on page 674 of the same volume of Reports (190 Pac. 192), states the rule as follows:

> "Acceptance of overdue installments of the price, on an executory contract for the sale of land, waives any right to declare a forfeiture on account of the previous failures to pay when due. But such acceptance alone does not change the terms of the contract as to forfeiture for future failures, nor eliminate the provision that time is of the essence of the contract. There may be conduct and acquiescence by the vendor sufficient to *justify the inference by a court* as a matter of fact that the vendor has waived the conditions of a contract regarding a forfeiture, which he afterward claims the right to enforce, and when in such a case the waiver has continued until after all installments are due, the condition cannot be revived except by notice to the vendee."

It is then further stated that none of these cases claim that such waiver is absolute or that the provision as to forfeiture cannot be revived.

In the case of Stevenson v. Joy, 164 Cal. 279, 128 Pac. 751, where time was made the essence of the contract, it appears that the weekly payments provided to be paid were accepted a great number of times after they had become delinquent, and that at a date prior to any notice of forfeiture on account of delinquencies in making installment payments as provided for the purchaser had tendered all the money due under the agreement. It was not until that time that the plaintiff refused to accept the same. The plaintiff also had not given any notice of insisting upon the terms of the contract, or of exercising his option of forfeiture on account of delinquency in making the payments as provided for in the contract. Under these circumstances, the court followed the rule laid down in Boone v. Templeman, supra, and held that the condition of the agreement providing that time should be of the essence thereof had been waived and could not be revived except upon notice and an opportunity allowed for making payment of the delinquent sums. In Hoppin v. Munsey, 185 Cal. 678, on page 687, 198 Pac. 398, 402, the Supreme Court uses the following language:

> "The plaintiff seeks to avoid the effect of these principles by the claim that the repeated acceptance of payments, however small, upon the contract price, not only operated as a waiver of all previous defaults, but also constituted a waiver of the provisions of the contract, declaring time of its essence and that the purchase money should be forfeited upon a failure to pay at maturity. His position is that after such waiver the aforesaid provisions cannot be again asserted or enforced until the vendor shall have served the vendee with notice that at the expiration of a stated period, which must be a reasonable time, performance would again become due and would be demanded. In this he relies upon Boone v. Templeman, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, and Stevenson v. Joy, 164 Cal. 279, 128 Pac. 751. These cases do not hold that such stipulation for forfeiture may not be restored and enforced by the vendor in any other manner than by giving a definite and specific notice of the intent to do so. There is a declaration to that effect in Monson v. Bragdon, 159 Ill. 66, 42 N. E. 383, which is quoted in Boone v. Templeman, but the quotation is given in support of the statement that from the facts alleged in the complaint 'a court *might infer* a waiver of the conditions regarding forfeiture and time,' and that because of such possible inference, 'they supported the general allegation of the complaint that Templeman had waived those conditions.'"

It will be observed that in all these cases there has been an acceptance of partial payments after they have become due, and it is also stated that these cases do not hold that the stipulation regarding forfeiture, even when once waived, may not be enforced in any other manner than by giving a definite and specific notice of the intent so to do. These cases also indicate that the intent to waive the terms of the contract as to time being the essence thereof may as an ultimate fact be inferred by the trial court from the course of conduct on the part of the seller in receiving payment of successive installments after they have become delinquent. In the case at bar there has been but one acceptance of payment. That payment included several installments which had become due after the institution of the suit to declare a forfeiture of the contract for nonpayment and, of course, were necessary to be included in order to effect the full settlement of the amounts due at the time the action was dismissed. It is here that the stipulation as to the rights of all the parties having been restored under the contract must be considered as having a bearing upon the decision of this case. If the parties, as stipulated, were restored to all their rights, then and in that case there was an understanding by and on the part of all the parties thereto that any of the provisions therein might be enforced just as they are written. Again, there was no course of conduct, but simply one act, on the part of the plaintiff in accepting payment of overdue installments and dismissing his action to enforce forfeiture. Whether the trial court might or might not have properly inferred from this the ultimate fact of a waiver of the time provision in the agreement, we do not need to decide but as a matter of law, under the decisions which we have heretofore referred to, we do not think such acts sufficient to justify the conclusion that time was no longer a part of the essence of the contract involved in this case.

[2] Again, there is a matter of pleading involved in this action. Section 3275 of the Civil Code provides:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party," etc.

No attempt, however, has been made to take advantage of this section of the Code. In this particular the case of Myers v. Williams, 173 Cal. 301, 159 Pac. 982, is applicable. There the court, in considering the Templeman Case, supra, and the Stevenson Case, supra, to which we have referred, said:

> "There can be no doubt of the existence of the rule, and possibly the facts [referring to the facts set out in the opinion] would have supported its application in favor of defendant, but the difficulty which confronts him is that *no claim of waiver of the right of forfeiture was made by the answer.*"

And further on it says:

> "Unless we are to hold, therefore, that the *mere fact of receiving the three payments* after January 1st necessarily amounted to a waiver of the provision as to time of future payments, and a waiver, too, of which defendant may take advantage *without pleading it,* defendant may not prevail on the record before us. If a waiver does not appear from the complaint, it is a matter of defense. None is deducible from that pleading. As we have seen, no allegation of waiver of that part of the agreement making time of the essence of the contract is set forth in the answer, and in the absence of any such claim the forfeiture must be held to have taken place."

In Leak v. Colburn, 55 Cal. App. 784 (204 Pac. 249) this court said (we quote from the syllabus):

> "While facts may be shown which would justify a court in relieving a vendee under a contract of sale of real property from a forfeiture even where time is of the essence of the contract, such relief will not be granted in the absence of any request therefor, or any suggestion that the vendee is either able or willing to make payment of the amount due."

In the case of Myers v. Williams, supra, it appears from a statement of the facts that monthly payments had been made for more than a year, but that no installment was paid on time, and that in each instance the vendors accepted tender of the money after it became due.

In the case of Leak v. Colburn, supra, payments were received from October 19, 1917, until July, 1918, of the installments in the sum of $15 monthly. The agreement provided also for the payment of interest which was not paid. There are also some other matters entering into that case not applicable to this. The testimony as to the payments of installments after they had become due was apparently introduced in both of these cases without objection and in that particular is similar to the stipulated facts introduced in this case and if the rule announced in the case of Myers v. Williams, supra, and followed in the case of Leak v. Colburn, supra, is correct, the trial court in the case at bar could not have granted the appellants any relief on the grounds of waiver of any of the terms of the contract because such issue was not tendered for decision. While the findings attacked in this case are a confusion of findings of facts and conclusions of law, they are sustained by the evidence, because the admitted facts show conclusively that payments were not made as provided by the agreement. We are also not unmindful of the fact that the beginning of suit by the plaintiffs to enforce the terms of the contract, as hereinbefore set forth, constituted matters of which the defendants had notice, and which the trial court had a right to consider in determining whether there was any conduct or course of action on the part of the plaintiffs from which it might infer a waiver of the provision as to time, and from which the trial court might conclude that sufficient appeared from such conduct to indicate that the plaintiffs would insist upon prompt payment.

However harsh these contracts may appear, and however reluctant courts may be to enforce forfeiture, under the circumstances as the record of this case is presented, we find no tenable grounds for disturbing the judgment of the trial court. It therefore follows that the judgment of the trial court must be and it is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

193 Cal. 470

GLOBE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 10948.)

(Supreme Court of California. April 11, 1924.)

Master and servant ⚷373—Injury in altercation with coemployee held compensable, as "arising out of and in course of employment."

Injury to cook, while preparing breakfast at a restaurant, in an altercation with the dishwasher, who, when requested to clean dishes, placed them in the sink, which the cook desired to use, *held* compensable, as "arising out of and in the course of his employment," and being an accident thereof; he not being the aggressor, and there having been no prior or personal quarrel or bad feeling between them arising out of circumstances extraneous to the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Bank.

Proceeding under Workmen's Compensation Act by Ernest Kopp, employee, opposed by Robert A. Gebhardt, employer, and the Globe Indemnity Company, insurance carrier. Compensation was awarded by the Industrial Commission, and the insurance carrier petitions for certiorari. Award affirmed.

H. C. Kelsey, of San Francisco, for petitioner.

A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

WASTE, J. This is an application for a writ of review for the purpose of determining the lawfulness of an award and certain orders of the Industrial Accident Commission. The petitioner is the insurance carrier of Robert A. Gebhardt, the owner of a restaurant, who had in his employ the respondent Ernest Kopp, a cook, and one Paul Griffith, who was a dishwasher and roustabout. As the result of an altercation between the two men, Griffith struck Kopp on the head, breaking his jawbone, and inflicting other injuries. Kopp, in due time, presented to the Industrial Accident Commission a claim for the injuries thus received. An award was made in his favor, which is the subject of the present inquiry.

It appears that early on a morning in September, 1922, Kopp, the cook, was preparing breakfast at the restaurant. There were many pots and kettles lying around, awaiting washing from the day before, and Kopp requested Griffith to clean them up, which the latter started to do. In doing the work, apparently he placed some of the unwashed dishes in the sink, which the cook desired to use, and an altercation arose between the two men, which resulted in the blow and injury just described.

The record is replete with evidence from which the respondent commission was justified in finding that the injured cook was not the aggressor, and that there was not any prior or personal quarrel or bad feeling between the two men, preceding the incidents of the morning in question, or that arose out of any circumstances extraneous to the employment in which they were at that time engaged. The evidence also shows that neither of the participants in the dispute was unusually quarrlesome, except that the employer testified that he thought Griffith, the dishwasher, had rather a quick temper.

Under these circumstances the commission was justified in allowing compensation to Kopp. The injury was clearly one arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act (St. 1917, p. 831). Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 706, 151 Pac. 398; Warren Construction Co. v. I. A. C. (Cal. App.) 221 Pac. 381. It was received while Kopp was actually performing a duty in the course of his employer's business, and can fairly be said to be an incident of such employment. San Diego & Ariz. Ry. Co. v. I. A. C. (Cal. Sup.) 223 Pac. 972.

The award is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

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193 Cal. 472

In re SPAGNOLI.

Ex parte WOLFGANG.

(Cr. 2680.)

(Supreme Court of California. April 11, 1924.)

Criminal law ⟹636(9)—Statute authorizing reimposition of sentence without accused's presence held remedial and applicable to pending proceedings.

The 1923 amendment to Pen. Code, § 1227, authorizing reimposition of sentence on affirmance of the judgment, without accused's presence in court, is remedial, and is applicable to proceedings pending at the time of its enactment; no substantial right of accused being prejudiced thereby.

In Bank.

In the matter of the application of Ernest B. D. Spagnoli for a writ of habeas corpus for Isaac Wolfgang. Writ discharged and prisoner remanded.

Ernest B. D. Spagnoli, of San Francisco, in pro. per.

U. S. Webb, Atty. Gen., and W. F. Cleary, Deputy Atty. Gen., for respondent.

PER CURIAM. The prisoner was convicted of murder in the first degree and judgment was pronounced imposing the death penalty and fixing the day for the execution thereof, prior to the 1923 amendments to sections 1193 and 1227 of the Penal Code. Thereafter, upon appeal to this court, the judgment was affirmed. People v. Wolfgang, 221 Pac. 907. Upon the going down of the remittitur the trial court followed the procedure prescribed in the amended sections and "reimposed" sentence upon the prisoner without requiring him to be again brought before the court for that purpose.

It is petitioner's contention that the defendant is entitled as of right to be again brought before the trial court for the reimposition of sentence as provided in section 1227 of the Penal Code, as the same existed at the time of his trial and conviction. The statutory provisions are purely remedial and procedural in their nature, and we see no reason why they should not be given application to proceedings pending at the time of their enactment, unless some substantial right of the prisoner should be prejudiced thereby. The requirements of section 1193 of the Penal Code as it existed prior to the amendment were fully complied with.

The prisoner was present in court at the time of the pronouncement of judgment herein. The reimposition of sentence does not constitute the pronouncement or rendition of a judgment. The original judgment herein became final and conclusive upon its affirmance by this court. The reimposition of sentence upon the going down of the remittitur amounted, in effect, to nothing more than the fixing of a date for carrying into execution of that judgment.

It may be conceded that the provisions of section 1227, prior to its amendment, were in the nature of an order to show cause, and that the effect thereof was to place upon the defendant when thus brought before the court the affirmative duty of then and there showing cause, if any he had, why the judgment should not be carried into execution. But it does not follow therefrom that the amendment of the section deprives the defendant of any substantial right. It is not contended herein that any legal ground exists against the carrying into execution of the judgment herein. If any such ground does exist there are ways and means still open to the defendant under the existing provisions of law by which he may effectively avail himself thereof.

The writ is discharged and the prisoner remanded.

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193 Cal. 432

RILEY v. HAVENS. SAME v. ROBINSON. SAME v. MATHER. (S. F. 10499–10501.)

(Supreme Court of California. April 8, 1924.)

1. Taxation 🔑859(7)—Taxability of transfer made in contemplation of death determined by law in effect when transfer made.

The taxability of a transfer, made in contemplation of death, must be determined by the law in effect when the transfer was made, and no subsequent act of the Legislature can thereafter add to, diminish, or otherwise disturb the tax.

2. Taxation 🔑861—Legislative intent to make Inheritance Tax Act of 1913 retroactive by removing defense of statute of limitations.

It was the legislative intent that Inheritance Tax Act 1913, which superseded all prior acts on the subject, and which by section 4 provides that inheritance taxes shall be a lien on the property transferred until paid, and makes the limitation of Code Civ. Proc. § 338, subd. 1, inapplicable, should be given a retroactive effect by making the statute unavailable as a defense to the collection of any tax or penalty imposed by prior inheritance tax acts, in view of section 26.

3. Statutes 🔑245—Rule of strict construction of tax legislation should not be applied to defeat evident legislative intent.

The rule that tax legislation must be construed strictly against the state should be applied with due regard to the intention of the Legislature as expressed in the statute, and such intention should not be disregarded or defeated.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Separate actions by Ray L. Riley against H. R. Havens, against Mary J. Robinson, and against Ethel M. Mather, to collect inheritance transfer tax on shares of stock. Judgments for petitioner, and respondents appeal. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

H. C. Lucas and W. H. H. Gentry, both of San Francisco (Ralph W. Smith, of Sacramento, of counsel), for respondent.

SEAWELL, J. These cases, presenting precisely the same questions of law, have been consolidated by the stipulations of the parties thereto, and are presented as one proceeding.

The actions were brought by the petitioner in his official capacity as state controller.

The appeals are taken by respondents and appellants, adult children of Elizabeth H. Havens, deceased, from judgments holding each respectively liable to the state for an inheritance transfer tax due upon certain shares of the capital stock of the M. K. Blake Estate Company, a corporation, the certificates of which were indorsed, transferred, and delivered February 9, 1911, by said Elizabeth H. Havens as gifts to her said children. The original certificates were canceled upon the books of said corporation October 11, 1912 and other certificates of corresponding values were thereupon issued to said children in lieu of those canceled. Elizabeth H. Havens thereafter, to wit, December 23, 1912, died, a resident of Alameda county, this state. These proceedings were commenced upon the 16th day of December, 1921, approximately nine years after the death of said Elizabeth H. Havens. The state's right to recover the tax is resisted solely upon the ground of the bar of section 338, subdivision 1, Code of Civil Procedure, which provides that "an action upon a liability created by statute, other than a penalty or forfeiture" must be commenced "within three years." This objection is undoubtedly valid, unless the bar of the statute has in some manner been tolled, or unless it has no force as against the state for the enforcement of the payment of these transfer taxes by virtue of the provisions of the inheritance

Tax Act of 1913 (Stats. and Amendments, 1913, c. 595, p. 1066), which, in part, provides as follows:

> "Sec. 4. Such taxes shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine, or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law; provided, that unless sued for within five years after they are due and legally demandable, such taxes, or any taxes accruing under any act herein appealed, shall cease to be a lien as against any bona fide purchaser of real property; and provided, that no such lien shall cease within five years from the date of the passage of this act. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted; and provided, that in determining said market value no deduction shall be made for any family allowance made out of said estate."

[1] It is the settled law of this state that the taxability of such transfers must be determined by the law in effect at the time the transfer is made, which in this case would be by the act of 1905, and no subsequent act of the Legislature can thereafter add to or diminish the tax or otherwise disturb it. Estate of Potter, 188 Cal. 55, 204 Pac. 826; Chambers v. Gibb, 186 Cal. 196, 198 Pac. 1032; Nickel v. State, 179 Cal. 126;[1] Estate of Brix, 181 Cal. 667, 186 Pac. 135; Estate of Felton, 176 Cal. 663, 169 Pac. 392; Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961. It must be conceded, of course, that statutes of limitation are designed to affect remedies and not rights. Appellants admit that the Legislature may, by a later act, extend the statutory period fixed by a prior act, provided no bar of the statute had been raised before or at the time the later act becomes effective.

[2] Appellants place their resistance to the asserted right of the petitioner to collect the taxes in suit upon the construction which they give to section 4 of the act of 1913. It is their contention that the words "prescribed by this article" (act, law, or statute) control the entire section, and limit the application of the statute of limitations as extended by the act of 1913 solely to transfers made at and subsequent to the time it became effective and not to the act of 1905. We think the language of the act of 1913 discloses a distinct legislative intent quite contrary to the construction given to it by appellants. It was the apparent intention and attempt of the Legislature to give to the act a retroactive effect by removing altogether the bar of the statute as a defense to the collection of any tax or penalty imposed by prior inheritance tax acts. Section 4 of the act of 1913 provides that the "act shall be construed as having been in effect as of the original enactment of the inheritance tax *law*." This sentence is followed by a clause making provision for *any taxes* accruing "under an act herein *repealed*." (Italics ours.) This is the equivalent of saying that the act shall be construed as having been in effect at the time of and continuously since the enactment of the statute of 1893 (St. 1893, p. 193) which was the first legislation had upon the subject. Section 4 of the act of 1913 cannot fairly be construed as applying alone to the tax impositions reincorporated in that act and to none other. Its language is sufficiently clear to disabuse the mind of any confusion in that respect. Transfer taxes were laid upon the same subjects which furnish the basis for the imposition of the same class of taxes under the act of 1905. The enlargement of the statute of limitation has in nowise changed the rate of taxation or the subjects upon which taxes were laid by the act of 1905 or by any prior act. No vested right has been disturbed, as the tax has not become barred during the life of the act that authorized its assessment, but it was a subsisting claim at the time the act of 1913 became a law. The "tax or penalty prescribed by this article" is a tax that was also prescribed by the acts of 1911, 1905 and other prior acts. The subjects of taxation are unchanged. The act of 1913 superseded all prior acts. It was a revision of the general law on the subject as was each one of the acts which it superseded. It was the evident intention of the Legislature to make section 4 of the act of 1913 a part of the general plan or system of inheritance taxation first adopted in 1893. The language of the act cannot be harmonized with any other reasonable theory. The act of 1913 requiring the taxation of transfers is but a continuation of the law that had been in existence during every moment of time for many years prior to its revision in 1913.

We are not here considering the question of the enforcement of a personal obligation or the revival of an action to restore a remedy which had become lost, such as was considered in Chambers v. Gallagher, 177 Cal. 704, 171 Pac. 931, or with the particular question of construction presented in Estate of Potter, supra, which will be hereafter adverted to.

Section 26 of said act of 1913 contained the last expression of the Legislature on the subject at the time the act was passed. After referring specifically to each re-enactment or amendment of the law from the beginning, said section concludes by reserving all prior rights given under repealed acts in the following words:

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[1] 175 Pac. 641.

> "That such repeal shall in no wise affect any suit, prosecution or court proceeding pending at the time this act shall take effect, *or any right which the state of California may have at the time of the taking effect of this act*, to claim a tax upon any property under the provisions of the *act or acts hereby repealed, for which no proceeding has been commenced;* nor affect any appeal, right of appeal in any suit pending, or orders fixing tax, existing in this state at *the time of the taking effect of this act*." (Italics ours.)

Thus it will be seen that all rights which had accrued to the state theretofore were by said act expressly reserved.

A law prescribing inheritance and transfer taxes has existed in this state for a period of more than thirty years. This law has been indiscriminately referred to as the inheritance tax act, the inheritance tax statute, and the inheritance tax law. No one has been deceived by the reference made to it. The law has been regarded as a part of our permanent policy in matters of inheritance taxation. With the exception of the added remedial provision as to the statute of limitations, section 4 of the act of 1913 is identical with section 1 of the acts of 1905 (St. 1905, p. 341) and 1911 (St. 1911, p. 713), respectively.

In Estate of Martin, 153 Cal. 225, 94 Pac. 1053, the effect of an express repeal of the Inheritance Tax Act of 1893 by the act of 1905 was considered by the court. It was there said that such re-enactments as the one now before us come within the scope and effect of section 325 of the Political Code, which declares that, when a part of a statute is amended, "it is 'not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted.'" Continuing, it was said:

> "The rule particularly applicable to this case is thus stated in Sutherland on Statutory Construction (2d Ed. § 238): 'Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.'"

The opinion gives approval to the following quotation from Bear Lake Irrigation Co. v. Garland, 164 U. S. 11, 17 Sup. Ct. 9, 41 L. Ed. 327, to which we have added the preceding sentences:

> "Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act."

This is the precise situation before us. Wood, in his work on Limitations (volume 1, p. 59, 4th Ed.), in discussing the statute of limitations in so far as it affects rights of action in existence when the statute is changed, states the rule as follows:

> "If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced and the new law governs. The period provided by the new law must run upon all existing claims in order to constitute a bar. In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar. The question, however, as to whether the statute is to have a retrospective operation is one of construction, to be determined from the language of the act and the intention of the Legislature as gathered therefrom and the subject-matter to which it applies; the rule being, as previously stated, that a statute will not be permitted to have a retrospective operation unless such is clearly the intention of the Legislature."

The early case of Billings v. Hall, 7 Cal. 1, is in point. In reviewing the earlier case of Billings v. Harvey et al., 6 Cal. 381, the court said:

> "We had occasion to examine the sixth section of the Act of April, 1855, limiting the time of commencing actions for the recovery of real estate to five years, and we then held, that the act of 1855 repealed the sixth section of the act of 1850, and that the time only commenced to run from the date of the last act. Now, the first act was passed on the twenty-second of April, 1850, and the last one on the eleventh of April, 1855. The time commenced to run, under the first statute, from the date of its passage, and the full measure of five years had not expired, on the repeal of the old law, by eleven days; so that the bar had not occurred before the repeal of the statute."

See, also, Morris v. DeCelis, 51 Cal. 55.

Neither the Estate of Martin nor the instant case is at variance with anything said in the Estate of Potter. As pointed out in the latter case the changes made in the law were as to matters of substantial rights. They affected both the rate of taxation and the amount to be allowed as exemptions. Further, had the construction contended for been sustained, a manifest injustice would have been done. Former Chief Justice Shaw took the pains to point out many of the points of difference between the act of 1905 and the act of 1913 in the methods of appraisement of the values of inheritance, devise, bequest, or other rights subject to the payment of an inheritance tax. The learned author of that opinion makes the following pertinent observation (188 Cal. 75, 204 Pac. 835):

> "A comparison of the respective sections of the acts of 1905 and 1913 on this subject shows that, while each act provides for an *appraisement* of all property subject to tax, including that passing by a prior gift as well as that passing at death, and perhaps the imposition of the tax on the whole thereof passing to the same person at the tax rates fixed by the respective acts, the language in which these provisions are expressed is not by any means the same in the two cases. The sections on the subject have been entirely recast; the 1913 section contains *many things not included in that of 1905*, and the provisions here in question are not couched in the *same* or *similar language*. It cannot be truly said that *any part* of the act of 1905 on this *subject* has not been altered, at least with respect to words, in the revision of 1913. The rule stated in the Political Code and in *Estate of Martin*, supra, applies in all proper cases, but, like all other rules of statutory construction, they are subject to the controlling principle that the object and purpose of all interpretation is to arrive at the intent of the Legislature." (Italics ours.)

In the discussion of section 325 of the Political Code and the Estate of Martin, it is said (188 Cal. 74, 204 Pac. 834):

> "This rule, under some circumstances, has been extended so as to apply to a case where the new statute expressly repeals the whole of the former statute. *Estate of Martin*, 153 Cal. 228, 94 Pac. 1053. In the Martin Case the Inheritance Tax Act of 1905 had expressly repealed the act of 1893 (Stats. 1893, p. 193) on that subject. In the latter act, however, there were two sections, one of which was a literal copy of a section of the prior act, and the other was the same as another section of the prior act, save a few words of trifling importance. These sections provided the mode of collecting the tax and were *strictly remedial* in character." (Italics ours.)

The question before us is also strictly one of remedial character. The act of 1905 contains all that is to be found in section 4, Act 1913, excepting the remedial provision.

[3] The rule contended for by appellants that all tax legislation must be construed most strictly against the state and most favorable to the taxpayer must be conceded. But this does not mean that the language of a statute must be given an unnatural construction to defeat tax legislation or that the evident intention of the Legislature in this particular may be disregarded.

> "The doctrine of the strict construction of revenue statutes, however, should be applied with due regard to the intention of the Legislature as expressed in the statute, and with a view to promoting the object of the statute; and especially those provisions of the statute which are intended to prevent fraud should receive a liberal construction." 36 Cyc. 1190.

The ease with which transactions such as are in the inheritance tax laws dealt with may be successfully concealed for long periods of time from official notice and the collection of the transfer thereby defeated doubtless furnishes the reason for the removal of the bar of the statute of limitations.

The crux of appellants' claim is that the act of 1913 is not the act of 1905. An examination of the decisions of this court construing the several inheritance tax acts, whether they purport to be revisions or amendments, will show that it has been uniformly held that said acts have been regarded as continuous in effect, and that there has been no moment of time since 1893, when some such act has not been in force, and that no one act has been construed or considered as an unrelated or isolated piece of legislation. The intent of the Legislature undoubtedly was that the bar of the statute should not be available to those who had not paid the tax as prescribed by law.

The orders and judgments appealed from are affirmed.

We concur: LAWLOR, J.; LENNON, J.; WASTE, J.; RICHARDS, J.; MYERS, J.

(193 Cal. 441)

PEOPLE v. CHAMPION. (Cr. 2625.)

(Supreme Court of California. April 10, 1924.
Rehearing Denied May 10, 1924.)

1. Criminal law 🔑644—Arrest of witnesses for perjury after adjournment of court in murder prosecution not misconduct on part of district attorney.

In a murder prosecution, the arrest of witnesses who testified for defendant for perjury did not constitute misconduct on the part of the district attorney, who caused their arrest, where the arrest was made in the corridor of the courtroom after court adjourned, there being no showing that the jurors standing in the corridor heard the conversation between the deputy sheriff and the witnesses or that the arrest of witnesses was knowingly made in the presence of jurors for the purpose of influencing them adversely to defendant.

2. Criminal law 🔑706—Prosecuting attorney's charge that one of defendant's witnesses was signaling to testifying witnesses in murder prosecution held not misconduct.

In a murder prosecution, that the prosecuting attorney charged a witness for defense, who was a spectator, with having signaled another witness for defense who was testifying, did not constitute misconduct, where the charge was made in good faith and witness did not positively deny that she had shaken her head, though denying it was a signal to the witness.

3. Witnesses 🔑383—Witness who testified to nothing material could not be impeached by former testimony.

An affidavit of a witness used upon extradition proceedings or the transcript of his testimony at the preliminary examination could not be resorted to for impeachment purposes, under Code Civ. Proc. §§ 2049 and 2052, where nothing material or immaterial, favorable or unfavorable, to defendant's case was elicited from witness, on the trial.

4. Criminal law 🔑687(2)—No error in reopening case when objection waived.

The court did not err in permitting the reopening of the case during the closing argument to permit the introduction of testimony of a medical expert, where the objection to the reopening of the case for that purpose was expressly waived by defendant.

5. Criminal law 🔑1170½(1)—Admission of testimony that witness possessed weak memory held harmless error.

It was harmless error for the court to permit a physician to testify that a witness for defendant was possessed of a weak and uncertain memory, where the witness impeached had not testified to a single fact material to any issue.

6. Witnesses 🔑328—Testimony of witness may not be impaired by other witnesses that he is affected with weak memory.

The testimony of a witness may not be impaired by the opinion of other witnesses that he is afflicted with a weak memory, in view of Code Civ. Proc. §§ 2051, 2052, since such fact may and perhaps must be done by cross-examination.

7. Criminal law 🔑1169(2)—Requiring defendant's attorney to testify that he had given defendant his gun prior to homicide held not reversible error.

In a murder prosecution, where the evidence was in conflict whether a witness had been defendant's attorney, that such witness was compelled to state that he had given defendant his gun, prior to the homicide, did not constitute reversible error, where the fact that he did have a gun was testified to and established by three eyewitnesses, and the fact that he received it from the attorney was already in evidence as an independent piece of evidence in the form of a declaration made by defendant, under Code Civ. Proc. § 1870, subd. 2.

8. Criminal law 🔑1169(1)—Refusal to permit officer to testify to inconsequential matter held not reversible error.

In a murder prosecution, the court's refusal to permit an officer to testify whether he had seen a witness who had testified for defendant at a hospital the night of the homicide did not constitute reversible error, where such evidence would not probably have changed the verdict.

9. Criminal law 🔑829(9)—Refusal to give duplicate instruction on corpus delicti in murder prosecution held not reversible error.

In a murder prosecution, the refusal to give an instruction requested by defendant that the burden was upon the prosecution to prove the corpus delicti was not erroneous where the court at the request of the defendant and on the request of the people gave other full and complete instructions on the subject.

On Petition for Rehearing.

10. Criminal law 🔑1133—Points presented on rehearing for first time on appeal not considered by appellate court.

Ordinarily, appellate court pays no attention to points presented for first time on a petition for a rehearing in a criminal case.

11. Criminal law 🔑823(6)—Instruction on degree of proof of alibi held not error in connection with other instructions.

In a murder prosecution, an instruction on degree of proof to establish defense of alibi was not erroneous, when read with two other instructions immediately following it, which correctly stated the law.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

A. F. Champion was convicted of murder, and he appeals. Affirmed.

S. S. Hahn, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and Edwin W. Widney, Deputy Atty. Gen., for the People.

LENNON, J. This is an appeal from a final judgment of conviction, carrying with it the death penalty, following and based upon a verdict of a jury finding the defendant guilty of the crime of murder in the first degree. Three eyewitnesses to the homicide testified in detail and without material variation to the killing of the deceased, and each positively identified the defendant as the person who shot the deceased.

The story of the homicide so narrated is as follows: On the evening of January 10, 1922, a crap game was in progress in a room in an apartment house located at 309 West Ninth street in the city of Los Angeles, in which a number of persons were participating. The party included Goldy, the deceased; Champion, the defendant; Doyle, Sidenstricker, Smith; a girl who was merely an onlooker; and Reebs, who joined the game about a half an hour after it started. The defendant Champion and the deceased Goldy were winning all the money. Champion kept urging Goldy to play for higher stakes, but Goldy refused, saying that he did not know enough about the game to play for big stakes. Champion got up from the floor where the dice were being rolled, walked over to a little table, and took from a newspaper wrapping a revolver which he loaded with cartridges which he took from his pocket. The deceased asked him, "What is the idea of all the firearms, Slim?" to which the defendant replied, "Some one is getting too lucky." A few more passes were made with the dice when the defendant threw a bunch of bills on the floor, saying, "Fade it," or words to that effect. Goldy refused to shoot for more than $10 of it. Without a word Champion rose from his chair, and, taking a step toward the deceased, shot him through the shoulder just as the deceased started to rise from his chair. The defendant was standing not farther than a foot and a half or two feet from the deceased, and the bullet, taking a downward course, plowed through his chest and abdomen. He pitched forward on his face. The defendant then declared that the first one who moved would get the other bullet, and, turning toward Doyle, said, "Doyle, if you move, I will blow your head off." The defendant turned and kicked the deceased and then, pressing his gun to the deceased's forehead, proceeded to rifle his pockets. He started to see how badly the deceased was injured, but desisted, telling Doyle to look at him and see. Upon Doyle saying that the deceased was shot in the shoulder the defendant said, "I guess I had better get out of here," and immediately left by the back door.

This is the story of the shooting as testified to by Doyle, and it is corroborated in detail by the testimony of other witnesses for the prosecution, who were also participants in the crap game. All of the eyewitnesses to the killing testified that the deceased was not armed; that there had been no quarrel of any kind between the deceased and the defendant, and that there was no conduct on the part of the deceased which might have warranted or justified the shooting of the deceased by the defendant. The deceased was taken to the Clara Barton Hospital. He was accompanied there by four of the participants in the crap game. The deceased was dead when they left the hospital a half an hour later. The defendant was arrested and returned to Los Angeles upon extradition proceedings from Cleveland, Ohio. At the trial of the case the defendant interposed the defense of an alibi, claiming that he was in Fort Worth, Tex., on the day of the shooting. He produced three witnesses—his father, his mother, and his cousin—in support of his defense. Evidently the jury disbelieved the testimony of the alibi witnesses and accepted the testimony of the prosecution's three witnesses, who testified that they were eyewitnesses to the shooting and saw the defendant kill the deceased.

No contention is made, and, indeed, none could successfully be made, that the evidence as a whole is insufficient to support the verdict and judgment. It is contended however, among other things, in support of the appeal, that the district attorney was guilty of misconduct during the course of the trial in (1) that he sought and secured the arrest of certain witnesses for the defense upon a charge of perjury in the presence of the jury, and (2) that he wrongfully charged a witness for the defense, who was a spectator in the courtroom, with having signaled another witness for the defense who was then upon the witness stand testifying.

[1] The record does not show that the arrest of the witnesses referred to was made in the presence of the jury. In this behalf the showing is that the court had adjourned; that the spectators were leaving the courtroom when the arrest was made, and that the witnesses in question were arrested outside of the courtroom in the corridor of the courthouse and not in the presence of the jury while it was still assembled as a body in the active operation of the trial of the case. True, there is in the record affidavits, one from a juror and one from a spectator, presented in support of a motion for a new trial, which aver, in substance, that the affiants were present in the corridor of the courthouse when the witnesses in question were arrested by the deputy sheriff. It does not appear, however, from the affidavit of the juror that she heard the officer say that the witnesses were being arrested upon a charge of perjury, and conceding, as the affidavit of a spectator avers, that the arrest and the statement that the arrest was made upon the charge of perjury, were made in the presence of some of the jurors, still it does not necessarily follow that the jurors heard the deputy sheriff assert the cause of the arrest. In any event, there is no affirmative showing that the jurors standing in the corridor heard the conversation between the deputy sheriff and the witnesses. That the juror who made the affidavit did not hear such conversation is evidenced by the fact that her affidavit makes no mention of the cause of the arrest, nor does it say or purport to say that she heard the deputy sheriff say that the arrest was being made upon a charge of perjury. Moreover, there is no showing, either affirmatively or by implication from the facts contained in the affidavits offered in support of the motion for a new trial, that the arrest of the witnesses was knowingly made in the presence of the jurors, as they were leaving the courtroom, for the purpose of influencing the jurors adversely to the case of the defendant and the defendant's witnesses. There is no contention made that the arrest was not rightfully made. The arrest had to be made somewhere, and it was proper to make it outside of the courtroom. The fact that some of the jurors sitting upon the trial of the case happened to be in the vicinity of the arrest will not suffice as a foundation for a charge of misconduct against the district attorney upon the theory that he was endeavoring to improperly influence the jurors in the case.

[2] It is evident from the record that the district attorney believed in the utmost good faith that Mrs. Hughes, one of the alibi witnesses for the defense, had been guilty of signaling to Mrs. Champion, another witness for the defense, while the latter was upon the stand testifying. Immediately after Mrs. Champion retired from the witness stand the district attorney called Mrs. Hughes to the stand and asked her:

> "It is a fact, is it not, a moment ago just preceding the time that I jumped up that you were shaking your head to the witness upon the stand."

The witness denied that she had been communicating with the witness upon the stand and explained that she had been talking to her other aunt, who was likewise a spectator. She did not positively deny, however, that she had shaken her head. What she did deny was that she had any intention of making any impression upon the witness who was upon the stand, and this was shown by her answer. The district attorney having asked her if she had not been looking at the witness on the stand at the time she was shaking her head, her reply was:

> "Well, if I was, I didn't know it. Certainly I didn't intend to have any impression on her."

In the interest of justice, the district attorney was entitled to an explanation of the conduct of the witness sitting in the courtroom, and if, as the district attorney evidently believed, the witness was attempting to communicate with a witness testifying upon the stand, he was not required to sit passive and permit such communication. Having acted in good faith, he cannot be charged with misconduct, even though he failed to fully substantiate the claim that the witness sitting in the courtroom was willfully signaling to the witness upon the stand.

[3] The court did not err in sustaining the objection of the prosecution to the defendant's attempt to read in evidence the affidavit of a witness for the defense, one Harry A. Smith (referred to in the record as Harry A. Smith No. 1) used upon extradition proceedings, nor did the court err in refusing to permit the defense to read in evidence the transcript of the testimony given by said witness at the preliminary examination of the defendant. The entire testimony of this witness as given upon the trial of the instant case, was confined to statements made in response to questions propounded by the defense, which were substantially that he did not know or could not remember anything concerning the making and signing of the affidavit used for extradition purposes and that he did not know whether or not he had testified at the preliminary examination of the defendant. Nothing material or immaterial, favorable or unfavorable, to the defendant's case was elicited from the witness. In short, it may be said that he utterly failed to testify to anything at all. Therefore, neither the affidavit nor the transcript in question could be resorted to for impeachment purposes as provided in sections 2049 and 2052 of the Code of Civil Procedure. People v. Creeks, 141 Cal. 532, 75 Pac. 101; People v. Cook, 148 Cal. 334, 83 Pac. 43; People v. Spencer, 58 Cal. App. 197, 225, 208 Pac. 380.

[4] There was no error in the ruling of the court permitting the reopening of the case during the closing argument of the district attorney in order to permit the introduction in evidence of the testimony of Dr. Parkin, a medical expert. The record shows that the objection to the reopening of the case for the purpose of permitting Dr. Parkin to testify was expressly waived by the defense.

[5, 6] It was error, however, for the trial court to admit, over the objection of the defense, the testimony of Dr. Parkin. Apparently it was the theory of the trial court that the testimony of the witness was admissible for the purpose of assailing the credibility of the witness Harry A. Smith No. 1. This was the announced purpose of the district attorney. The testimony of Dr. Parkin was to the effect that the witness was not insane at the time he was called to the witness stand, and the major portion of the doctor's testimony tended to show no more than that the witness was possessed of a weak and uncertain memory. A witness not affected by mental disease or mental derangement may be impeached only in the manner and for the reasons provided in sections 2051 and 2052 of the Code of Civil Procedure. People v. Harrison, 18 Cal. App. 288, 296, 123 Pac. 200. His testimony may not be impaired by the opinion of other witnesses that he is afflicted with a weak memory. That fact, if it be a fact, may and perhaps must be done by cross-examination. Ah Tong v. Earle Fruit Co., 112 Cal. 679, 682, 45 Pac. 7. Conceding the error in this behalf, the defendant could not have been prejudiced thereby because the witness Harry A. Smith No. 1, as previously indicated herein, had not testified to a single fact material to any issue in the case. Therefore, Dr. Parkin's testimony as to the weakened and uncertain memory of the witness could not have harmed the defendant.

[7] Conceding, without deciding, that it was error to require Hale Day, a witness for the prosecution and an attorney at law, to testify against the defendant, still the error, if any, was without prejudice to the defendant. It is doubtful whether the fact that Day was the attorney for the defendant at the time in question was sufficiently shown in evidence. In one breath he said that he was the attorney for the defendant at that time and in the next breath he said that he was not. In such a situation there was a conflict in the evidence as to the fact of the existence of the relationship, and therefore the ruling of the trial court made at one stage

of the case as to the nonexistence of the relationship might well have been placed upon that ground. Day was called as a witness for the prosecution after one of the witnesses for the prosecution had already testified that upon the afternoon of the homicide the defendant had told him that he had just "brought" his gun from his attorney, Day, who had been minding it for him while he was in San Francisco. Day was called to the stand and compelled to testify that he had delivered the gun to the defendant, Champion, the last time he had seen him, which was shortly before the homicide. The question of where the defendant got the gun was not an essential link in the prosecution's chain of evidence. The material thing to know was that he did have a gun and that he used it to kill the deceased. This was testified to and established by three eyewitnesses. Moreover, the fact that the defendant had received the gun from his former attorney was already in evidence as an independent piece of evidence in the form of a declaration made by the defendant. Code of Civ. Proc. § 1870, subd. 2. The testimony of the witness Day that he had delivered the gun to the defendant a short time before the homicide in question was not, therefore, prejudicial to the defense and will not suffice to warrant a reversal of the judgment.

[8] Complaint is made of the trial court's refusal to permit Officer Cline, a witness for the prosecution, to testify as to whether or not he had seen Harry A. Smith No. 1 at the Clara Barton Hospital on the night of the murder. This is not a closely balanced case on the evidence, and the value of the evidence sought to be elicited from Officer Cline was so slight and inconsequential that we have no doubt but that the verdict would have been the same had the witness been required to testify in response to the question put to him.

[9] The refusal of the court to give an instruction requested by the defense to the effect that the burden was upon the prosecution to prove the corpus delicti was not error, inasmuch as the record shows that the court did give another instruction at the request of the defendant which was substantially the same as that requested which was refused. Furthermore, the trial court gave full and complete instructions at the request of the people upon the subject of corpus delicti. The trial court did not, therefore, err in refusing what was practically a duplicate instruction.

A reading of the entire record convinces us that there has been no miscarriage of justice.

Judgment affirmed.

We concur: MYERS, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

On Petition for Rehearing.

PER CURIAM. [10, 11] In the petition for a rehearing in this case the point is urged for the first time that a certain instruction requested by the people and given by the trial court erroneously stated the rule relating to the measure of proof required for the establishment of an alibi which was the defendant's defense. No mention was made of this point in the original briefs presented in support of the appeal, and therefore the point was not discussed in the opinion affirming the judgment. Ordinarily we pay no attention to points presented for the first time upon a petition for a rehearing, but in view of the fact that the judgment affirmed in this case involves the death penalty we feel constrained to notice the point, and say that the instruction complained of contained an erroneous statement of the law.

The instruction should not have been requested by the district attorney and should not have been given by the trial court. If that instruction had been permitted to stand alone, it may well have constituted prejudicial error. The record, however, shows that immediately following the instruction complained of the trial court, at the request of the counsel for the defendant, gave two separate, particular, and pertinent instructions, which clearly and correctly stated and reiterated the law relative to the degree of proof required to establish the defense of alibi, and when the instruction complained of is read, as it must be, in conjunction with the two instructions immediately following it, it cannot be said that the jury was not fully informed of the law which covered and controlled the defendant's defense of an alibi. It was doubtless for that reason that the instruction now complained of in the petition for a rehearing was not complained of and commented on in the briefs filed upon the original hearing.

The rehearing is denied.

66 Cal. App. 45

LOWRY v. COMMON COUNCIL OF CITY OF SAN DIEGO. (Civ. 4002.)

(District Court of Appeal, Second District, Division 1, California. Feb. 29, 1924. Hearing Denied by Supreme Court April 28, 1924.)

Municipal corporations 🔑918(4)—Bond issue defeated unless two-thirds of those voting on several bond issues voted for such issue.

Where several bond issues are submitted at a special election, each proposed issue must receive two-thirds of all those voting at the election, under Deering's Gen. Laws 1915, No. 2371.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Mary Clarke Lowry against the Common Council of the City of San Diego. Judgment for plaintiff, and defendants appeal. Reversed.

S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for appellants.

C. C. Pease, of San Diego, for respondent.

CURTIS, J. With the general municipal election held in the city of San Diego on the 5th day of April, 1921, the common council of said city consolidated a special election, at which there were submitted to the voters of the city of San Diego six bond issues. Five of said issues received a two-thirds majority of all the votes cast at said special election, and were declared carried by said common council, but the other bond issue, known as "Proposition Six," while it received a two-thirds majority of all the votes cast upon said proposition six, failed to receive two-thirds of all the votes cast at said special election. The common council for this reason declared that proposition 6 was defeated, and refused to issue or sell the bonds therein provided for. The plaintiff, as a taxpayer of said city, instituted this proceeding for a peremptory writ of mandate, directed to said common council, to compel them to issue and sell the bonds called for in said proposition six. The trial court gave judgment in favor of plaintiff, and defendants have appealed therefrom.

There is but one question involved in this appeal, and that is, Was it necessary, in order to carry said proposition 6, that two-thirds of all the voters voting at said special election should vote in favor of said proposition, or was it sufficient, in order to carry said proposition, for two-thirds of all the voters voting on said proposition to vote in favor thereof? Counsel on each side of this controversy have ably presented their respective views in their exhaustive briefs filed in this court. At the time of the filing of these briefs, this question was no doubt open to debate. Since that time, however, the Supreme Court has decided the identical question involved herein in the case of the City of Pasadena v. Chamberlain (Cal. Sup.) 219 Pac. 965. The opinion in this case was written by Chief Justice Wilbur, and was concurred in by all the other justices, and we think it conclusive upon the subject. The court in this case followed Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014, and City of Long Beach v. Boynton, 17 Cal. App. 290, 119 Pac. 677, and held—

> "That under this statute, where two bond issues were submitted at the same election, a separate proposed bond issue was defeated, unless two-thirds of all of those voting at the special election voted for the particular bond issue in question."

The statute referred to in this opinion is the statute of 1901, as amended in 1915 (Deering's Stats. 1915, p. 1151), and is the same statute under which the common council of the city of San Diego proceeded in the calling and holding of the special bond election, out of which this action arose.

In the Pasadena Case four bond propositions were submitted to the voters of said city at a special bond election, which special bond election had been consolidated with the general municipal election. Bond proposition No. 4, at such election, received a two-thirds majority of all the votes cast on said proposition, but failed to receive two-thirds of all the votes cast at said special election, and the Supreme Court held that it was defeated.

It follows that the judgment in this action should be reversed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

65 Cal. App. 680

In re WILSON'S ESTATE.

DOOLITTLE et al. v. McCONNELL et al.

(Civ. 2646.)

(District Court of Appeal, Third District, California. Feb. 21, 1924. Rehearing Denied March 22, 1924. Hearing Denied by Supreme Court April 21, 1924.)

1. Wills 🔑506(2)—Distribution among heirs "as provided by the laws of the state" construed to mean laws as existing at time of execution of will.

Provision that, upon death of life tenant without issue, property should be distributed "among my heirs, as provided by the laws of the state of California, the same as if I had died intestate," *held* to refer to laws in force at time of execution of will and not as changed some years later, before testatrix's death, making blood relatives of a deceased spouse her heirs as regards separate property of the deceased spouse, especially in view of rule that court should prefer a lesser degree of uncertainty to a greater degree of uncertainty unless language is clearly to contrary, and should accept as beneficiaries of a contingent estate those who are so designated by a lesser contingency, and in view of Civ. Code, § 1327, and notwithstanding section 1336.

[Ed. Note.—For other definitions, see Words and Phrases, As Provided by Law.]

2. Wills ⚷493—Rule stated for ascertaining devisee of contingent estate.

Where an estate is given to a person described by relation either to testator or to other devisees on contingency that may or may not happen, and a person is in being at time of execution of will to whom on happening of the contingency description would apply, it is a safe general rule to hold such person as intended to be the devisee.

3. Wills ⚷452—Interpretation of law adopted which prefers those of the blood.

Where law is capable of two interpretations, one should be adopted which prefers those of blood of testator to strangers, intent of testator being doubtful.

4. Wills ⚷493—Rule stated for ascertaining identity of beneficiaries.

Where there is any doubt as to identity of beneficiary or class of beneficiaries, intent of testator should be interpreted in light of known conditions surrounding him and presumably influencing him at time he executed will.

5. Wills ⚷493—Identity of beneficiaries determined in light of law pertaining to them at time of execution of will.

Where there is an ambiguity of expression by testator as to identity of objects of his bounty, his real intent and meaning will be sought for in light of the law pertaining to such objects in force and existing at time testator formed and expressed his intent.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

In the matter of the estate of Ellen M. Wilson, deceased. From a decree of distribution in favor of Thomas McConnell and others as against E. Phœbe Doolittle and others, the latter appeal. Reversed, with directions.

Grove L. Johnson, Butler & Van Dyke, Ben P. Tabor, and George Hinsdale & Pigott, all of Sacramento, for appellants.

White, Miller, Needham & Harber, Irving D. Gibson, and Elliott & Atkinson, all of Sacramento, for respondents.

BUCK, Judge pro tem. This is an appeal from a decree of distribution involving the construction of a will and the ascertainment of the intention of the testatrix as expressed in her will regarding which of two classes of persons should be the beneficiary of a certain contingent remainder created by the will.

On behalf of the appellants who comprise 19 nieces and nephews of the testatrix it is contended that it was the intent of the testatrix to designate as the objects of her contingent bounty that class of persons who under the law as she knew it to be at the time of the execution of her will were her heirs as provided by law in the event of intestacy and the failure of issue, while on behalf of the respondents who are the collateral relatives of her predeceased husband it is contended that it was the intent and purpose of the testatrix as disclosed by her will to have her property go to that class who would be her heirs in the event of intestacy under the law as the law might be at the time of the vesting of the contingent remainder.

By her will dated April 30, 1896, which was prepared by "an attorney of recognized standing and ability throughout the state of California," the testatrix provided as follows:

> "All the real property of which I may die seized, and all in which I may at the time of my death have any interest, wheresoever situated, I give and devise unto my said son, to have and to hold the same for and during the term of his life; and at his death the same shall go and be the property of his then living children,—it being my intention to devise unto him a life estate in the whole of said realty, with remainder over at his death, to his then living children; and if he leaves no issue, then upon his death, all of such real property shall be distributed among my heirs, as provided by the laws of the state of California, the same as if I had died intestate."
>
> "If my said son shall die before me, leaving issue, then all my property and estate, of every kind, shall go to such issue, to whom I hereby give, devise and bequeath the same; but if he shall die before me without issue, then I give, devise and bequeath the whole of my property, and estate, of whatsoever kind and wheresoever situated, unto my heirs—the same to be distributed among them according to the California laws of succession in cases of intestacy."

The son was designated as executor without bonds. The first codicil, dated February 14, 1898, which was not prepared by the attorney referred to, gave $4,000 and a diamond ring to her "beloved niece," Carrie Doolittle.

On June 2, 1899, she executed a second codicil which merely revoked the legacy of $4,000 to Carrie Doolittle, the amount of the same having been given her that day in money, and confirmed and ratified her previously executed will in other respects.

At the time of the execution of the will the deceased was a widow 60 years of age and had then living several brothers and sisters and numerous nieces and nephews. In 1861 she had married one Thaddeus McConnell, who died intestate in 1863, leaving property of the value of $24,661, all of which was his separate property and one-half of which was distributed to the testatrix and the other one-half to her infant son Thaddeus. At the time of her death the value of her estate was $94,822, a greater portion of which was found by the court to be the proceeds of the separate property of her deceased husband distributed to her from his estate. After the death of her husband, Thaddeus McConnell, the testatrix married one William T. Wilson, whom she subsequently divorced. At the time of her death in 1907 she left as her sole heir her son, Thaddeus McConnell. She also left surviving her a brother and numerous nieces and nephews. Subsequent to her death her brother and one of her nieces, Ellen Flanagan Purchase, died, leaving certain heirs at law. On April 10, 1919, her son, Thaddeus McConnell, died testate without living issue and left as his sole heir at law and devisee his widow, Etta McConnell. In 1896, at the time testatrix made her will, it was provided by law that the property of a person, irrespective of the source from which it may have been derived, should, in the event of intestacy, and the failure of issue, spouse, or parent, go upon his death to his brothers and sisters and the children of deceased brothers and sisters. Not only at the time the testatrix made her will, but from time to which the memory of man runneth not to the contrary, it had been in substance so provided by law. But in 1905, two years before her heath and nine years after she made her will, the statute of succession of this state was amended to provide that, upon the death of an intestate without spouse, or issue, that portion of his estate which had been the separate property of a predeceased spouse would go to the relatives of the predeceased spouse.

After the death of her son without issue in 1919, the appellants herein and the widow of the son Thaddeus each claimed to be entitled to the estate of the testatrix herein and opposing petitions for distribution were filed. And in the lower court the property was ordered to be distributed to the widow, but upon appeal to the Supreme Court by the appellants herein this order was reversed. Estate of Wilson, 184 Cal. 63, 193 Pac. 581.

The respondents herein filed no petition for distribution in the lower court and made no appearance in the Supreme Court until after the opinion of the court was filed. Then one of them applied to the Supreme Court for a modification of the language of the opinion "in order that he and others similarly related may not be prejudiced by anything stated in the opinion," and the opinion was accordingly amended to read as follows:

> "If the heirs are to be determined as of the date of the termination of the life estate as we think is the proper construction of the will, in so far as the record before us shows such claimants constitute the whole of the heirs to whom such realty is given."

By "claimants" the court referred to the appellants herein. All of the foregoing amendment and some other language of like import was a part of the original opinion except the words "in so far as the record before us shows." After the rendition of this decision in the Supreme Court the respondents petitioned the superior court for distribution of the estate to them, claiming that the estate left by the testatrix, being the proceeds of the separate property of her predeceased spouse who died in 1863, was by her will devised and bequeathed to them by virtue of the contingent remainder provided for in the will. And that it was her intention, as expressed in her will made in 1896, that the beneficiaries of the contingent remainder should be not the class indicated by the statute in effect in 1896, but should be the class to be indicated by whatever statute might be in effect upon the vesting of this contingent remainder.

Respondents and appellants herein each rely in their respective behalfs upon different language in the opinion rendered by the Supreme Court on the previous appeal as conclusive of the present controversy. But the only suggestion made in the opinion that the court had before it any facts indicating the origin or nature of Mrs. Wilson's estate appears from the following language in the opinion:

> "Mrs. Wilson's estate consisted entirely of the property derived from her first husband's estate and additional property acquired through her own subsequent investments."

But it does not appear that the court at the time of the filing of this opinion had any knowledge from the record that Mrs. Wilson's first husband had left any relatives or that such relatives were making any claim as against the appellants or any one to any of the property in her estate "derived from her first husband's estate." The court, however, in construing the will, did mention the following fact which was evidently a potent surrounding circumstance when she executed the will:

> "At the date of the execution of the will she had several brothers and sisters still living, and numerous nieces and nephews and the relations between her and her relatives were very friendly."

In this connection the court stated that—

> "The question presented is, of course, as to the intention of the testatrix as disclosed by the language she has used in her will, taking into view, in case of any uncertainty arising upon the face of the will, the circumstances under which it was made, exclusive of her oral declarations."

And in its conclusion the court used the following language, upon the first portion of which the appellants herein especially rely and upon the latter portion of which the respondents rely:

> "Considering the will in its entirety, the scheme of the testatrix is perfectly clear to

our minds. If her son died before her leaving issue, she desired such issue to have all her property, and if he died before her without issue surviving, she desired her own relatives to have all the property, to the utter exclusion of any person or persons taking solely under the son. If he survived her, she desired him to have all her personal property as his own, and a life estate only in her realty, with remainder to any of his children who survived him, but if, surviving her, he died without issue surviving him, she desired the real property to go to her next of kin, other than her son. The case is one where 'the context clearly indicates' (Civ. Code, § 1327) that the word 'heirs' was not used in the strict technical sense as designating the person or persons who would have succeeded under our succession statutes to the estate of deceased had she died intestate, but was intended to designate only those who would have been her heirs at law but for her son, either at the time of her death or at the termination of the life estate by the death of the son.

"Whether in view of the language of the will such heirs are to be determined as of the date of the death of the deceased or as of the date of the death of the life tenant is a matter of no great moment to the respondent, who was not entitled to any of the real property in dispute in either event; but we think it clear that the intention was that they should be determined as of the date of the termination of the life estate."

In the controversy which preceded the foregoing expression from the court there was no occasion for the court to consider the fact that the predeceased spouse of the testatrix had left any kindred. Nor does it appear that the court had any occasion to consider the fact that the statute relied upon by the respondent McConnell herein did not come into effect until nine years after the time of the making of the will. Consequently, as between the litigants in this proceeding, it does not appear that any of the language used by the court in its opinion precludes a determination by this court of the question of construction presented herein, to wit, the question whether or not it was the intent of the testatrix when she created the contingent remainder herein to constitute as the beneficiaries thereof her own blood relatives whom the law, at the time she made the will, "provided should be her heirs in the event of intestacy and the failure of issue."

In the cases of Estate of Watts, 179 Cal. 20, 175 Pac. 415, Estate of Page, 181 Cal. 537, 185 Pac. 383, and Estate of Simonton, 183 Cal. 53, 190 Pac. 442, relied upon by respondents herein, it was held that when a testatrix used the words "heirs" or "my heirs" or "my lawful heirs" or heirs at law, as provided by the laws of succession of the state of California, "she adopted for the purposes of her testamentary disposition the statute of succession" (Estate of Watts), and that by such adoption she is presumed to have intended to make the blood relatives of her deceased spouse the objects of her bounty. But in each of the cases cited the statute adopted was, as a matter of fact, the statute in existence at the time the testatrix made her will and at the time she conceived and executed her intention to so adopt the statute. As already noted, the testatrix was a twice married widow of the age of 60 years, and had been a school teacher in Vermont in her youth. Up to the time of the making of her will and for many years thereafter she was actively engaged in attending to the details of the management of a large business of farming, stock raising, buying and selling property and the loaning of money on mortgages; and was a woman, as shown by the evidence, of considerable business ability, self-reliant, self-assertive and always responsive to the human ties of blood and family. In the drafting of her will she had the advice and counsel of a competent attorney. But irrespective of such advice and irrespective of any mere fiction of the law under which it is sometimes presumed for the purposes of accomplishing justice that a person is familiar with the law and the changes in the law, in this case it can be conclusively, as a matter of common reason, presumed that at the time testatrix made her will in 1896 she actually knew and was influenced by the knowledge that her numerous kindred with whom she was very friendly, were the persons who were her "heirs as provided by the laws of the state of California the same as if I had died intestate."

And there is no evidence that at the time she made her codicils, or at any time before her death, that she was aware of any change in the statute, nor is there any presumption of law or of common reason that she would be aware or be made aware of such a change in the statute. It would therefore seem that where there are two statutes of succession invoked, one of which was in existence and known to the testatrix at the time she deliberately adopted the statute and the other of which did not come into existence until nine years after her act of adoption was performed, we should scrutinize the language of the will for the purpose of seeing whether the testatrix by the use of any language in her will expressed any intent or purpose to adopt the unknown and nonexisting statute and repudiate the known and presumably satisfactory one for the purpose of designating the objects of her contingent bounty.

When she used the words "as provided by the laws of the state of California," if it was her intention to include with the existing provisions of which she presumably approved future possible provisions as well, there was very apt and convenient language by which she could so have expressed herself by inserting after the word "as" the words "may be," "will be," or "might be," or the word "then," of which latter word she had just before made apt and discriminating use when, in order to avoid any ambiguity, she twice referred to "his then living children." The word "then" following the words "if he left no issue," and preceding the words "upon his death," was evidently used not in its chronological but in its sequential sense, and clearly implies "in that event," etc. Brown v. Higgins, 180 Wis. 253, 193 N. W. 84; Behrens v. Bauman, 66 W. Va. 56, 66 S. E. 5, 27 L. R. A. (N. S.) 1092.

[1] Therefore, if the testatrix herself has not by any apt or convenient term stated that she intended to refer to any possible future statutory enactments to designate the objects of her bounty it would seem in reason that she meant by the use of the words "as provided by the laws" to refer to the laws already in existence.

Furthermore, by the same token that the court will prefer a vested estate to a contingent estate it should prefer a lesser degree of uncertainty to a greater degree of uncertainty and should, unless the language is clear to the contrary, accept as beneficiaries of a contingent estate those who are so designated by a lesser contingency. In the contingent remainder which she created there were already three contingencies: First, the contingency of the death of the son; second, his death without issue; and, third, the contingency that at the time of his death when the contingent estate vested there would be any one of the designated class alive. But, if the construction of the respondents is accepted, there would be in addition to those contingencies, the biennially recurring contingency of a change in the statute which would create a further contingency to determine the class that would be provided by law to be heirs in the event of intestacy; whereas, if the construction of appellants be accepted, the intent of the testatrix would be made more certain and would be responsive to the conditions and circumstances of her environment.

[2] As stated in In re Solms' Estate, 253 Pa. 293, 296, 98 Atl. 596, at page 597, quoting Anshutz et al. v. Miller, 81 Pa. 212, 215:

> "Where an estate is given to a person described by relation either to the testator or to other devisees, on a contingency that may or may not happen, and a person is in being at the time of the execution of the will, to whom, on the happening of the contingency, the description would apply, it is a safe general rule to hold such person as intended to be the devisee."

See, also, Quick v. Quick, 21 N. J. Eq. 13, where the court distinctly held that in the event of failure on the part of the testatrix to indicate some future law for the purpose of ascertaining the objects of her bounty, such as the words "as the law may direct," and where she made use of the present tense by using the words "as the law directs," it will be presumed that she intended to control the division of the property among certain contingent heirs "not by the law as it might stand at the death of Ezekiel, but as it then stood." But in the case at bar the testatrix, by the use of the past tense, was certainly further from using the future tense than was the testatrix who used the present tense in the case of Quick v. Quick.

[3] Furthermore, from the terms of the will and codicils and the close family relations existing between the testatrix and her own blood kindred, if from her language her intent may be deemed to be doubtful there is "the well-settled rule that, where a will is capable of two interpretations, the one should be adopted which prefers those of the blood of the testator to strangers." In re Edie, 117 App. Div. 310, 102 N. Y. Supp. 424, citing Wood v. Mitcham, 92 N. Y. 375.

[4] The rule is well established that where there is any doubt as to the identity of the beneficiary or class of beneficiaries the intent of the testator should be interpreted in the light of the known conditions surrounding him and presumably influencing him at the time he executed the will. And where he has made an ambiguous reference to the law to designate his beneficiary it will be presumed, in the absence of differently expressed intent, that he referred to the law existing at the time of the expression of his intent. Schouler in his work on Wills has stated the rule as follows (Schouler on Wills [6th Ed.] vol. 2, pars. 844 and 938–939):

> "On questions of construction a testator is presumed to speak as of the time of executing his will, but the date of a will must be considered in construing it, and the will speaks from its date on a question of identity of the beneficiary, and the conditions existing at the time of execution may be considered in construction. * * * In general, the intent of a testator must be gathered not merely from the language used in the will, but from that language in connection with the law of the land, whether of state or nation, and his personal environment including the state of the law at the time in view of statutes in force at the date of the will. * * * It is also presumed that the testator knew what disposition would be made of his property in case of intestacy and intended a different disposition by will and that a testator made his will with knowledge of the well-settled law of the state. The maxim that every one is presumed to know the law, applies to existing but not to future enactments. In construing a testator's will as executed by him the court may ascribe to the testator, so far as his language permits it, the common impulses of human nature."

Among the authorities relied upon to sustain the foregoing conclusions are the following cases: In re Crozer's Estate, 257 Pa. 241, 101 Atl. 801, where the court held that—

> "A testator's legal intention is to be gathered from the state of the law at the date of the will, regardless of what it was at the date of his death."

Also the case of In re Peterson's Estate, 242 Pa. 330, 338, 89 Atl. 126, at page 128, where the court uses the following language:

> "The doctrine of the case just cited [Neal's App., 104 Pa. 214] agrees with that which now generally prevails, to the effect that the rule making a will to speak as though executed immediately before the death of the testator relates to the effect and operation of the instrument rather than to its construction, and, as regards the intention of the testator, the will is to be construed as of the date of the execution. Another way of stating the rule is that, where it appears in the will that a testator intended the will to be confined to the state of affairs existing when the will was made, the construction must be such as to conform to such intention."

Also Matter of Hoffman's Will, 201 N. Y. 247, at page 255, 94 N. E. 990, 993, the court used the following language:

> "In considering the effect of the codicil, we do not look to what happened, when it became operative; we seek for what the testator intended by it when arranging the disposition of his residuary estate. * * * The intention of the testator in disposing of his residuary estate is to be ascertained not by what occurred long after the execution of his will, but by what was, apparently, or presumably, in his contemplation, at the time he was making it. A testator is presumed to speak as of the time of executing his will and to base his calculations upon his dispositions taking effect. McLean v. Freeman, 70 N. Y. 81; Morris v. Sickly, 133 N. Y. 456."

In the case of Morris v. Sickly, cited above (133 N. Y. 456, 31 N. E. 332), the court uses the following language:

> "While a will is in some sense ambulatory as to the objects and subjects with which it deals, yet it is not ambulatory as to the meaning of the language used by the testator and the intention and purpose which controlled the disposition of his property. That intention and purpose must be found to exist at the time of the execution of the will, and cannot be varied or changed by any after occurring events."

And in the case of Houghton v. Hughes, 108 Me. 233, 79 Atl. 909, Ann. Cas. 1913A, 1287, the court, referring to the testator, stated:

> "Levi W. Houghton lived and died in Maine. His will was made and executed in Maine. It is not probable that he was familiar with the laws of any other state, but he is presumed to know the laws of Maine, and it should be assumed, we think, that he used the words 'heirs at law' in his will in the sense which those words then had according to the laws of the state of Maine, and as judicially construed by the courts of Maine, there being nothing in the language used which repels or controls such conclusion."

In the foregoing case the court quoted the following language of Mr. Justice Story in the case of Harrison v. Nixon, 9 Pet. 483, 9 L. Ed. 201:

> "The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion."

Also, in the case of Webb v. Webb, 111 Ark. 54, 163 S. W. 1167, the court uses the following language:

> "As to the effect and operation of the will, as a general rule, in the absence of language showing a contrary intention, it speaks from the death of the testator. But when the purpose is to ascertain what the intention of the testator was from the construction of the language used by him in the will, then the will should be construed as of the date of its execution. See 40 Cyc. 1424 B."

Also, in the case of In re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115, the court held as follows:

> "The rule that a will speaks as of the date of the decease is not an unyielding one, especially when by a change of statute, the words would have had a different meaning if used in a will executed under the new law. * * * The testator would have no reason to suppose that his manifest intent could or would be affected by legislative enactment, and that if, when he executed the will, certain persons were clearly intended and sufficiently designated as the recipients of his bounty, future legislation could interfere with or control that intention and designation. The words 'heirs at law,' found in the residuary clauses of the will, must be construed as of the date of its execution, and not with reference to the statute as it existed when the testator died."

Such words as heirs, or legal heirs, though their technical significance is not to be overlooked, may, to give effect to the intent of the testator, be held to refer to others than those who are technically heirs, or to exclude those who are technically heirs. See, also, In re Anderson's Estate, 148 Minn. 44, 180 N. W. 1019.

And in the case of Radford v. Fidelity, etc., Co., 185 Ky. 453, 215 S. W. 285, the following language was used by the court:

> "It is contended by appellants that in ascertaining the intentions and meaning of the testatrix, as expressed in the instrument, and in construing it in order to determine the rights of the parties under the will, we must be guided by the laws upon those subjects which prevailed in the state of Indiana at the time of the execution of the will. This contention seems to be sound, as, in accordance with the general rule of interpreting and ascertaining the meaning and intentions of a testator as expressed in his will, reference must be had to the law of his domicile at the time the will was executed, and such law will govern, unless it appears from the will that the testator had in mind and made his will with reference to the law prevailing in some other country or

jurisdiction." See, also, Williamson v. Williamson, 58 N. C. 142–145; Lavender v. Rosenheim, 110 Md. 150, 72 Atl. 669, 132 Am. St. Rep. 420.

[5] The foregoing cases illustrate the principle that, where there is an ambiguity of expression by the testator as to the identity of the objects of his bounty, his real intent and meaning will be sought for in the light of the law pertaining to such objects under the law in force and existing at the time the testator formed and expressed his intent.

On behalf of the respondents, however, it is argued in substance that there is no ambiguity existing in the will as regards the identity of the beneficiaries of the contingent remainder because the law has given a fixed and stable meaning to the words "my heirs" used by the testator. Therefore, respondents—

> "earnestly contend that those entitled to share in the distribution of the estate are those who can qualify as heirs of decedent under the law which was in force at the time of the death of the life tenant. It is true that testatrix is presumed to have known the law at the time of the execution of the will. The law was, and she knew it, that the Legislature had exclusive control over the laws of succession and could amend or repeal such laws at any time; that the Legislature met every two years. She is also presumed to have known that the law was amended in 1905. She knew that her will did not take effect until her death, and that, as to the contingent remainder provided by the will, the shares therein given to a class did not vest in them until the termination of the life estate."

In support of their contention respondent relied upon the following authorities: Lincoln v. Perry, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 217; Van Tilburgh v. Hollinshead, 14 N. J. Eq. 32; Kohler's Estate, 199 Pa. 455, 49 Atl. 286; McGunnigle v. McKee, 77 Pa. 81, 18 Am. Rep. 428; Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536; Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602, 52 L. R. A. 75, 79 Am. St. Rep. 246; Smith v. Hunter, 86 Ohio St. 106, 99 N. E. 91.

These were cases where the testator provided simply and directly that the remainder in question should vest in the heirs at law or in the children of a specified life tenant. And the courts held that there being no ambiguity in designating the remaindermen and the estate in remainder not vesting until the death of the life tenant that, therefore, if there were any change in the statutes either of adoption or succession after the making of the will and before the vesting of the estate in remainder that those statutes should be effective in determining the persons who should share in the estate in remainder. But in the case at bar it will be noticed that, though the life tenant was clearly designated, there was no attempt, as in the cases cited, to confine the remainder to the heirs of the said life tenant by the use of the word "heirs" as a technical word; in fact, in the case at bar, the first remainder attempted to be created was in favor of "his then living children." And in the case at bar the construction of the words "to his then living children" is not involved, as it was involved in some of the cases relied upon by counsel wherein was involved the question as to whether the word "children" would include illegitimate children or children by adoption and whether statutes of adoption or of legitimization enacted since the making of the will could be considered. And, furthermore, in the case at bar, unlike in the cases relied upon by counsel, the word "heirs" was not used in a technical sense by the testator, and, furthermore, the word "heirs" was qualified by the clause "as provided by the laws of the state of California, the same as if I had died intestate." In other words, in the case at bar the language of the will as used by the testatrix involves and invites a wider scope of interpretation than did the language used in the cases cited by counsel involving the wills therein construed. Consequently in the case at bar the construction on the question of time involved cannot be settled by determining first that the contingent remainder did not vest until the death of the life tenant and then by suggesting that the testator knew that the Legislature could amend or repeal the law in the light of which she made her will, and that she knew that the Legislature met every two years and is presumed to have known that the law was amended in 1905, and knew that her will did not take effect until her death, and knew that as to the contingent remainder the shares therein given to a class did not vest in them until the termination of the life estate.

In the first place, as to the use of the words "my heirs," on the previous appeal referred to (184 Cal. 63, 193 Pac. 581) our Supreme Court stated:

> "Obviously, this language referred simply to the manner of distribution among the persons constituting 'my heirs' 'among' whom the property was to be distributed."

Also:

> "The case is one where 'the context clearly indicates' (Civ. Code, § 1327) that the word 'heirs' was not used in the strict technical sense as designating the person or persons who would have succeeded under our succession statutes to the estate of deceased had she died intestate."

And, furthermore, as stated by counsel for respondents in their brief on this appeal:

> "Of course, neither appellants nor respondents are strictly heirs at law of the testatrix. They take shares in her estate under a suppositional condition of affairs surmised by testatrix as possible of occurrence, and which actually came about. They take shares in the

estate by analogy to the statute of successions and distributions, and under the supposition made by testatrix that they would have been her heirs at law if she had survived all her issue and had died subsequent to the date of the termination of the life estate."

From all this it is evident that this will which does not use the word "heirs" in a technical sense, as it was used in the case relied upon by counsel, and where it further appeals that the whole clause "upon his death all such real property shall be distributed among my heirs as provided by the laws of the state of California, the same as if I had died intestate," was indicative "simply of a suppositional condition of affairs surmised by testatrix as possible of occurrence," it would seem that we should, in order to obtain a fair construction of testatrix's intent, place ourselves so far as we can in her actual situation as regards knowledge, motive, and surrounding conditions at the time she indulged in these suppositions.

In the first place, we must assume that the words "as provided by law of the state of California, the same as if I had died intestate" were inserted after the words "my heirs" for the purpose of adding to or qualifying the meaning already expressed by the words "my heirs." And this is a fair presumption irrespective of the fact that the will was drawn by an attorney of high standing. At least one of the effects of the clause added would be to control the disposition of her personal property in the event of a change of domicile by applying thereto the laws of the state of California. It seems also equally clear that the laws she intended to refer to and apply were the laws existing at the time she made the will, "the same as if I had died intestate." For since these words, as suggested by counsel, were used in an entirely suppositional sense, then the only time she could reasonably be supposed to have died intestate would have been some time immediately before the time she made her testament or will. And it was evident, in view of her approval of the laws as they existed at that time, conforming as they did to her natural instincts and actual feelings towards her own blood, that she meant to have the objects of her bounty designated by the laws as they then provided.

Counsel also cite the cases of In re Nichols' Estate, 102 Wash. 303, 172 Pac. 1146, L. R. A. 1918E, 986, and Will of Kopmeier, 113 Wis. 233, 89 N. W. 134, wherein it is stated that "a will is ambulatory during the life of its maker and subject to his control." In each of these cases, unlike the case at bar, it was not the mere intention of the testator that was involved, but the validity and effect of the will as to whether or not it was contrary to public policy. So it was properly held in each of those cases that the law or the condition existing at the time of the taking effect of the will would control the situation as to whether the effect of the will was in accord with the law. The intent or purpose that the testator might entertain as to the identity of the objects of his bounty was not in those cases a subject of construction or interpretation. The invalidity of the will would be determined by the status of the law and fact at the time the will became effective at the death of the decedent. Barber v. Brown, 55 Okl. 34, 154 Pac. 1156; Carter v. Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. (N. S.) 733; Schouler on Wills, vol. 2, par. 840.

Counsel also refers to the case of Hardy v. Gage, 66 N. H. 552, 22 Atl. 557, wherein he claims "the facts of the case are almost identical with the facts at bar." In that case the facts do differ from the facts in the other cases cited by counsel and are similar to the facts in the case at bar to the extent that both wills provide for contingent remainder which does not directly and specifically vest in the heirs or children of the life tenant, but does go to the "heirs at law of the testator"; but the case cited does materially differ from the case at bar in that in the case at bar the testatrix specifically and further prescribes that "my heirs" shall be those "as provided by the laws of the state of California the same as if I had died intestate." And, as already noted, these words under a proper construction should be given some meaning for the purpose of explaining and qualifying the words immediately preceding them. They should not be so construed as to insert "as may be" or "as shall be" or "as to be" or "as then provided," when the testatrix herself did not make use of or evidently intend to make use of any such further qualifying words, but did evidently use the words "as provided" to express a present and existing situation and status of the law with which she was content "the same as if she had died intestate." Also counsel refers to section 1336 of the Civil Code, which provides that "words in a will referring to death or survivorship, simply" relate to the time of the testator's death, etc. But in the case at bar the words in the will do not refer "to death or survivorship simply." Estate of Briggs, 186 Cal. 351, at page 356, 199 Pac. 322. In the case at bar the immediate words which are the subject of construction are not the words which are determinative of the vesting of the estate but are the words determinative of the intent of the testatrix in regard to whether she desired to have the objects of her contingent bounty determined by the law existing at the time she expressed her intent and made the will or by any law that might be in effect at the time of the vesting of the estate. And since "judicial construction is the process of applying natural methods of finding and weighing evidence to discover the fact of intention" (Peet v. Peet, 229 Ill. 341, 82 N. E. 376, 13 L. R. A. [N. S.] 780, 11 Ann.

Cas. 492) it would seem that such intention in the case at bar should not be determined by assuming a knowledge on the part of the testator of technical words pertaining to the time of the vesting of an estate in heirs, when, as has been held, she did not use the word "heirs" in any technical sense and when she used no apt words to indicate that it was her intent to be so governed. Such a construction as is contended for by respondents herein is not responsive to the spirit of the rule which makes the existing lawful intent of the testator as expressed by our Supreme Court the polar star of construction,

> "Of whose true, fixed and resting quality
> There is no fellow in the firmament;
> The skies are painted with unnumbered
> sparks,
> They are all fire and every one doth shine;
> But there's but one in all doth hold his place."

In the language of Wigmore in his monumental work on Evidence (2d Ed.) vol. 5, par. 2461:

> "The history of the law of interpretation is a history of progress from a stiff and superstitious formalism to a flexible rationalism."

And paragraph 2462:

> "So long as men are allowed to grant and contract freely, and so long as the law undertakes to carry out those acts by enforcement, just so long must the standard of interpretation continue to be mobile, subjective and individual."

The construction of the will contended for by the appellants will therefore be accepted as being more in accord both with the language of the will as well as being in more accord with the intent of the testatrix interpreted in the light of all the surrounding circumstances.

It is therefore ordered that the judgment be reversed and the lower court be directed to make distribution of the property of the estate to appellants.

We concur: FINCH, P. J.; PLUMMER, J.

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65 Cal. App. 727

PALLADINE et ux. v. IMPERIAL VALLEY FARM LANDS ASS'N et al.

(Civ. 4421.)

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1924.)

1. Appeal and error 🔑930(1)—Testimony of prevailing party assumed true, where evidence is conflicting.

Where there is a substantial conflict in the evidence, the appellate court must assume the testimony of the prevailing party to be true, and construe it as favorably to him as possible, even when the law requires clear and convincing proof.

2. Fraud 🔑11(1)—Representation land was free of alkali held not opinion.

Vendor's representation, made as the affirmation of an existing fact, that the land was free of alkali, was not a matter of opinion on which purchasers, who were ignorant of conditions in the locality, had no right to rely.

3. Fraud 🔑64(1)—Whether representation land was free of alkali was one of fact question for jury.

Vendor's representation to purchasers, who were not familiar with conditions, that the land was free of alkali, if not a representation of a fact as a matter of law, could at least be so construed by the jury, and in such case the question was for the jury.

4. Fraud 🔑64(1)—Representations of fact or expressions of opinions question for jury.

When it is impossible to determine as a matter of law whether a statement is the expression of an opinion or a representation of a fact which the defendant intended to be understood as true of his own knowledge, the question is one for the jury.

5. Fraud 🔑11(1) — Representations as to adaptability of soil for grape culture held actionable.

Where general manager of land company was held out as one who would give prospective purchasers expert advice as to what lands were best adapted to their purposes, and where purchasers had no knowledge of the conditions, and relied on his representations, the manager's misrepresentation as to the adaptability of soil for the culture of grapes was an actionable misstatement of fact, and not merely an expression of opinion.

6. Fraud 🔑58(2)—Direct and positive proof of knowledge of falsity of representation not required.

In purchaser's action for damages for fraudulent representations, direct and positive proof of knowledge of falsity of the representation is not required; the question being one for the jury to determine from all the circumstances.

7. Fraud 🔑18—Representation land had not been covered by salt water held material.

Statement by vendor's manager that the land had not been covered by waters of the Salton Sea *held* a material representation as to purchasers, who in their negotiation with vendor emphasized the fact that they would not purchase alkali land.

8. Fraud 🔑58(1)—Evidence held to prove injury to land from salt water.

In purchaser's action for damages for fraudulent representation that the land had not been covered by the waters of the Salton Sea, evidence *held* to prove injurious effect on the land of such water.

9. Fraud 🔑23—Purchaser visiting property held not precluded from relying on representations.

That purchaser drove onto the land, and saw it prior to purchasing it, did not necessarily charge him with knowledge of the facts or establish that he relied upon his own judgment and not upon representations made by vendor's manager as to freedom of land from alkali and adaptability for grape culture, where purchaser was an elderly man with defective eyesight, and trusted the manager because a member of his own secret order.

10. Estoppel 🔑78(1)—Purchaser held not estopped from claiming damages because of fraudulent representation by reason of provision in contract.

Provision in contract that vendor shall not be responsible for any representation not set forth therein did not estop purchaser from recovering damages for fraudulent representations as to the character of the land, since the fraud affected the validity of the entire contract, including such provision.

11. Fraud 🔑58(4)—Direct and positive evidence of continuing effect of fraudulent representations unnecessary.

In purchasers' action for damages sustained because of vendor's fraudulent representations, they were not required to show by direct and positive evidence the continuing effect of the fraudulent representations as the inducing cause of the final contract embracing more land than originally contracted for.

12. Fraud 🔑52—Refusal to strike evidence of representations not actionable held not error.

In purchaser's action for damages from vendor's fraudulent representations, court's refusal to strike out the evidence of those representations which were not actionable *held* not error.

13. Fraud 🔑34 — Purchaser may withhold payments after discovery of fraud pending action for damages.

Purchaser induced by fraud to enter into the contract for the purchase may withhold payments after discovery of fraud and pending the action for damages to recoup such damages as may be recovered.

14. Appeal and error 🔑1050(1)—Admission of preliminary documents in purchaser's action against vendor for fraudulent representations held prejudicial error.

In purchaser's action for damages from misrepresentations, the erroneous admission of preliminary documents, preceding signing of final contract, calculated to create a suspicion that the vendor was fraudulently seeking to impose upon purchasers a contract other than the one the parties had agreed to, *held* prejudicial error.

15. Evidence 🔑378(3)—Letter from vendor's secretary not admissible without showing writer's authority.

In purchaser's action against corporate vendor for fraudulent representations, letter to purchaser from vendor's secretary, written prior to execution of final contract, *held* not admissible to show vendor's acceptance of the final contract without proof of secretary's authority.

16. Evidence 🔑135(2)—Testimony of neighboring farmers as to meager crops raised on their land held not admissible in purchaser's action for misrepresentations.

In purchaser's action for fraudulent representations as to the character of the land, testimony of neighboring farmers as to the meager crops raised by them on their lands *held* not admissible, in the absence of showing of similarity of conditions.

17. Appeal and error 🔑1050(1)—Testimony of neighboring farmers as to crops in purchaser's action for misrepresentations held prejudicial.

In purchaser's action for misrepresentations as to character of land, testimony of neighboring farmers as to meager crops raised on their lands, admitted without a showing of similarity of conditions, *held* prejudicial to vendor.

18. Fraud 🔑58(3)—Intent may be inferred from circumstances.

In purchaser's action for misrepresentations, the intent to deceive can be inferred from circumstances, and need not be proven by direct or positive evidence.

19. Fraud 🔑23—Purchaser without expert knowledge may rely on vendor's representations.

Where vendor holds himself out as an expert possessing superior knowledge of the subject-matter, and the vendee does not possess such expert knowledge, and expressly reposes confidence in the vendor's supposed superior knowledge, and leads vendor to understand that he is relying on the truth of his representations, vendee may safely rely thereon, though there is no legal fiduciary relation between them.

20. Fraud 🔑59(2)—Measure of damages to purchaser stated.

In purchaser's action for fraudulent representations, the measure of damages is the difference between the actual value of the property and the value which it would have possessed if it had been as represented.

21. Fraud 🔑59(2) — Jury, in ascertaining purchaser's damages, should deduct unpaid portion of price.

In purchaser's action for misrepresentations, the jury, in ascertaining the damages, should deduct therefrom any unpaid portion of the purchase price.

22. Fraud 🔑65(4)—Instruction on purchaser's duty to make inquiry held objectionable.

In purchasers' action for misrepresentations as to the character of the land, instruction that purchasers could not recover if they did not investigate or make any inquiry, unless they were induced to refrain from investigation, *held* objectionable for failure to describe the nature of the acts or statements which would excuse inquiry or examination where inquiry or examination would otherwise be essential.

23. Fraud 🔑22(1)—Purchaser's duty to investigate stated.

Where parties stand upon an equal footing, and have equal means of knowing the truth, and the vendee's suspicions are not lulled by the nature of the representation, an examination by the buyer will be excused only when he is fraudulently induced to forego examination, or where trick or artifice has prevented him from doing so.

24. Fraud 🔑65(4)—Instruction authorizing jury to consider whether purchaser was "lulled" into reliance on vendor's representations held not erroneous.

In purchaser's action for misrepresentations, instruction authorizing jury to "consider whether plaintiff was put upon inquiry, or whether he was lulled into a reliance upon any representations," *held* not objectionable, in view of the fact that one of the consequences of the misrepresentations was to disarm purchaser's vigilance and to lull his suspicions.

25. Evidence 🔑142(2)—Prices of lands in other localities not standard for ascertaining actual value of land misrepresented.

In purchaser's action for misrepresentations as to the character of the land, the prices at which lands in other localities of like quality and adaptability and similarly situated could be purchased did not constitute a proper standard for ascertaining the actual value of the land.

26. Appeal and error 🔑882(9)—That evidence was brought out on cross-examination did not justify refusal to charge jury not to consider it.

In purchaser's action for misrepresentations, refusal to instruct jury not to consider whether land of similar character could have been purchased at lower price in other localities *held* error, though evidence as to such other lands was brought out on cross-examination.

27. Evidence 🔑558(8)—Witnesses testifying as to value of land properly cross-examined as to prices at which other similar land could be bought.

In purchaser's action for misrepresentations, admission of testimony as to prices at which other similar lands could be bought was proper on cross-examination for the purposes of testing the witnesses' knowledge and impeaching their opinions.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by A. C. Palladine and wife against the Imperial Valley Farm Lands Association, H. H. Clark, and another. From judgment for plaintiffs against named defendants, they appeal. Reversed and remanded.

Luther G. Brown and Leon R. Yankwich, both of Los Angeles, for appellants.

Hickcox, Crenshaw & Trude, of El Centro, and L. B. Stanton, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action to recover damages for fraudulent representations made in the sale of a section of land in the Imperial Valley, hereafter referred to as section 13. The case was tried before a jury. A judgment of nonsuit was entered in favor of the defendant Janss Investment Company. A verdict in the sum of $25,000 was returned against the defendants Imperial Valley Farm Lands Association and H. H. Clark, both of whom have appealed from the judgment.

The following outline of some of the principal facts will suffice for an understanding of the points to be discussed: The defendant Clark is the general manager at Calipatria of the Imperial Valley Farm Lands Association—hereafter referred to as the association. The association owned some 47,000 acres of land in the Imperial Valley which it desired to sell. It inserted an advertisement in a Los Angeles newspaper advertising the lands for sale. It likewise caused to be published a printed folder which contained a map of the lands and certain information respecting the properties. In this folder the association made certain representations, of a more or less general nature, respecting the character of Imperial Valley lands, as, for example, that they are the choicest farm properties in the world—marvelous lands that frequently pay for themselves in 1 year, and that many of the valley's record-breaking crops were grown on the lands of the association.

Plaintiffs are husband and wife. They purchased section 13 from the association. The negotiations with defendants were carried on by the husband, A. C. Palladine, whom we shall refer to as the plaintiff, using the plural, plaintiffs, only when referring to both husband and wife. Plaintiff, a man of 68 years and of impaired eyesight, had been a viticulturist in Fresno county for more than 30 years prior to purchasing section 13. His attention was attracted to the newspaper advertisement of the association's Imperial Valley lands, and early in March of 1920, in company with his wife and their two sons, he called at the office of the Janss Investment Company, which was acting as sales agent for the association, and had a talk with a Mr. Link, an employee of the sales agent, whose office was in Los Angeles. Link told plaintiff that the association had large tracts of land for sale; that the soil is of greater fertility and depth; that it is suitable for the growth of citrus fruits and vegetables, and that no better land can be found in the world. Link showed plaintiff the folder published by the association. Mrs. Palladine read it to her husband. Plaintiff asked Link about alkali. Link stated that there was no alkali on the association's lands. Thereupon plaintiff said that it was well—that it would be useless for him to go to the Imperial Valley to look at alkali land. Plaintiff informed Link that he was looking for grape land and general farming land. Link gave to plaintiff, or to one of his sons for him, a letter of introduction to the defendant Clark, at the same time telling plaintiff that Clark, the association's general manager at Calipatria, was an honorable gentleman upon whose judgment plaintiff could rely. The next evening plaintiff, his wife, and two sons took the train for Calipatria, arriving there the following morning. Plaintiff was a stranger in the Imperial Valley. He had never previously visited that section of the state. On the morning of their arrival plaintiff, his wife, and sons, with other prospective purchasers, accompanied by Clark and Link, were taken in automobiles to see the association's lands.

[1] Though there is a sharp and irreconcilable conflict in the testimony with regard to the representations claimed to have been made during the time that Clark was showing plaintiff the association's properties, we shall state the events substantially as they were narrated by plaintiff and his witnesses. This we do in view of the well-known rule that, where there is a substantial conflict in the evidence, the appellate court must assume the testimony of the prevailing party to be true, and construe it as favorably to him as possible. And this is the rule even in those cases where the law requires clear and convincing proof. Couts v. Winston, 153 Cal. 686, 96 Pac. 357.

What occurred after Clark took charge of the party is described by plaintiff and his witnesses substantially as follows: Plaintiff and the other members of the party, including plaintiff's wife and their two sons, were first shown the Clark ranch—a half section of land owned by the defendant Clark, and situated some five or six miles south of section 13. Growing upon the Clark ranch were fine specimens of olive, fig, apricot, peach, pomegranate, and citrus trees, as well as grapevines, alfalfa, and garden truck. Clark told plaintiff that the lands which would be shown him during the day would grow anything that would grow on the Clark ranch, and that the soil was the same. From the Clark ranch the party was driven to section 19. While motoring toward section 19 one of plaintiff's sons saw a patch of white substance on the bank of a ditch. He asked Clark if it was alkali. The latter assured the son, in his father's hearing, that it was not alkali, but that it was chalk washed down from the Colorado river. During the course of the trip, and before arriving at section 13, plaintiff informed Clark, with whom he was riding, that he had spent his life in vineyards, and was acquainted only with viticulture; that he was in the Imperial Valley for the purpose of looking for land on which to grow grapes; and that, as he and Clark were members of the same fraternal order, he wished Clark would assist him in finding such land, telling the latter that he was wholly unfamiliar with conditions in the valley.

From section 19 the party was driven to section 13, where the automobiles were stopped in the road which passed through the section. While seated in the automobile during the time that the party halted somewhere near the center of section 13, Clark told plaintiff that the section was fine, level land, gently sloping to the west, thus making it easy to irrigate; that the southeast quarter had been recently planted to barley; that the northeast quarter had been in cultivation the previous year; that it was perfectly level and could be planted to cotton, and that, though the west half had not been cleared, it was good, level land, and not hard to clear and border. One of the plaintiff's sons asked Clark if the Salton Sea had ever been over the land. Clark replied that it had not—that the sea never rose higher than a certain line shown on the map which the association had published as a part of the folder that had been given to plaintiff by Link. Plaintiff asked Clark if he could especially recommend section 13 for grape land and for general farming purposes. In reply Clark said that it is the best section in the north end of the Imperial Valley; that it is the same sort of land as that which constitutes the Clark ranch; that it will grow anything that can be grown on the Clark ranch; and that it is especially adapted to the growing of grapes and general farming. One of plaintiff's sons then asked Clark if there was any alkali in the section. To this query Clark replied: "I told you once before there is no alkali in the Imperial Valley."

At no time while on section 13 did plaintiff get out of the automobile in which he was riding. He made no examination of the land other than such as could be made by one of his impaired eyesight while sitting in the automobile as it traveled along, or stopped for a short time in the road which passed through the section. Instead of making a careful examination of the land, plaintiff, so he says, relied entirely upon Clark's judgment. He testified that the only reason why he did not make a personal examination of the land to see if it was suitable for his purpose—the raising of grapes and general farming—was that he relied entirely upon Clark, and that but for the latter's recommendation and representations he would not have purchased the property. After the very cursory view of the land made by him as he sat in Clark's automobile, and as the automobile started to leave the spot where the party had stopped to glance over the section, plaintiff, who had discovered that he and Clark were members of the same fraternal order, said:

> "Mr. Clark, if all the representations that you make of this place are true, and if you give me your word as a Mason, I will take this section."

To this Clark replied that, not only were his representations true, but that the land was even better that he had represented it to be.

In 1908 the Salton Sea overflowed a very considerable territory in the vicinity of this land. The waters of the sea covered all of section 13 for a period of about 5 years. As a consequence the land is heavily impregnated with alkali—so much so that only such plant life will thrive thereon as is very resistant to alkali. Witnesses for plaintiff testified that the land in its present condition is not suitable for the growth of grapes or for general farming purposes. In addition to the alkali left on the land during the 5 years that it was covered by the Salton Sea, much alkali has been brought down to it by a ditch which drains upper parcels of land.

On the return trip to Calipatria, after their visit to section 13, plaintiff changed his mind about buying the entire section and concluded to purchase only the east half. He so informed Mr. Clark. A few days later plaintiff and his wife signed a contract to purchase the east half of the section. At the same time they made a part payment on the purchase price. A few days later, about March 26, 1920, being persuaded thereto by Clark, so plaintiff says, the Palladines, husband and wife, executed a new contract—a contract to purchase the whole section—and, at the same time, made a further payment. For some reason, perhaps due to a mistake on the part of the scrivener, the written instrument fixed the 18th day of March of the succeeding years as the dates upon which the deferred annual installments of the balance of the purchase price should be paid. In their preliminary negotiations the parties had agreed that the deferred payments should be due on the 1st of July of each year. Accordingly, another written contract for the purchase of the entire section was prepared and signed by the parties. In this last instrument July 1st was substituted for March 18th. Not until some time after this last instrument was signed did plaintiffs discover the fraud of which they complain.

The principal misrepresentations, as set forth in the complaint, are: (1) That there is no alkali on section 13; (2) that the section is excellant land for the raising of grapes and for general farming purposes; and (3) that the section has never been covered by the Salton Sea.

The grounds of appeal are: (1) That some of the representations are but expressions of opinion, and that such as are statements of fact do not constitute actionable fraud; (2) that plaintiffs waived the fraud; (3) that error was committed in the admission of certain evidence; and (4) that the court erred in giving and in refusing certain instructions and in modifying one of defendants' requested instructions.

Three or four of the assignments of error—errors in the admission of evidence, and in giving and refusing certain instructions—are not only well taken, but involve errors so prejudicial to appellants' substantial rights as to necessitate a reversal of the judgment and a remanding of the cause. A consideration of these errors would be sufficient to dispose of the appeal, but, as the case must go back for a new trial, it is expedient that we should pass upon and determine all questions of law presented by counsel which are likely to arise upon the retrial; for sooner or later they must be decided in order to settle this controversy. We shall proceed to an examination of the points substantially in the order of their presentation by counsel.

[2] 1. The representation that the land is free of alkali is not a matter of opinion upon which the purchasers had no right to rely. It was not given in the form of an opinion, but was made by Clark as the affirmation of an existing fact upon which the purchasers, who were ignorant of conditions in the Imperial Valley, could safely rely. It not only was the affirmation of one who held himself out as an expert in such matters, but was made under such circumstances as to warrant the jury in inferring that Clark's unequivocal affirmation involved the necessary implication that he was acquainted with facts which justified his statement.

> "If the facts are not equally known to both sides, then a statement of opinion by the one who knows the fact best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." Lord Bowen, in Smith v. Land, etc., Corp., 28 L. R. Ch. Div. 15, quoted in McDonald v. Smith, 139 Mich. 211, 102 N. W. 668, and in Olston v. Oregon Water Power, etc., Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915, 926.

See, also, Armstrong v. Rachow, 205 Mich. 168, 171 N. W. 389.

It is said in Hall v. Mitchell, 59 Cal. App. 752, 211 Pac. 857, that—

> "Where the statement of the opinion is necessarily based upon a fact, or carries such inference that it must be regarded as the statement of a fact and is known to be false and made with intent to deceive, it may be actionable."

In Como Orchard L. Co. v. Markham, 54 Mont. 438, 171 Pac. 274, the court said:

> "We think the following rule is sustained by reason and the authorities: If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts."

See, also, Henry v. Continental Building, etc., Ass'n, 156 Cal. 680, 105 Pac. 960; Edward Barron Estate v. Woodruff, 163 Cal.

561, 126 Pac. 351, 42 L. R. A. (N. S.) 125; and 12 R. C. L. p. 380.

Moreover, the representation falls within the rule enunciated in Herdan v. Hanson, 182 Cal. 546, 189 Pac. 444, that—

> "When a statement concerning a subject-matter of a transaction, which might otherwise be only an expression of opinion, is affirmed as an existing fact material to the transaction and reasonably induces the other party to consider and rely upon it as a fact, the statement then becomes an affirmation of fact within the meaning of the general rule as to fraudulent representations."

See, also, Crandall v. Parks, 152 Cal. 772, 93 Pac. 1018; Edward Barron Estate v. Woodruff, supra; 2 Pomeroy's Eq. Jur. § 878.

In Scott v. Delta Land, etc., Co., 57 Cal. App. 320, 207 Pac. 389, the representations set out in the complaint were that the land "was of the best quality, fertile in every respect, *free from alkali* and noxious weeds, and suitable for growing thereon all kinds of crops of hay, grain, and vegetables." (Italics ours.) Other representations were made which are not material to be set forth here. It was held that the judgment might be sustained upon evidence showing the making of any one of the material representations pleaded in the complaint. In Stone v. McCarty (Cal. App.) 220 Pac. 690, it was held that statements made by a vendor or his agent to a party unfamiliar with the land or soil that the land was free from hardpan, that nursery trees growing on the land were of a stated value, and that the trees would soon be ready for market and were already budded, and that, if they were properly irrigated, the vendee could easily sell them for a stated price, and that the soil was adapted to the growing of fruit trees, are not expressions of opinion, but amount to representations such as to give rise to a cause of action, if false.

[3, 4] Even if it were assumed that the court could not say, as a matter of law, that the statement that the land was free of alkali was the representaion of a fact, it would be equally true that it could not be said, as a matter of law, that the statement amounted to nothing more than an expression of opinion. Hence it became at least a question for the jury to decide whether the statement was a mere expression of opinion or the representation of a fact. When it is impossible to determine, as a matter of law, whether a statement is the expression of an opinion or is the representation of a fact which the defendant intended to be understood as true of his own knowledge, the question is one for the jury. Olston v. Oregon Water Power, etc., Co., supra; Ward v. Jenson, 87 Or. 314, 170 Pac. 538; Pacific Gas, etc., Co. v. Almanzo, 22 Ariz. 431, 198 Pac. 457; 12 R. C. L. p. 446.

[5] 2. Under the circumstances here presented the representation that section 13 is excellent land for the raising of grapes and for general farming purposes was more than a mere expression of opinion. It was a statement upon which the purchasers had the right to rely as the affirmation of a known fact. Had the statement stood alone, it doubtless would have been but an expression of opinion (Rendell v. Scott, 70 Cal. 514, 11 Pac. 779; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300), for the general rule is that a mere naked assertion, without more, that land is suitable for the growth of some particular crop, though known to the vendor to be untrue, does not constitute actionable deceit. This is so, because in most cases such an assertion is, and is understood to be, the statement of an opinion and not of a fact, and therefore the party to whom it is made has no right to rely upon it. But to the general rule that such statements are only expressions of opinion there are many exceptions, arising out of the special circumstances under which the representation is made, as, for instance, where the seller has, or assumes to have, a special or expert knowledge of the subject, and the buyer does not possess equal opportunity for knowing the facts, but, to the seller's knowledge, trusts entirely to the latter's representation. Gustafson v. Rustemeyer, 70. Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92. In Stonemets v. Head, 248 Mo. 243, 154 S. W. 108, it is said that—

> "Courts generally recognize that, where parties do not stand on an equal footing of opportunity and knowledge, a positive assertion of a matter, which, stated in another form, might be a mere opinion, may when false and fraudulent be actionable if the statement was a material inducement to the trade or sale."

Here the seller's manager, Clark, was held out as one who would give to prospective purchasers expert advice as to what lands were best adapted to the buyers' purposes. These plaintiffs knew nothing of the Association's Imperial Valley lands or of their adaptability for the growth of grapes or other crops; whereas Clark assumed to have, and did in fact have, a special knowledge of all these lands—a knowledge which was based on the past experience of himself and others. In a preceding year the association, while Clark was its general manager at Calipatria, had rented the east half of this particular section to a tenant on a crop-sharing basis. This fact, with other circumstances which were adduced in evidence, warranted the jury in drawing the inference that Clark's knowledge of the land was exceptional and unique. Clark, if plaintiff's testimony is to be believed, knew that the latter was purchasing the land with the intention of raising grapes thereon. According to the testimony of the experts, grapes cannot be grown on soil which is impregnated with more than four-tenths of one per cent. of alkali. The top soil of this section, if the testimony of plaintiffs' experts be true, contains on an average, 1.50 per cent, and the subsoil 1.38 per cent of alkali. Clark, who had had practical experience as a viticulturist, testified that he always was of the opinion that these lands contained alkali. And yet, as one having superior facilities for knowing the facts, he recommended the section to plaintiff as land which was suitable for the purposes for which plaintiff told him the land was being purchased.

Under these circumstances the misrepresentation as to the adaptability of the soil for the culture of grapes was actionable deceit. While it is true that the man without special knowledge is prone to overvalue his property, yet, as was said by the South Dakota Supreme Court:

> "It is likewise true that in all lines of business, and in connection with all kinds and classes of property, we have those who, through special study or unusual opportunities and experience, have become possessed of unusual information regarding the value or quality of some particular piece or class of property, so that their judgment thereon is accurate, and little, if any, influenced by the fact of personal interest therein. Upon the honest judgment of such a person, the law, based as it is upon human experience, gives another the right to rely even in connection with a transaction between such parties, unless both parties are possessed of such special knowledge. This right is given, though the party may have an opportunity to see and inspect the property himself, because the law recognizes that even then the judgment of the one should be superior to that of the other; that, under such circumstances, the statement of opinion as to the value of property is a statement of a material fact, the fact that such opinion exists." Rodee v. Seaman, 33 S. D. 184, 145 N. W. 441.

In Wendell v. Ozark Orchard Co. (Mo. App.) 200 S. W. 747, it was held that false representations as to the productiveness of a peach orchard and as to the enhanced value of the land because of its being fruit land should be regarded as representative of existing conditions, and fraudulent, because made by one having superior knowledge based upon the past experiences of himself and others. In that case it was said:

> "It is claimed that these representations as to the productiveness of the peach orchard and the enhanced value of this land because of its being fruit land were mere matters of opinion and related to future events rather than to existing facts, and therefore do not sustain allegations of fraud. It will be found, however, that false representations and promises as to what will result in the future, when made by one having or professing to have superior knowledge based on the past experience of himself or others, are in effect false representations of existing conditions and support allegations of fraud. Should the selling agent of an automobile company falsely represent that an automobile would sustain a speed of 50 miles an hour, or would average 15 miles travel per gallon of gasoline, no one would doubt but that an inexperienced buyer, on discovery that such machine would not run to exceed 20 miles per hour, and would consume a gallon of gasoline for every 7 or 8 miles, would not be turned out of court because the false representations were mere opinions and related to the future. Even representations of value often afford a solid basis for actionable fraud."

See, also, Hall v. Mitchell, supra, and Stone v. McCarty, supra.

[6] 3. It will not be necessary to consider appellants' claim that there is no evidence of the falsity of the representation respecting the price at which water could be bought. Respondents practically concede that the evidence does not support the allegation of the falsity of that representation. Nor is it incumbent upon us to consider the representation to the effect that the east half of the section was level land, as that is not alleged in the complaint as one of the representations inducing the contract. Neither will it be necessary to consider appellants' claim that the evidence fails to establish that they had knowledge of the falsity of the representation that the land had not been inundated by the Salton Sea. Since the case must be remanded, and since the evidence to be adduced at the second trial may supply any deficiency in this particular, if deficiency there be, it will not be necessary to consider this point further than to say, as a guide to court and counsel, that in cases such as this direct and positive proof of the knowledge of the falsity of the representation is not required. The scienter may be inferred from other facts in the case; and it is for the jury to determine from all the circumstances whether the defendants knew the representations to be false. Hiner v. Richter, 51 Ill. 299. Furthermore, as to this particular representation the scienter seems to be admitted by the pleadings.

[7, 8] 4. The statement that the land had not been covered by the waters of the Salton Sea was a material representation. The nature of the statement is such that it naturally must have influenced plaintiffs in making their contract to purchase the land. Throughout the negotiations plaintiff was at pains to emphasize the fact that he would have naught to do with alkali land. That the falsity of the representation concerning the Salton Sea was a source of injury to plaintiffs is beyond question. Obviously, the inundation, with its consequent deposit of salts, must have had a most deleterious effect upon the soil. It is alleged in the complaint and admitted by the answer that these lands "were deeply covered by the briny waters of the Salton Sea, *and have become thoroughly impregnated with salt.*" (Italics ours.) From the testimony of the experts it appears that land containing more than four-tenths of 1 per cent. of salt or alkali is practically valueless for all ordi

nary farming purposes, and that only at considerable expense can alkali land be reclaimed, and then only if there be no impervious layer underlying the soil to prevent the necessary drainage. There is testimony that the subsoil in section 13 is a heavy clay, and that it tends to retard the natural drainage from the top soil. It seems self-evident that, other things being equal, land upon which the briny waters of an inland sea have stood for several years necessarily must contain far more deleterious substances than would be the case with similar land which has not been thus submerged.

Appellants contend, however, that plaintiff's testimony is such that it compels the conclusion that he was not influenced by the representation respecting the waters of the Salton Sea. It seems that on his cross-examination plaintiff testified as follows:

> "Q. In the purchase of both the first half section, and later in making the purchase of the other half section, you relied entirely upon Mr. Clark; that is correct, is it? A. Yes, sir. Q. And then if he told you it was submerged and that made it better land, or good land, or advised you to buy it, you would have bought it just the same, wouldn't you? A. I believe I did just the same, you know. Q. If you had known the land was covered with water, had been covered with water, and he would have advised you to buy it, you would have still bought it on his advice, wouldn't you? A. Yes, sir; at that time I had full confidence in Mr. Clark."

This testimony is far from justifying appellants' claim that plaintiff entered into the contract uninfluenced by Clark's representation that the land had not been inundated. The questions put to plaintiff on his cross-examination, questions adroitly propounded by skillful counsel, postulate a purely hypothetical situation; and it was that suppositious situation to which plaintiff was addressing himself when replying to counsel's skillful questioning. The witness did not say that he was not influenced by Clark's statement that the sea had not submerged the land. What he did say, in effect, is that his confidence in Clark was so great that he would have entered into the contract, even though he had known that the land had been so covered by the waters of the sea, provide Clark had advised him to do so. His answers, far from showing that he would have purchased the land had he known Clark's representation to be false, show that he placed such implicit reliance in Clark that he would have taken the latter's word at its full face value without questioning it, even though it had amounted to a statement that the submergence of land by the waters of this sea improves it, but that, unless he was assured by Clark that the sea water does improve land, he would not have purchased if he had known that the property had indeed been under the waters of this inland sea.

[9] 5. The fact that plaintiff drove onto the land and saw it prior to purchasing it does not necessarily charge him with knowledge of the facts, or establish that he relied upon his own judgment, or debar him from claiming that he relied solely upon the representations made to him. The fact that a vendee visits the property does not necessarily preclude him from saying that he relied upon his vendor's statements. French v. Freeman (Cal. Sup.) 217 Pac. 515; Kincaid v. Price, 82 Ark. 20, 100 S. W. 76; Jones v. Hawk, 64 Wash. 171, 116 Pac. 642; Woody v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102.

There was that in the relations of these two men, Clark and A. C. Palladine, which was calculated to disarm caution. It seems that in the course of the trip and prior to the party's arrival at section 13 plaintiff discovered that he and Clark were members of the same secret order. Plaintiff testified that some time after he and Clark had made themselves known to each other as brothers in the same fraternal organization, and after the party had arrived at section 13, but prior to the closing of the deal, the following conversation occurred: Plaintiff, addressing Clark, said:

> "Mr. Clark, I am helpless [deferring, doubtless, to his purblindness and to his unfamiliarity with the conditions in that part of the state]. I will charge you for myself. Will you advise me as a gentleman and a Mason if this land grows grapes, fruit, cotton, alfalfa, etc.?"

To this Clark replied:

> "Certainly, this land will grow grapes, fruit, some other things and cantaloupes, and will grow anything that will grow outside of doors."

Thereupon plaintiff asked Clark if the soil was good, to which Clark replied:

> "It is all sandy loam of great fertility and rich."

One of plaintiff's sons testified that his father said to Clark:

> "Mr. Clark, if all the representations that you make of this place is true, and you give me your word as a Mason that they are true, I will take this section of land,"

—and that to this Clark replied that his representations were true, and that the land was even better than he represented it to be. Thereupon the deal was closed. It is due to Mr. Clark to say that these conversations are denied by him; but though his testimony in many particulars is corroborated by that of disinterested witnesses in the case, the jury chose to believe plaintiff and his witnesses, and we, perforce, must accept the testimony of the latter as true for all the purposes of this appeal.

If the testimony of plaintiff be true, Clark took advantage of their fraternal relation and of the confidence which plaintiff reposed in him by reason of that relation. Though they never had met before that day, plaintiff's discovery that he and Clark were members of the same fraternal order was well calculated to inspire him with the same confiding trustfulness which one intimate friend may safely repose in another. It has been held that when men deal as friends, and one accepts as true false representations by the other, into which, but for the relation of friendship, he would have made inquiry, the law will protect him in his trust as certainly as it will deny him relief, if the personal relations of the parties are such that the dealing is at arm's length. Gray v. Reeves, 69 Wash. 374, 125 Pac. 162. See, also, Dorr v Cory, 108 Iowa, 725, 78 N. W. 682, and Grant v. Ledwidge, 109 Ark. 297, 160 S. W. 200. For reasons equally cogent it must be held that, when two men deal with each other as members of the same fraternal order, and one accepts as true the representations of the other, into which but for the fraternal relation he would have made inquiry, the law will protect him in his trust.

Moreover, plaintiff, an elderly gentleman of defective eyesight, would have experienced some difficulty in ascertaining the exact truth respecting this land. It is true he testified that by "feeling" the soil he could tell "whether it is good grape land or not." But to discover even in this crude manner that the soil of this 640-acre tract was not "good grape land" it doubtless would have been necessary for him to have felt the soil on more than one spot. And, although he contented himself with a mere view of the land as he sat in the automobile which had conveyed him to the premises, he may have been led to make this superficial examination solely by reason of the character of the representations which were made to him by the man to whom he was bound by fraternal ties. To discover the falsity of all the representations it would have been necessary for plaintiff to do more than merely "feel" the soil. He would have had to make a most careful examination of the property, and probably would have had to make inquiries of the neighboring landowners. But, if the truth was more or less difficult of ascertainment by plaintiff, the facts were peculiarly within the knowledge of Clark, who was held out as one possessing special knowledge of the association's properties, and who, as plaintiff knew, had exceptionally advantageous facilities for acquiring exact information. In Smith v. Fletcher, 102 Wash. 218, 173 Pac. 19, 636, it is said that—

> "Where facts are peculiarly within the knowledge of the vendor and difficult of ascertainment by the vendee, the vendee, who relies on the vendor's word, is entitled to rescind for misrepresentation as to material facts, although he may have inspected the land and made some investigation of the subject matter of the representations."

See, also, Rodee v. Seaman, supra; Hetland v. Bilstad, 140 Iowa, 411, 118 N. W. 422; Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933; Best v. Offield, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; Champneys v. Irwin, 106 Wash. 438, 180 Pac. 405; Williams v. Hanna, 105 Kan. 540, 185 Pac. 17, and Mannel v. Shafer, 135 Wis. 241, 115 N. W. 801. In Dow v. Swain, 125 Cal. 683, 58 Pac. 271, Mr. Justice Temple said:

> "If the seller knows the facts, and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations, I see no reason why relief should not be granted, although an imperfect examination was made. It may have been imperfect because of the representations."

6. Plaintiffs are not estopped to complain of the fraud by reason of that provision in the written contract of sale which declares that the party named therein as vendor, C. I. Whitesell, and his attorney in fact, the Title Insurance & Trust Company, shall not be responsible for any representation not set forth in the contract. Whitesell executed the contract by his attorney in fact, and is referred to in the instrument as the vendor and as the party of the first part. The exact status of the title is not clear, but it seems to be conceded that the association is the real owner, and that Whitesell was acting as its trustee. The clause in the contract upon which appellants rely reads:

> "It is further agreed that neither the party of the first part [Whitesell] nor the Title Insurance & Trust Company shall be responsible or liable for any inducement, promise, *representation*, agreement, condition, or stipulation not set forth herein." (Italics ours.)

By reason of the presence of this clause it is claimed that plaintiffs waived the fraud.

[10] This provision of the contract—even if we assume that, if valid, it could redound to the benefit of the association—was not a waiver of plaintiffs' right to maintain the action. The fraud which was the inducing cause of the execution of the contract renders the whole instrument vulnerable—the clause in question as well as all the other provisions. Watson v. Duarte (Cal. App.) 215 Pac. 1039; American National Bank v. Sommerville (Cal. Sup.) 216 Pac. 376.

> "False and fraudulent representations made by one party to a contract, by which the other party is induced to enter into the contract, render it voidable, at the election of the defrauded party, and a stipulation in such a contract to the effect that the false and fraudulent representations by which the one party induced the other to enter into it shall not affect its validity is itself of no validity. No one can be estopped by anything contained in an instrument which instrument was itself obtained

from him by fraud and deceit." Hofflin v. Moss, 67 Fed. 440, 444, 14 C. C. A. 459.

The chain cannot be stronger than its weakest link. The clause which it is claimed estops plaintiffs to complain of the fraud cannot be made to survive the rest of the transaction as a shield and protection to defendants, whose false representations were the efficient and inducing cause of the contract.

> "Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing." Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458.

Appellants have cited Blackstad Mercantile Co. v. Porter & Co. (Tex. Civ. App.) 158 S. W. 216, as a case in point. There it was held that a provision in a written contract of sale that no statement by the seller's agent should be considered a part of the agreement, unless written into the contract, bound the buyer, so that promises by the seller's agent, not made a part of the contract, did not bind the seller. But that would be true, even in the absence of any such special provision in the contract. Civ. Code, § 1625. In the present case the party to whom the statements were made is not seeking relief upon the theory that the representations were a part of the agreement. Here the fraudulent misrepresentations which constistuted the inducing cause influencing plaintiffs to enter into the contract were collateral to and not a part of the agreement.

[11] 7. The jury was warranted in finding that the false representations continued to influence the minds of plaintiffs after they had agreed to purchase the east half of the section and until their execution of the final contract. It was not incumbent upon plaintiffs to show by direct and positive evidence the continuing effect of the fraudulent representations as the inducing cause of the finally executed contract.

> "If a false statement was intended to be relied upon as an inducement to a given transaction which takes place within a reasonable time afterwards, it may well have a continuing operation on plaintiff's mind, and in the absence of proof to the contrary it cannot be said as a matter of law that he did not continue to rely on the statement." 26 C. J. p. 1165, § 76.

We may repeat, in passing, that the fraud was not discovered by plaintiffs until some time after the execution of the last contract.

[12] 8. The court did not err in refusing to strike out the evidence of those representations which appellants claim were not actionable. In Haven v. Neal, 43 Minn. 315, 45 N. W. 612, it is said that, when representations which are matter of opinion and not of fact "are made in connection with others, which are material as tending to establish the plaintiff's case, they should not be ruled out, but the entire statement should be received and considered together." See, also, Anderson v. Heasley, 95 Kan. 572, 148 Pac. 738.

[13] 9. The court erred in admitting evidence of certain preliminary documents preceding the signing of the instrument which plaintiffs claim was the corrected and final contract for the purchase of the entire section. The answer admitted the contract as pleaded in the complaint, except that it denied that the deferred installments were to be paid on July 1st of each year, and alleged that they were payable on the 28th of March of each year until fully paid. A written contract for the sale of the entire section, signed by all of the parties, was produced at the trial. It had been in the custody of the association. The instrument showed that a line had been drawn through the words and figures "March 18," and that written over the canceled words and figures were the words and figures "July 1st." The trial of the case took place in the month of May, 1921. Respondents, assuming that Hines v. Brode, 168 Cal. 507, 143 Pac. 729, holds that the plaintiff in an action of this character must show that he has complied with all the terms of his contract up to the time of the trial, argue that it was necessary for them to establish the payment by them of any installment of the purchase price which fell due prior to the trial. Upon this false premise it is further argued by respondents that, since none of the deferred installments had been paid by them up to the date of the trial, it was incumbent upon them to show that under the terms of the contract as finally executed the first deferred installment was payable in July, 1921, and not in the month of March of that year. There is no merit in the contention. One induced by fraud to enter into a contract for the purchase of real estate may withhold payments after the discovery of the fraud and pending the action for damages. True, the plaintiff in such an action must be willing and able to pay, if and when he shall become liable therefor (Hines v. Brode, supra); but the fraud suspends liability to make payments accruing after discovery of the fraud and pending the action. Payments may be withheld to recoup such damages as may be recovered. Pembrook v. Houston, 41 Cal. App. 54, 181 Pac. 828. See, also, Webb v. Emerson, etc., Co. (Tex. Civ. App.) 227 S. W. 499, and cases there cited. In Hullinger v. Big Sespe Oil Co., 50 Cal. App. 10, 194 Pac. 742, the Supreme Court, in denying a petition to have the cause heard by it after judgment of the

District Court of Appeal, said that it did not approve that part of the opinion of the latter court which declares that it is essential for the plaintiff in an action for damages on the contract to allege and prove his willingness and ability to perform the contract according to its terms.

Moreover, the preliminary documents, though tending to show why the parties signed the instrument which plaintiffs claim was the final and accepted contract, do not prove or tend to prove its due execution. If the time when the first deferred payment fell due had been material, that is, if it had been necessary to show that the first installment would become due subsequent to the trial of the action, i. e., in July, and not in March, that fact could have been established by evidence that the changes in the final instrument were made before the Title Insurance & Trust Company signed it for and in the name of its principal, C. I. Whitesell, and that the signing of the instrument was followed or accompanied by delivery as the remaining essential to due execution. But evidence which merely showed why it was that the parties intended to enter into such a contract as is evidenced by the instrument last to be signed by them did not tend to establish that instrument, in its corrected form, as the finally executed contract.

[14] Nor can we say that the improper admission of this immaterial evidence did not injure defendants. The circumstances were such that the evidence may have created a suspicion in the minds of the jurors that the officers of the association were fraudulently seeking to impose upon plaintiffs a contract other than the one upon which the parties had agreed.

[15] 10. The letter of December 29, 1920, from the association's secretary to plaintiff, was improperly admitted in evidence. Respondents claim that this letter was admissible in order to show an acceptance by the association of what plaintiffs claim was the finally executed contract. There is nothing to warrant the inference that by his allusion to the "contract" the writer of the letter intended that the reference should be to the instrument last signed by the parties. The reference may just as well have been to the next preceding written instrument—the instrument which provided for the payment of the installments in the month of March. Moreover, no foundation was laid for the introduction of the letter by showing authority in the secretary to say which one of the instruments was accepted by his principal as its final contract with plaintiffs.

[16] 11. Another error, and one which we believe must have seriously prejudiced defendants' case in the minds of the jurors, was the admission of the testimony of neighboring farmers as to the meager crops raised by them on their lands. Evidence of this kind, injecting collateral issues into a case, should be received with caution, and then only when it is obvious to the court, from the similarity of conditions, that it affords a safe and reliable standard of comparison. Converse v. Ferguson, 166 Cal. 1, 134 Pac. 977; Fairbanks, Morse & Co. v. Zimmerman, 30 Cal. App. 81, 157 Pac. 509; People v. Wagner, 29 Cal. App. 363, 368, 155 Pac. 649; Patrick v. Howard, 47 Mich. 40, 10 N. W. 71; Wigmore on Evidence, vol. 1, pp. 522, 523. The results which these witnesses obtained from the farming of their lands could afford no logical basis for the inference that better results could not be obtained from the proper farming of section 13, unless it were shown that the soil of section 13 and the soils of these nearby lands were substantially alike in texture, structure, chemical content, and composition. Some of the witnesses in the case testified that the lands in that vicinity, as well as those in the Imperial Valley generally, are very "spotted," and that no two pieces are alike. Before the crops raised by these neighboring farmers on their lands could be taken as a safe criterion whereby to judge the character of the soil on section 13 it would be necessary to show, in addition to similarities of soil texture and chemical content, that the lands were leveled in a similar manner; that they were brought to the same pitch or fall so as to be similarly affected by the artificial irrigation practiced in that desert region; that section 13 and these other lands had been prepared for crops by the same kind and degree of cultivation and treatment, exhibiting the same methods of husbandry; that the crops were planted at the same seasons and under the same weather conditions, and were irrigated in practically the same manner and for the same periods of time. These are some of the essential elements of similarity which it would be necessary to show before the court could properly receive the evidence of these neighboring farmers as to the results obtained by them from the farming of their lands. Unless these elements of similarity exist, there is no just or fair standard of comparison. No attempt was made to show such similarity of conditions, notwithstanding the burden rested upon plaintiffs to make a satisfactory showing thereof. 22 C. J. p. 753.

Respondents seek to justify the admission of this evidence upon the theory that it tended to establish the falsity of a representation in the folder as to what "other farmers are doing"—referring to a statement in the folder where in the association speaks in glowing terms of the successes achieved by other farmers in the district. But respondents' right of recovery must be based upon representations respecting the character of the particular parcel of land which they purchased. They cannot recover for the falsity of representations which affect other lands only. Moreover, evidence of what could or could not be done with lands in the immediate vicinity of section 13 does not tend to disprove the very general statements in the folder wherein the association speaks in ing.

[17] We can readily see how the admission of this improper evidence must have been prejudicial to appellants in a substantial measure. Without doubt it must have been considered by the jury, and must have had some weight with them in their determination of the value of the land sold to plaintiffs; and thus it must have had a tendency to enhance the jury's award of damages. This is so for the reason that in cases of this kind the measure of damages ordinarily is the difference between the actual value of the property sold and the value which it would have had if it had been as represented. Hines v. Brode, supra. It follows, therefore, that, the value which the property would have had if the representations were true being determined, the amount of damages awarded to the party complaining of the deceit will decrease or increase pari passu with the rise or fall of the property's actual value as determined by the jury. That is to say, other things being equal, the lower the actual value the greater the difference between it and the value which the land would have had if it had been as represented. The testimony as to the results obtained from the farming of neighboring lands must have had a strong tendency to depreciate, in the estimation of the jury, the actual value of the land in section 13. To the extent that it did so, this improperly admitted evidence must have tended to increase the amount of the verdict. Without doubt, therefore, it was prejudicial to appellants' case; and, if there were no other error, the improper admission of this testimony would alone necessitate a reversal of the judgment and a retrial of the action.

12. We do not think plaintiff's instruction No. 2 is objectionable upon the score that it fails to single out the false representations that were material and separate them from those which appellants claim were but expressions of opinion and immaterial. For reasons already stated we are of the opinion that each of the representations specifically referred to in the instruction was material and actionable. And, even if one of them were not material, we probably should hesitate to reverse the judgment for that reason alone. See Anderson v. Heasley, supra.

[18] 13. By plaintiffs' instruction No. 4 the court charged the jury that it is not necessary to prove by direct or positive evidence the intent to deceive, but that it is sufficient to prove facts from which such intent may be drawn—that the intent to deceive may be inferred from circumstances in evidence. This is a correct statement of the law. The intention of the parties cannot often be proved by direct testimony, but may be established by inference from the acts of the parties. 27 C. J. p. 70; Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522.

[19] 14. By the last clause of this same instruction the jury was advised that one has a right to rely upon the representations or statements of another in purchasing property when the other is held forth as an expert. It is claimed by appellants that a buyer is warranted in relying upon the representations of a vendor who has expert knowledge of the subject-matter of the sale, when, and only when, there has arisen a legal fiduciary relationship between the parties. The contention lacks merit. If the vendor holds himself out as an expert possessing superior knowledge of the subject-matter of the sale, and the vendee does not possess such expert knowledge, and if the latter, during the preliminary negotiations, expressly reposes confidence in the vendor's supposed superior knowledge as an expert, and gives the latter to understand that he is going to rely upon the truth of his representations, he may safely rely thereon, irrespective of whether there is or is not a legal fiduciary relation between the two; and the confidence thus reposed by the vendee must not be abused. Grant v. Ledwidge, supra.

[20, 21] 15. By plaintiffs' instruction No. 9 the jury was advised, and properly advised, that the measure of damages in cases of this character is the difference between the actual value of the property and the value which it would have possessed had it been as represented. But in this same instruction the court gravely erred, so far as the rights of the association are concerned, when it told the jurors that, if they found for plaintiffs, they should not deduct from the total amount of damages any unpaid portion of the purchase price, but should assess the damages irrespective of any unpaid balance.

> "* * * In case of an executory contract, from the award which the jury may make because of the fraud, must be deducted the unpaid part of the purchase price or the value of any other consideration. *And to this effect the jury should be instructed.*" Hines v. Brode, supra. (Italics ours.)

Where, as in this case, the amount of the purchase price remaining unpaid exceeds the sum awarded as damages, it would be unjust to the vendor if he were compelled to pay the full amount of damages and thereafter be required to resort to a separate action for the recovery of the unpaid portion of the purchase price in the event that his vendee, after the judgment for damages had been satisfied, should be unable or unwilling to carry out the terms of his contract.

[22, 23] 16. Complaint is made of the modification of an instruction requested by appellants—defendants' instruction No. 22.

The instruction, as prepared by defendants, advised the jury that plaintiffs cannot recover if they had the means of investigating the facts and did not do so, or if the circumstances attending the transaction were such as to put plaintiffs upon inquiry and they did not make any inquiry. The court gave the instruction as requested, after modifying it by adding thereto the following:

> "Unless you further find that plaintiffs were induced to refrain from investigation by acts and statements of the defendants."

Considered as an abstract proposition, this modification is subject to the criticism that it fails to describe the nature of the acts or statements which will excuse inquiry or examination, where inquiry or examination would otherwise be essential. It is not every act or statement of a vendor which will excuse a vendee's neglect to make an examination or investigation where the parties are dealing at arm's length and with equal means of knowing the truth, and the representation is as to the value of the land, its condition, quality, or adaptability for particular uses. Here, if the allegations of the complaint and the testimony of plaintiff and his witnesses be true, plaintiff and defendants were not standing upon an equal plane of vantage, with equal means of knowing the truth, and the representations were made under such circumstances as to disarm caution and lull plaintiff's suspicions. But, if the jury believed otherwise, that is, if it believed that plaintiff and the defendants were in fact standing upon an equal footing, and did have equal means of knowing the truth, and that the representations were not made under such circumstances as to disarm the vigilant and lull his suspicions, then, and in that case, it would not be true that an act or statement of defendants would excuse plaintiff's failure to make an examination or investigation, irrespective of whether such act or statement was or was not fraudulent, i. e., done or said with the fraudulent purpose of inducing plaintiff to forego making an examination. The rule is that, where the parties stand upon an equal footing, and have equal means of knowing the truth, and the vendee's suspicions are not lulled by the nature of the representation, an examination by the buyer will be excused only when he is fraudulently induced to forego examination, or where trick or artifice has prevented him from doing so. Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Gustafson v. Rustemeyer, supra. See, also, 26 C. J. p. 1157; 12 R. C. L. p. 384; and Koch v. Rhodes, supra.

[24] 17. Objection is made to plaintiff's instruction No. 6, whereby the court advised the jurors that they might "consider whether plaintiff was put upon inquiry, or whether he was lulled into a reliance upon any representations made at the time of the sale." It is claimed that by the use of the word "lulled" the instruction implies the use of improper means to prevent inquiry and an examination by plaintiff. But under the circumstances of this case, as testified to by plaintiff and his witnesses, one of the consequences of Clark's representations was to disarm plaintiff's vigilance and to lull his suspicions. See Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496.

[25-27] 18. Appellants justly complain of the court's refusal to instruct the jury that in determining the fair market value of section 13 they should not consider whether land of similar character could have been purchased at a lower price in other localities. The prices at which other lands of like quality and adaptability and similarly situated could be purchased do not constitute a proper standard for ascertaining the actual value of the land in question. Reclamation District v. Inglin, 31 Cal. App. 495, 160 Pac. 1098. The owners of such other lands, through force of circumstances beyond their control, might be willing to sell their lands at prices below their actual value, or they might be willing to make such sales through improvidence or want of good judgment. That the jury, in arriving at the actual value of the land, sold to plaintiffs for the purpose of determining the amount of damages which should be awarded, was probably influenced by this improperly admitted testimony as to the prices at which other lands could be bought is indicated by the fact that the jurors themselves, or some of them, separately asked several witnesses about the prices of other lands. This testimony, it is true, was brought out on cross-examination, but that fact did not excuse the court's refusal to give the requested instruction or an instruction covering the same subject. As cross-examination, the testimony as to the prices at which other similar lands could be bought was proper for the purpose of testing the witnesses' knowledge and impeaching their opinions, but not for the purpose of fixing the value of the land; and the jury should have been so advised particularly in view of defendants' requested instruction.

The judgment is reversed, and the cause is remanded.

We concur: WORKS, J.; CRAIG, J.

66 Cal. App. 77

SAN FRANCISCO-OAKLAND TERMINAL RYS. v. ALAMEDA COUNTY et al.

(Civ. 4392.)

(District Court of Appeal, First District, Division 2, California. March 4, 1924. Hearing Denied by Supreme Court May 1, 1924.)

1. Municipal corporations 🔑646 — "Street" relates to public way in municipality.

Strictly speaking the word "street" relates to a public way within a municipality only.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Street.]

2. Highways 🔑18—Public way generally referred to as "highway" or "road."

A public way over unincorporated territory of a county is generally referred to as a "highway" or "road."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Highway; Road.]

3. Highways 🔑80—Fee to land usually rests in adjoining property owner.

The fee to the land in a highway generally rests in the adjoining property owner, and the public holds the easement for the use.

4. Highways 🔑80 — Municipal corporations 🔑658—Municipality merely trustee of state with duty of maintaining highway.

Where adjoining owners own the fee in lands used as highways or streets, the easement lies in the people of the state, and the county or the city is merely the agent or trustee of the state, committed to the duty of maintaining the highway for the use of the public.

5. Appeal and error 🔑909(1)—Assumed in support of judgment that franchises cover right to use public highway in which county did not own fee.

In the absence of any showing to the contrary, it will be assumed in support of a judgment that franchises of a street railway in unincorporated territory covered the right to use public highways in which the county did not own the fee, but which were dedicated to public use in the ordinary and usual way.

6. Municipal corporations 🔑647—Jurisdiction over highways transferred by annexation of territory.

On annexation of territory to a city under St. 1889, p. 358, entire jurisdiction and control over highways therein for the benefit of the state was thenceforth imposed in the city, and jurisdiction of the county in respect thereto ceased.

7. Street railroads 🔑18—Nature of franchise.

The right which the grantee of a street railroad franchise obtains is more than the mere right to operate a railroad; the most valuable part of the franchise being the right to lay tracks and operate its road on a street, which carries the obligation to serve the public in the use of the street in furtherance of the original use.

8. Street railroads 🔑24(4)—Charge exacted under franchise rental for use of highway.

The gross percentage charge exacted under a street railway franchise granted by county is in the nature of a toll or rental for use of highway.

9. Constitutional law 🔑134—Municipal corporations 🔑36(1)—City held entitled to percentages on gross receipts of street railway in territory annexed, and no question of impairment of contract arises.

On annexation of territory by the city of Oakland under St. 1889, p. 358, it became entitled to annual payment of percentages upon gross receipts of operation of street railways located within the annexed territory and operated by virtue of franchises granted by the board of supervisors of Alameda county, or in accordance with the terms of the Broughton Act, granting the right to use streets "within unincorporated territory in the county"; the gross percentage charge being in the nature of a toll or rental for the use of the streets, and there being no question of impairment of the obligation of contracts.

10. Franchises 🔑2—Deemed granted in contemplation of existing statutes.

Franchises granted after enactment of a statute must be deemed to have been made in contemplation of its terms.

11. Statutes 🔑219—Legislature not bound by interpretation placed upon acts by officials.

Legislature is not bound by an interpretation placed upon its acts by the officials of one county without, at least, some showing that such interpretation was brought to its notice either directly or indirectly.

Appeal from Superior Court, Alameda County; A. B. McKenzie, Judge.

Action by the San Francisco-Oakland Terminal Railways, in interpleader, against the County of Alameda and the City of Oakland. From an adverse judgment, the first-named defendant appeals. Affirmed.

Ezra W. Decoto, Dist. Atty., and Frank Mitchell, Jr., Ralph E. Hoyt, and Carlisle C. Crosby, Deputy Dist. Attys., all of Oakland, for appellant.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for respondent City of Oakland.

Morrison, Dunne & Brobeck, of San Francisco, for respondent San Francisco-Oakland Terminal Rys.

NOURSE, J. The San Francisco-Oakland Terminal Railways commenced this action in interpleader to require the county of Alameda and the city of Oakland to litigate between themselves the question as to which one was entitled to the annual payment of percentages upon the gross receipts of the operation of street railways over certain streets now located within the municipal boundaries of the city of Oakland. The railways are operated over these streets by virtue of four franchises granted to the predecessors of the plaintiff railroad corporation by the board of supervisors of Alameda county. The first franchise was granted by ordinance of the supervisors adopted July 10, 1893. The other three franchises were granted in accordance with the terms of the Broughton Act (Stats. 1905, p. 777) in May, 1907, December, 1907, and May, 1909, respectively. All four franchises granted the right to construct and operate street car lines over public highways within unincorporated territory in the county of Alameda. All were to run for a period of 50 years each, and all called for the payment to the county of Alameda of a percentage upon the gross receipts derived from the operation of the roads. On December 8, 1909, after all the franchises were in full operation, all that portion of the territory of the county of Alameda which was covered by the franchises was annexed to and became a part of the municipal corporation of the city of Oakland in accordance with the annexation statute of 1889. Stats. 1889, p. 358. Following the annexation proceedings and at all times thereafter until the year 1921 all percentages collectible under the franchises were paid to the city of Oakland. Prior to June 30, 1921, the county of Alameda demanded that all payments becoming due under the franchises on June 30, 1921, be paid to the county instead of the city of Oakland. Thereupon the San Francisco-Oakland Terminal Railways, the holder of the franchises, commenced this suit in interpleader to determine to whom said payments should be made. The city of Oakland and the county of Alameda joined issue therein, and judgment was rendered in favor of the city of Oakland, from which judgment the county of Alameda prosecutes this appeal.

The appellant insists that, inasmuch as each franchise is a contract which provided for the payment of the percentages to the county as an original contractor, the right to receive such payment is a property right, and that the obligation under the contract cannot be impaired by the Legislature through the annexation proceedings. On the other hand, the respondent argues that the percentage is merely a toll or charge in the nature of a rental exacted as a consideration for the privilege of using the highways, and that the right to collect the percentage lies in the public agency upon which is imposed the burden of supervision and control of the highways. The appellant insists that the annexation of the unincorporated territory to the city of Oakland did not work a transfer of the property of the county in the absence of express legislative declaration. The respondent insists that the legislative intention to do this must be inferred from the general statutes which provide for the supervision and control by the city of the public highways which lie within the territory annexed and the consequent denial of such supervision and control on the part of the county.

Appellant relies upon the rule that, where two political corporations change their boundaries, in the absence of any statute on the subject, the old corporation retains all the property rights and privileges which it had, except as to such property as is physically situated within the territory going to the new corporation. For the purposes of this opinion we need not quarrel with the rule as stated, but there are so many exceptions to it that we cannot see its application here. It is sufficient to say that it is a matter of intention and that, generally, each case must stand upon its own facts as showing the intention of the parties. If, for instance, a county owns and operates a public hospital in territory which is thereafter annexed to a municipal corporation, it would not be reasonable to say that title to the hospital passed to the municipality. It has been said that what property the county holds it holds in trust for the benefit of the state. Reclamation District v. Superior Court, 171 Cal. 672, 679, 154 Pac. 845. The state may therefore provide for such disposition of its property as will best suit the public welfare. It becomes necessary, therefore, to determine what, if any, property rights are involved in this proceeding.

[1-5] The case is presented on the theory that the franchises covered the right to operate street car lines "over certain streets within unincorporated territory of the county of Alameda." Strictly speaking, the word "street" relates to a public way within a municipality only. A public way over unincorporated territory of a county is generally referred to as a highway or road. From the transcript it appears that in the franchises the words "public roads," "highways," and "routes" are used. A public road or highway through unincorporated territory is generally a public way dedicated to the public use but not owned as such by the county. Generally speaking, the same applies to a public street within a municipality. The exceptions in both instances are where highways or streets are obtained in fee by the county or the city through public or private grant. In most cases the fee to the land rests in the adjoining property owner and the public holds an easement for the use. Where an easement only is acquired, the right lies in the people of the state, and the county or the city is merely the agent or trustee of the state committed to the duty of maintaining the highway for the use of the public. In the absence of any showing to the contrary, we may assume, in support of the judgment, that these franchises covered the right to use public highways in which

the county did not own the fee, but which were dedicated to public use in the ordinary and usual way.

[6] Thus, in so far as it concerns the public highways over which the franchises were granted, the county had no property to lose, and these highways became public streets of the city of Oakland upon the annexation of the territory where they were located, at least when so declared to be by the city authorities. In any event, the entire jurisdiction and control over such highways for the benefit of the state was thenceforth imposed in the city, and all jurisdiction of the county in respect thereto ceased with the annexation.

[7] The right which the grantee of a street railroad franchise obtains is more than the mere right to operate a railroad. As said by Mr. Justice Shaw in San Francisco, etc., Ry. Co. v. Scott, 142 Cal. 222, 228, 75 Pac. 575, 581:

> "The right which a street railroad obtains from the city to lay its track and operate its road on a street, on the contrary, is the most valuable part of its franchise. It carries the obligation to serve the public in the use of the street, and is in furtherance of the original use."

The state has been zealous to insure that this obligation to serve the public in the use of the street shall be protected and enforced by the public agency having control over the streets. All these franchises were conditioned upon this power of supervision and control, and, as the highways covered by these franchises are the property of the state, the state is interested in enforcing the obligations of service to the public under the franchises.

[8, 9] The gross percentage charge exacted under the franchises is in the nature of a toll or rental for the use of the streets covered by the franchises. In Tulare County v. City of Dinuba, 188 Cal. 664, 670, 206 Pac. 983, 985, the Supreme Court say:

> "The gross receipt charge under the Broughton Act is neither a tax nor a license, but is obviously a toll or charge, which the holder of the franchise undertakes to pay as part of the consideration, for the privilege of using the avenues and highways occupied by the public utility."

Primarily this charge would go to the state as the owner of the highway. But the state has chosen to award it to the public agency upon which is imposed the burden of enforcing the obligations under the franchise.

The act of 1889 (Stats. 1889, p. 358) provides that when the annexation is complete the annexed territory shall be "to all intents and purposes a part of such municipal corporation." This language is broad enough to support the conclusion that the supervision and control of all public highways within the annexed territory passes from the county to the municipality. As the percentage upon the gross receipts collected under the franchises is a fee for the supervision and control of the street railroads operating on the public streets, it is reasonable to assume that the state intended that this percentage should be paid to its new agency.

[10] The question of the impairment of the obligation of a contract is not involved. The franchises were all granted after the enactment of the annexation statute and must be deemed to have been made in contemplation of its terms. The state, through the annexation statute, has transferred the supervision and control of the streets from the county to the city. This transfer carries with it the right to collect charges for the use of the streets. An assignment of the rights of the grantor has thus been effected by operation of law. This result is wholly consistent with the annexation statute in contemplation of which the contracts were executed.

It is also argued that the county has lost whatever claim it might assert to the percentages through the acquiescence of its officials in the collection of payments by the city over a period of eleven years. We do not favor the doctrine of acquiescence, or estoppel, as applied to a situation of this kind. There is much respectable authority holding that public officials and public agencies cannot alienate public rights by mere failure to assert such rights in behalf of the public which they represent.

[11] It is also said that the doctrine of departmental construction should be applied and People v. Town of Antioch, 17 Cal. App. 751, 757, 121 Pac. 945, is cited. But, inasmuch as the question before us demands an interpretation of the legislative intention in the enactment of the statute involved, it would be unreasonable to hold that the Legislature is bound by the interpretation placed upon its acts by the officials of one county without, at least, some showing that such interpretation was brought to the notice of the Legislature either directly or indirectly.

We conclude that when the franchises were granted the county was merely acting as the agent of the state; that the gross receipts charge was exacted as a toll for the use of the state's public highways; that when the supervision and control of these highways was transferred to a new state agency, it carried the benefits as well as the burdens, including the right to collect and retain these charges. Accordingly, the county has no enforceable property right growing out of the franchises.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

66 Cal. App. 69

JOSLIN v. SHAFFER et al. (Civ. 2693.)

(District Court of Appeal, Third District, California. March 3, 1924.)

1. Taxation 🔑439—Failure to attach affidavit to assessment book held cured by statute.

St. 1915, p. 23, cured omission of affidavit, required by Pol. Code, § 3732, to be attached by county auditor to assessment book of 1914 to validate tax sale.

2. Taxation 🔑658(2)—Tax sale without notice held not made "at proper time" nor "as prescribed by law."

Sale of unredeemed property under Pol. Code, § 3771, at time of which legal notice was not given to owner, is not made "at a proper time" nor "as prescribed by law," of which tax deed is made prima facie evidence by Pol. Code, § 3786, subd. 5.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proper Time; First Series, Prescribed by Law.]

3. Taxation 🔑788(5)—Presumption from tax deed of publication of notice of sale not conclusive.

Presumption of publication of notice, if included in presumption, under Pol. Code, § 3786, subd. 5, from tax deed, that property was sold as prescribed by law at proper time and place, is not conclusive.

4. Taxation 🔑788(5)—Not lightly presumed that Legislature intended to make tax deed conclusive evidence of notice to owner.

It is not to be lightly presumed that Legislature intended to make tax deed conclusive evidence, contrary to fact, that owner was given notice of sale.

5. Taxation 🔑814(1)—Title can be quieted against claimant under void tax deed only on condition that owner repay taxes, etc., paid at or on faith of sale.

Title to property can be quieted, as against claimant under void tax deed, only on condition that owner repay taxes, penalties, interest, and costs, paid at sale or afterwards, on faith of it, with legal interest from time of payment, less rents received, if purchaser has been in possession.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Charles T. Joslin against H. S. Shaffer and others. Judgment for defendants, and plaintiff appeals. Reversed.

John F. Poole, of Los Angeles, and H. E. Gleason, of Madera, for appellant.

C. W. Croop, of Merced, for respondents.

FINCH, P. J. This is an action to quiet title to the land described in the complaint. Judgment was entered quieting defendant H. S. Shaffer's title to the land, and the plaintiff has appealed.

Shaffer claims title under a sale of the land for delinquent taxes. "By operation of law and the declaration of the tax collector," the land was sold to the state in the year 1915 for delinquent taxes of the year 1914. The land remaining unredeemed, the tax collector, in the year 1920, pursuant to the provisions of sections 3764 to 3771 of the Political Code, included the land in the delinquent tax list of that year and sold the same to Shaffer, he being the highest bidder therefor. The tax collector thereupon executed a deed to Shaffer.

[1] Appellant contends that the assessment of 1914 is void because of the failure of the county auditor to attach to the assessment book of that year the affidavit required by section 3732 of the Political Code. It has been held that such affidavit is essential to the validity of a sale of property for delinquent taxes. Miller v. County of Kern, 137 Cal. 516, 70 Pac. 549; Moyer v. Wilson, 166 Cal. 261, 135 Pac. 1125; Brady v. Davis, 168 Cal. 259, 142 Pac. 45. The Legislature in 1915, however, passed an act validating all assessments theretofore made which were defective by reason of the omission to attach the affidavit required by section 3732. Stats. 1915, p. 23. Since the Legislature in the first instance might have dispensed with the requirement of such affidavit, no reason appears why the validating act is not effective to cure the defect of its omission.

[2] It is urged that the sale of the land to Shaffer is void because legal notice thereof was not given. In addition to notice by publication, section 3771 provided, at the time of the sale in question, that "when any property is to be sold at public auction as provided in this section, within five days after the first publication of said delinquent list the tax collector shall mail a copy of said list or publication, postage thereon prepaid and registered, to the party to whom the land was last assessed next before such sale, at his last known post office address." Stats. 1919, p. 142. In this case the sale was noticed for June 28, 1920, and publication was made on the 4th, 11th, 18th, and 25th of that month. On the first day of publication the tax collector duly mailed a copy of the delinquent list, postage thereon prepaid and registered, to the person to whom the land was last assessed, at his last-known post office address, which was Los Angeles. The envelope in which the list was mailed was admitted in evidence, and from it and the testimony of the tax collector it appears, without contradiction, that the envelope contained a direction to return the same to the tax collector if not delivered in ten days and that it was mailed back to him on June 17, 1920. Appellant contends that such service by mail was not a compliance with the statute by reason of the return of the notice before the day of the sale.

Section 3771 provides that property upon which taxes have become delinquent "shall, by operation of law and the declaration of the tax collector, be sold to the state." Section 3780 provides:

> "A redemption of the property sold may be made by the owner, or any party in interest, within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state, in the manner provided by section three thousand eight hundred and seventeen."

Sections 3764, 3771 and 3897 provide the procedure by which the owner's right of redemption may be foreclosed. Section 3764 provides that the delinquent tax list shall be so arranged that the publication thereof "shall designate in some particular manner the property contained in said list which was sold to the state five years previous under the provisions of section three thousand seven hundred and seventy-one of this Code" and has not been redeemed. Section 3771 provides that, at the time fixed for the sale of delinquent property, any property contained in the advertised list "which has not been redeemed from the sale made to the state five years previously, shall be sold by the tax collector at public auction to the highest bidder for cash. * * * After such bid has been made and accepted the right of redemption shall cease [with exceptions not applicable here]. * * * If no sale is had under the provisions of this paragraph, then said property shall be deeded to the state." If no sale is had and the property is deeded to the state, the delinquent owner's right of redemption continues until the property is sold by the state under the provisions of section 3897. Pol. Code, §§ 3780, 3817; Jordan v. Beale, 172 Cal. 226, 155 Pac. 990. Section 3897 provides for the publication of notice of sale for at least three successive weeks and, in addition thereto, that "it shall be the duty of the tax collector to mail within five days after the publication of said notice of sale a copy of said notice, postage thereon prepaid and registered, to the party to whom the land was last assessed next before the sale, at his last-known post office address." In Smith v. Furlong, 160 Cal. 522, 117 Pac. 527, and Healton v. Morrison, 162 Cal. 668, 124 Pac. 240, it was held that, in a sale by the state under the provisions of section 3897, publication and mailing of notice "were both jurisdictional prerequisites to a valid sale by the state, and that a failure to give the latter notice when the condition existed requiring it, rendered the sale and the deed thereunder void." In the latter case the notice by mail was returned to the tax collector, pursuant to directions on the envelope, prior to the sale, without having been delivered. At page 674 (124 Pac. 242) it is said:

> "In view of the conclusion reached, that notice by mail was not given under the section because it was not sent in time, it is unnecessary to discuss what would be the effect of this procedure by the tax collector when, by reason of the indorsement on the registered letter, it is returned to him many days prior to the date of sale and during which it might have been delivered to the person to whom it is addressed. * * * Certainly there is no warrant whatever for placing a notification thereon calling for such return at any time earlier than the date set for the sale. The party to whom the letter is addressed is entitled to all the advantages for its delivery which the postal system, domestic or foreign, affords, and the tax collector has no right to do anything which may prevent him from having them."

The soundness of the views so expressed is so obvious that further discussion of the matter would be superfluous.

Section 3898 provides that a deed from the state for property sold under the preceding section "shall be prima facie evidence of all the facts recited therein." Respondent contends that the deed here in question is conclusive evidence that legal notice was given of the sale by the tax collector and that therefore, the cases arising under sections 3897 and 3898 are not in point. Relative to a deed executed pursuant to a sale to the state or to an individual under the provisions of section 3771, section 3786 provides:

> "Such deed, duly acknowledged or proved, is primary evidence that: 1. The property was assessed as required by law; 2. The property was equalized as required by law; 3. The taxes were levied in accordance with law; 4. The taxes were not paid; 5. At a proper time and place the property was sold as prescribed by law, and by the proper officer; 6. The property was not redeemed; 7. The person who executed the deed was the proper officer; 8. Where the real estate was sold to pay a poll tax or taxes on personal property, that the real estate belonged to the person liable to pay the tax."

Section 3787 provides:

> "Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed."

In Bernhard v. Wall, 184 Cal. 612, 622, 194 Pac. 1040, 1045, where the notice of sale was first published more than 28 days prior to the day fixed therein for the delinquent sale, it is said that—

> "The publication was not sufficient to authorize the sale and that the deed based thereon was void. Section 3787, which makes the tax deed 'conclusive evidence of the regularity of all other proceedings,' from the assessment down to the deed, does not apply to or cure this defect. Sections 3786 and 3787 must be read and construed together. The phrase 'all other proceedings,' in section 3787, refers back to section 3786, and, therefore, includes only such proceedings as are not included in section 3786. The presumption as to the proceeding which fixes the time for the sale is prescribed by section 3786. It declares that the tax deed

is 'primary,' meaning prima facie, evidence of the fact that the property was sold 'at a proper time.' * * * The tax deeds here in question were, therefore, only prima facie evidence that the tax sales on which they were founded were made 'at a proper time.'" A sale made at a time of which legal notice was not given cannot be held to have been made "at a proper time."

By subdivision 5 of section 3786 the tax deed is made prima facie evidence that "the property was sold as prescribed by law." The law specifically prescribes the notice of sale which must be given, and a sale without such notice is certainly not made "as prescribed by law." In Hayes v. Ducasse, 119 Cal. 682, 685, 52 Pac. 121, it is said:

> "Defendants urge further that the deed fails to show that publication was made of the notice of sale required by section 3765 of the Political Code, and that the omission was fatal. * * * Since * * * the deed contains nothing to show that notice was not published, the due publication thereof is included in the presumption (which flows from the presence of the essential recitals in the deed) that at a proper time and place the property was sold as prescribed by law. Pol. Code, secs. 3786, 3787. Whether such presumption is disputable or conclusive is not now material."

[3, 4] If publication of notice is included in the presumption that "at a proper time and place the property was sold as prescribed by law," the exact language of subdivision 5, § 3786, then it necessarily follows that such presumption is one of those enumerated in that section and is not conclusive. It is not lightly to be presumed that the Legislature intended to make a tax deed conclusive evidence, contrary to the fact, that the owner was given notice of his last opportunity to save his property. Whether a provision making a tax deed conclusive evidence that such notice was given would be a denial of due process of law has not been considered, because it clearly appears that the Legislature did not intend to give such deed that effect.

[5] From what has been said it follows that the deed in question is void. Plaintiff's title to the property can be quieted, however, only upon condition that he repay to the purchaser "the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterwards upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession." Holland v. Hotchkiss, 162 Cal. 366, 375, 123 Pac. 258, L. R. A. 1915C, 492. The other grounds urged for a reversal are of minor importance, and it is sufficient to say that they are without merit.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

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66 Cal. App. 53

STATE v. SAN FRANCISCO SAVINGS & LOAN SOC. (Civ. 2676.)

(District Court of Appeal, Third District, California. Feb. 29, 1924.)

1. Courts 🔑91(1), 97(3)—Validity of escheat statute not open to further consideration.

Since both state and United States Supreme Courts have directly passed on escheat statutes (Code Civ. Proc. § 1273, and St. 1915, p. 1106, § 5) and held them valid, question as to their validity is not open to further discussion in the Court of Appeal.

2. Corporations 🔑54—By-law, effective retrospectively, impairing obligation or right, held unreasonable.

Where, by giving by-law retrospective operation, it destroys or impairs existing obligation or substantive right, it will be held unreasonable or in defiance of existing laws.

3. Banks and banking 🔑303—By-law amendment as to interest on accounts ten years dormant held retrospective.

Amendment to by-laws of savings bank, organized under Civ. Code, providing that if for ten years no money had been deposited or withdrawn no interest should be allowed after 10 years had elapsed since last deposit or withdrawal, *held* to apply at once, and not 10 years after its adoption, to accounts already dormant, but, as so construed, retrospective in operation.

4. Banks and banking 🔑300—Bank unauthorized to change by-laws as to interest without consent of owner of dormant accounts.

Savings bank, organized under Civ. Code, §§ 571–583b, which agreed when accounts were opened that dividends, as declared, would be appropriated and credited to depositor's accounts, cannot, after accounts have remained dormant or inactive for a number of years, and after statutory time for escheat to state, without consent of depositor, so change its by-laws as to disallow interest from date of change; bank being exempted from obligation for interest only when deposits earned no interest or accumulated no dividends.

5. Banks and banking 🔑299—Deposit creates relation of debtor and creditor.

Deposit in savings bank, organized under the Civil Code amounts to a loan of use of money to bank in consideration of payment of fixed interest or such sum as deposit, invested by bank, may earn, and creates relation of debtor and creditor.

6. Banks and banking 🔑300—Savings bank may amend by-laws as to interest on notice to depositors.

A savings bank may, on notice to depositors, so amend its by-laws as to reduce rate of interest on deposits or to refuse to continue deposits.

7. Banks and banking 🔑300—Limitation on bank's right to amend by-laws as affecting depositors stated.

By dealing with bank, depositor adopts existing regulations, but, though by-law, at time account is opened, provides for amendment, bank may not so amend by-laws as to materially change the contract without depositor's knowledge.

8. Banks and banking ⚷300—Savings bank cannot terminate or vitiate contract as to unclaimed deposits.

Savings bank, doing bulk of its business on money deposited, could not vitiate or terminate contract with depositors on assumption that depositors, who failed to claim deposits and allowed them to remain inactive for more than 20 years had abandoned accounts and waived rights under contract with bank as to dividends or that notice of change in by-laws disallowing interest on dormant accounts was unnecessary, since, if depositors were dead, right to deposits vested in their heirs, and, in absence of heirs, deposit, under escheat laws, vested in state eventually.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the State against the San Francisco Savings & Loan Society, a corporation (originally sued as the German Savings & Loan Society, a corporation). Judgment for plaintiff, and defendant appeals. Affirmed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the State.

HART, J. The Attorney General of the state of California instituted this action in behalf of the state in pursuance of the provisions of section 1273 of the Code of Civil Procedure, as the same was amended by the Legislature of 1915 (Stats. 1915, p. 107), to have 170 different savings deposits in the defendant bank declared escheated to the state.

The notice required by the section named of the commencement of the action was duly given to the defendants, and the notice to claimants, required to be given by the county clerk by the Bank Act, as amended by the Legislature of 1915 (Stats. 1915, p. 1106), was also given as so prescribed. The state was awarded judgment declaring each of the deposits as escheated to it, and particularly from said judgment and particularly so much thereof as awards interest on each of the accounts from the date of the adoption of a certain amendment to the by-laws of the appellant (to be hereinafter considered) to the time of the rendition of judgment the defendant bank appeals. The case is brought here on the judgment roll alone.

Section 1273 of the Code of Civil Procedure provides, among other things, that, where a deposit of money in a bank made by a depositor has, for a period exceeding 20 years, remained in such bank without being added to or drawn on in any amount, and the depositor has failed to claim the same, and neither the depositor nor any other claimant has filed with the bank any notice of his or her present residence, such deposit, with the accrued interest, shall escheat to the state.

Among the findings are the following:

"That it was agreed between the defendant bank and the defendant depositors when their said accounts were opened that dividends, as declared, would be appropriated and credited to the accounts of the said depositors, and it was further agreed between the defendant depositors and the defendant bank that the defendant depositors would be governed by the by-laws of the bank; that the by-laws of the defendant bank at all times provided that they could be amended;

"That on January 26, 1917, the defendant bank added to its by-laws, in the manner prescribed by law for the amendment of its by-laws, a new provision, to wit: 'If for ten years no money has been deposited on an account nor withdrawn therefrom, no interest shall be allowed on such account after ten years have elapsed since the last deposit or withdrawal was made.'"

[1] At the trial the defendant bank opposed the action on the ground that the escheat statutes of this state were unconstitutional and void. Since the trial of this action, however, both the Supreme Court of the state of California and the Supreme Court of the United States have directly passed upon and decided that our legislation with respect to escheats is not invalid for any of the reasons urged here or for any reason at all. See State v. Security Savings Bank, 186 Cal. 419, 199 Pac. 791; State v. Anglo-London, Paris Nat. Bank, 186 Cal. 746, 200 Pac. 612; Security Savings Bank v. State of California, 263 U. S. 282, 44 Sup. Ct. 109, 68 L. Ed. —. Counsel for the appellant, notwithstanding those decisions, still cling to the position that the escheat statutes of this state sanction the taking of property without due process of law and also deny to the appellant "and certain other citizens and persons within the jurisdiction of said state the equal protection of the laws," and insist that the conclusions reached in the cases cited are erroneous. The cases mentioned set at rest all question as to the constitutionality of our escheat statutes, and it follows that the question of their validity is not now open to further consideration, at least so far as this court is concerned. Indeed, counsel for the appellant do not themselves appear to be serious in pressing the point here. The discussion in their briefs is addressed mainly to the question as to the meaning and the effect of the above-quoted amendment made by the appellant to its by-laws upon the obligation of appellant to pay interest on the savings deposits for the whole period of dormancy on said deposit accounts and to the date that the same were judicially declared escheated to the state.

The amendment in question was, it will be noted, adopted or passed by the board of directors of the appellant on the 26th day of January, 1917, and as to this the general proposition of the appellant is that, after the date of the adoption of the said amendment, the deposit accounts in suit were not, by virtue of the terms of the amendment, to draw or to be credited with interest.

All the deposit accounts concerned in this action had been dormant or inactive for a period far in excess of 20 years prior to the date of the commencement of this action, on the 30th day of July, 1917. It is, in fact, expressly admitted by counsel for the appellant that the amendment in question was adopted long after the accounts herein involved became subject to transfer to the state treasury under the escheat laws.

[2] Much of the controversy in the briefs revolves around the proposition as to whether the amendment in question was or is, as to the accounts in suit, retroactive or prospective in its operation. This controversy arises upon the facts disclosed here by the findings considered in the light of the well-settled rule that where the language of a bylaw of a corporation is such that, by giving it retrospective operation, it would have the effect of destroying or impairing an existing obligation or a substantive right, it will be held to be unreasonable or in defiance of existing laws. See 6 Cal. Jur. p. 717.

[3] The appellant contends that the amendment is prospective in that it applies, not to the accounts as they existed prior to the date of the passage of the amendment, but to the accounts as they existed from and subsequent to said date. The state maintains that the amendment is susceptible only to the construction that it is not to have operative effect until the lapse of 10 years from the date of its adoption.

We do not agree with the Attorney General's construction of the amendment. For its purposes, the amendment divides the dormancy of the accounts into two different periods of time of 10 years each, and, paraphrased in simple language, plainly means this: That interest will be allowed on the accounts for each of the 10 years of their dormancy, but, from and after the expiration of such 10 years of inactivity, interest will not be allowed thereon. If the amendment were valid or enforceable according to its plainly expressed terms, the fact that the bank does not claim or pretend to be authorized by virtue thereof to exercise the right to disallow interest for any period prior to the adoption of the amendment would not, it is obvious, change or alter the retrospective effect of the amendment. The appellant evidently recognized the construction which we ascribe to the amendment in undertaking to exercise what it conceived to be its right under the amendment by confining the exercise of such right to a period beginning with and subsequent to the date of the adoption of the amendment, claiming, as we have shown, that, since the right to disallow interest on the account is so limited or confined, the amendment is made to operate in the future or prospectively.

[4] But, in our opinion, even as construed by the appellant, the amendment, in its terms, is still retrospective in its operation, for it would, in such case, as it would in any view of it, not only operate upon agreements made prior to its adoption, but would by such operation so affect said agreements as to destroy one of the vital rights established thereby when made. Thus we are brought to the consideration of the pivotal point of this appeal, to wit, whether a savings bank, subsequent to its acceptance of savings deposits, upon an agreement to pay the depositors the interest or dividends thereon, may, after such accounts have remained dormant or inactive for a number of years, or, as in this case, after the statutory time has run when the state may proceed to have the same transferred to the state treasury, and without the consent of the depositors, so change its by-laws as to authorize it to disallow interest on such accounts from the date of such change. It is, of course, the contention of the appellant that this may be done. The real basic proposition of the argument in support of that position is that, as the court found, the by-laws of the appellant, at the time the deposits in suit were made contained a provision that "the by-laws of the defendant bank at all times provided that they could be amended"; that when the deposits were made it was agreed by and between the defendant depositors and the defendant bank that the former would be governed by the laws of the latter; that, therefore, the by-laws, as so providing at the time the deposits were made, essentially became a part of and entered as an element into the agreement whereby the deposits were made by the depositors and accepted by the bank, and that the depositors thus agreed that an amendment of the by-laws might be made at any time by the bank without actual notice of the amendment or the intention to make it to the depositors. We cannot assent to this proposition in its entirety.

[5] The appellant is a savings bank, and, ever since October, 1885, has existed and carried on business as such under the provisions of the Civil Code of the state of California of 1872 and amendments thereto. Civ. Code, §§ 571–583b. Under the provisions of the Civil Code under which it was organized and is operating, it has a capital stock, and the depositors, unlike the original conception of savings banks where the depositors shared proportionally in profits and losses, and where the managers of the funds were but the trustees and agents of the members, when making and maintaining deposits therein, sustain the relation of creditors to the

bank. In other words, the legal relation created between said bank and its depositors is, as to the deposits made by the latter, that of debtor and creditor. Where moneys are deposited in the savings account of a savings bank so organized the transaction amounts to an agreement between the depositors and the bank, whereby the former loaned the use of their moneys to the latter upon a consideration that, for such use, the bank will compensate the depositors either by the payment of a fixed rate of interest or such sums as the moneys so deposited and as invested by the bank may earn. These payments are sometimes called interest and sometimes dividends, although the latter term is more applicable to those savings banks where the depositors share proportionally in the earnings of the bank. As seen, the court in this case found that—

> "It was agreed between the defendant bank and the defendant depositors when their said accounts were opened that dividends, as declared, would be appropriated and credited to the accounts of the said depositors."

We are at a loss to understand how the bank can avoid the effect of that agreement. There is nothing in the agreement as found which provides that "the dividends, as declared, would be appropriated and credited to the accounts" for a limited period only. Nor is there any language in the agreement itself which gives, or may be so construed as giving, the bank authority to limit the period during which interest may be allowed on the accounts, while they are still maintained, to a specified time, or, in other words, that, after a certain time, the bank may discontinue the payment of interest, although still holding and using the deposits. The agreement, it seems perfectly clear, can mean but one thing, so far as the rights of the depositors are concerned, to wit: That so long as the accounts exist and remain in the bank, whether they become dormant or remain active or live accounts, the bank is obligated to credit such accounts with such dividends or interest as may be declared. There is but one contingency which can happen under the agreement, as found by the court, which could operate to exempt the appellant from the performance of the obligation of allowing interest or dividends on the accounts for the whole period of their existence as assets of the bank and that would arise when, perchance, the deposits had earned no interest or the bank had accumulated no dividends which could be declared.

[6, 7] The right of a bank to amend its by-laws, and, upon sufficient notice to its depositors, so to amend them as to reduce the rate of interest on deposits or to refuse to continue the deposits, cannot be questioned. Nor will it be doubted that, by dealing with the bank, every depositor adopts its regulations which are in existence at the time, and it may be conceded to be true that where, as here, the by-laws of a bank at the time an account is opened therein by a depositor contain a provision authorizing their amendment the bank may, under such authorization and without notice to such depositor, amend the by-laws so as to bind the latter, in so far as such amendment may affect only those general rules and regulations, common to all banking and other corporations, which relate to the general administrative policies thereof. But "the fact that a by-law of which a depositor has notice authorizes the amendment of the by-law does not operate to change the depositor's contract where a material amendment to the by-law is made, without notice to him, and without his consent." 3 R. C. L. § 339. In other words, a provision in such by-laws authorizing an amendment thereof cannot give power to the bank to amend by-laws so as to change materially the contract of the depositor without his knowledge. 2 Morse on Banks and Banking (4th Ed.) p. 620, and cases therein cited. And this proposition holds good even in the face of the established rule that the by-laws of a bank existing at the time an account is opened therein enter into and become a part of the contract whereby the deposit is made by the depositor and accepted by the bank. The rule seems to be uniform that where a person opens a deposit account with a bank the depositor is to be thereafter governed and bound by the by-laws existing at the time the account is opened, and that all deposits made after the opening of the account are deemed to be made under the original contract. Of course, the latter rule is subject to this qualification: That if, upon notice to the depositor, the by-laws are so amended as to change materially the original contract, such deposits as are made subsequent to the amendment will be held to be made under the contract as so changed.

[8] The argument is made that the appellant had the right to assume that the defendant depositors, having failed to claim their deposits and allowed them to remain inactive for over 20 years, had abandoned their accounts as well as waived their rights under the contracts with the bank, including their right to notice of the amendment, "if any existed"; that the appellant had no knowledge of the whereabouts of the defendant depositors, and, therefore, it could not only not give notice, but, upon the assumption that they had abandoned their contracts, it was not necessary to give notice; that the appellant is authorized to presume that said depositors were dead; that "the situation would be inequitable, for the bank would have to keep deposits, regardless of its desire, when not required by law or contract to do so, and still have to credit interest"; that by the passage of the amendment "the bank could be deemed to have canceled the contract." Without attempting to reply to the points in the order in which thus they are stated, we make these general observations as a complete answer thereto: A savings bank, such as is the appellant, does the bulk of its business on borrowed capital; that is, on the moneys deposited therein by the depositors. Its business is, therefore, to seek such deposits. Indeed, without such deposits it could not survive as a savings bank. And certainly it could not be said to be inequitable, assuming that such a consideration could influence the determination of this appeal, if, as may well be assumed to be true, the bank has used the moneys in the accounts involved herein. As to the suggestion that the failure of the depositors to claim their accounts or to allow them to remain inactive for over 20 years is to be deemed an abandonment thereof, as well as a waiver of their rights under their contract with the bank, the ready reply is that such contracts cannot be terminated or their validity vitiated in any such way. The policy of the state is that there shall be an ownership of all property in some one. If the depositors are dead and they died intestate, the contract, with all its rights, vest in their heirs, or if they have died testate and have thus disposed of their accounts, either specifically or in general language, then the accounts belong to those named in the will as such beneficiaries. If there be neither heirs nor a will, then, under the law, the property must, after the prescribed time during which they have remained dormant, be transferred to the state treasury under the provisions of our escheat laws. The claim that there is no necessity for giving notice to the depositors of the adoption of the amendment in question because their whereabouts are unknown, making it impossible to give such notice is not only answered hereinabove, but by the further consideration that when the bank accepted the deposits it did so with full knowledge of the fact that one of the contingent incidents of such a transaction was that the accounts might become dormant and remain unclaimed for a sufficient period of time to justify the state, under our statutes of escheat, to institute suit for the transfer of the moneys therein into the treasury of the state.

We do not intend to review in detail herein the cases cited by the appellant as supporting its position. None of them is directly in point, and, indeed, we have not been able to find any case precisely like the one here. All the cases cited by the appellant involve amendments to the by-laws of mutual benefit or fraternal societies which pay sick and other benefits to its members. The amendments dealt with in those cases changed the amount of benefits to be paid, or limited the period during which those members coming within the terms of the sick benefit provisions should receive weekly or monthly benefit payments. The cases are not unlike in principle those cases dealing with savings banks in which the depositors themselves are the bank and the trustees and officers of the bank are the agents of the depositors. In such case the relation of debtor and creditor is not created between banks so organized and conducted and the depositors, who are themselves the owners of the banks. The directors and officers of such banks are the agents or trustees of the depositors, and when a regulation is made by such agents it is the act of the depositors themselves. The same situation exists as to the mutual benefit societies or fraternal organizations awarding sick or death benefits to the members. The relation of debtor and creditor does not exist between such society itself and its members, for the reason that the members themselves constitute the society and the officers thereof are the agents or trustees of the members. When, therefore, such officers or agents or trustees adopt a by-law or regulation within the scope of the powers of the society and their official authority, the adoption of such by-law or regulation involves the act of the members themselves, whose consent thereto is necessarily of the essence of the act. The distinction between a savings bank whose depositors share proportionally the profits thereof and who really are the owners of the bank and a savings bank having a capital stock and of which the shareholders and not the depositors are the owners is clearly pointed out in the case of Ackenhusen v. Peoples Savings Bank, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338, a case approved by our Supreme Court in Los Angeles Investment Co. v. Home Savings Bank of Los Angeles, 180 Cal. 601, 614, 182 Pac. 293, 5 A. L. R. 1193.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

193 Cal. 478

PARKER v. PARKER et al. (L. A. 7960.)

(Supreme Court of California. April 23, 1924.)

1. Divorce 🔑247—Provision for payment of alimony not based on consent ends on death of either spouse.

Provisions for payment of alimony, made not upon consent of parties, are founded upon legal obligation which the law imposes on husband to support the wife, and obligation comes to an end on death of either spouse.

2. Divorce 🔑247—Stipulation incorporated in decree held to create annuity to wife for life.

A stipulation in a divorce action that in lieu of a division of property court might order husband to pay to wife $50 per month during remainder of her natural life, which stipulation was incorporated in decree of divorce, *held* to create an annuity to wife for her natural life, which was not terminated by death of husband.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Willie O. Parker against Maud D. Parker and another, as executrices of the will and estate of Francis M. Parker, deceased. Judgment for plaintiff, and named defendant appeals. Affirmed.

John B. Nichols, of Santa Ana, for appellant.

Tobias R. Archer, of Los Angeles, for respondent.

PER CURIAM. In a divorce action pending in the superior court of Los Angeles county in 1912, wherein Francis M. Parker (the decedent herein) was plaintiff and Willie O. Parker (plaintiff and respondent herein) was defendant, it was stipulated in open court at the trial that, "if a decree for divorce should be awarded to either party, the court instead of dividing the property of said parties between them, might provide for the separate maintenance of defendant by awarding to her certain property for life, and that plaintiff pay defendant such monthly allowance and secure the same by a lien upon such property of plaintiff as in the discretion of the court should seem proper." Thereafter a decree was entered therein in favor of Francis M. Parker, plaintiff therein. It was provided in the interlocutory decree and also in the final decree which followed in due course "that said plaintiff pay to said defendant the sum of $50 on the first day of each and every month during the remainder of her natural life, beginning on the 1st day of September, 1912, and to secure the payment of said sum of $50 per month a lien in favor of said defendant is hereby created and declared to exist upon the remainder over and interest of said plaintiff in" certain real property therein described. See Parker v. Parker, 55 Cal. App. 458, 203 Pac. 420.

Said Francis M. Parker died in 1922, and the executrices of his estate refused to continue thereafter the payments of $50 per month as provided in said decree, upon the ground that his liability therefor terminated with his death. Thereupon said Willie O. Parker duly presented her claim against his estate for the payments accrued and unpaid, which was disallowed. She thereupon commenced this action against the defendants as executrices of his estate and recovered judgment in the court below, from which this appeal is prosecuted.

The merits of this appeal depend upon the true interpretation of the effect of the quoted provisions in the decree of divorce. If those provisions are to be regarded in the light of the rules governing the interpretation of contracts there would be no room for a difference of opinion as to their meaning and effect. It is there provided "that said plaintiff pay to said defendant the sum of $50 on the first day of each and every month during the remainder of her natural life." It is apparent that if it had been intended that those payments should continue only during the joint lives of the plaintiff and defendant it would have been very easy and simple so to say.

[1, 2] Coming now to the question whether any different meaning and effect can be or should be given to the quoted words, we are directed to numerous cases cited in appellant's brief wherein it is held that similar provisions for the support of the wife contained in divorce decrees have been construed by courts of other states as ceasing and determining upon the death of either

spouse. If the provision in the decree here under consideration were merely the ordinary provision for the payment of permanent alimony, then we might be constrained to follow those decisions, because provisions for the payment of alimony made not upon the consent of the parties, but usually against the opposition of one of the spouses, are founded upon the legal obligation which the law imposes upon the husband to support the wife, and that obligation comes to an end upon the death of either spouse. So, regardless of the language used by a court in making a provision in its decree for the payment of alimony, that provision ceases to be effective upon the death of either spouse. But here we have a provision based upon an agreement of the parties, in effect a contract. It is not an award of permanent alimony, but an award of a life annuity given in lieu of a division of the property of the spouses. It rests, not upon the obligation which the law imposes upon a husband to support his wife, but upon the contract of the parties thereto.

It is true that the trial court in its decree attempted to reserve to itself the power to modify these provisions from time to time. It is not necessary for us to determine here whether that attempted reservation was or was not effective, because in so far as the provision we are now considering is concerned the trial court never attempted to modify it. So, regardless of the question whether the attempted reservation was effective, these provisions have remained the same, unmodified by any action or attempted action of the trial court. We are convinced that the true interpretation and effect of these provisions are to create an annuity of $50 per month to the wife for the period of her natural life, and that therefore there is no merit in this appeal.

This conclusion renders it unnecessary for us to determine whether or not anything which was decided or said in the opinion upon the appeal in Parker v. Parker, supra, is to be regarded as the law of the case upon this appeal.

The judgment is affirmed.

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193 Cal. 474

PEOPLE v. FRANK. (Cr. 2643.)

(Supreme Court of California. April 23, 1924.)

1. Criminal law 🔑1043(1)—Objection held sufficient to raise question of accessibility of witnesses whose testimony at preliminary examination read.

An objection to reading of depositions, made at preliminary examination, that there was no showing as to genuineness of letters, purporting to be written by witnesses, which established their presence outside state, *held* sufficient to raise point on appeal that there was no showing that witnesses were not within state, or that diligent search or inquiry had been made for them.

2. Criminal law 🔑543(2)—Evidence held insufficient to show absence from state of witnesses whose testimony at preliminary examination read.

Letters and telegrams, purporting to be in reply to request from district attorney for their presence, were insufficient to show their presence outside state, so that their depositions taken at preliminary examination might be read, in absence of evidence that any communication was sent to witnesses by district attorney.

3. Criminal law 🔑543(2)—Matters not considered on question of absence from state of witnesses whose testimony at preliminary examination read.

Where no proper foundation was laid for admission of depositions taken at preliminary examination, their contents could not be considered to lay foundation for their own admission by establishing that witnesses were outside state.

4. Criminal law 🔑1163(3)—Conviction based on incompetent evidence, admitted over objection, reversed.

Appellate court must conclude that a conviction based on incompetent evidence, admitted over objection of defendant, sufficient to preserve his exceptions thereto, involves a miscarriage of justice.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

George Frank was convicted of burglary and robbery. He appeals. Reversed.

F. W. Allender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted upon each of two counts of an information, which in the first count charged him with the commission of the crime of burglary with intent to commit larceny, and in the second count charged him with the crime of robbery. The court received in evidence the testimony, given in January, 1923, at the preliminary examination, by Edwin A. MacPherson and his wife, Ellen MacPherson, to the effect that in their room in the Ambassador Hotel, in the city of Los Angeles, at the time stated in the information, the defendant, in their presence, committed the acts constituting the alleged crimes. Without this evidence it is reasonably certain that the defendant could not have been convicted; with it his guilt is established "beyond a reasonable doubt." He appeals from the judgment, and from an order denying his motion for a new trial.

The principal point relied upon in support of the appeal is that the court erred in permitting the depositions of said witnesses to be read in evidence. Counsel for defendant, in stating his objection that no proper foundation was laid for admission of said depositions, insisted that there was nothing before the court tending to show—

> "that the party therein mentioned is not in the county of Los Angeles or in the state of California; there is nothing there indicating that any diligent search or inquiry has been made for either one of those parties in the state."

The information was filed on the 9th day of February, 1923. The case was first set down to be tried on the 5th day of April, at which date, at request of defendant, the trial was continued to April 23. On April 23 the trial was continued to June 7, and at that time the case was tried. In order to lay a foundation for the introduction of said depositions in evidence, the district attorney first exhibited to the court and opposing counsel, along with the questions which had been propounded to Mr. MacPherson and the answers thereto, three documents, all "for the purpose of reading his testimony—both he and his wife." The documents consisted of a telegram, dated April 4, 1923, from Denver, Colo., directed to the district attorney, and which he stated that he had received, and purporting to be signed by said Edwin A. MacPherson; a letter dated April 5, 1923, purporting to be signed by the district attorney and addressed to said MacPherson at Fort Worth, Tex.; and a letter dated May 3, 1923, Denver, Colo., purporting to be signed by said MacPherson.

The telegram of April 4, purported to be in reply to a message of the district attorney to Fort Worth, "re Mrs. MacPherson and me being Los Angeles on April 5th," in relation to this case, referred to the fact that they had gone to Los Angeles in January solely to give evidence in this case, and regretted that it would be impossible for them to return on April 5. The letter of April 5 informed MacPherson that the trial of Williamson (the name first given by defendant at the time of his arrest, and therefore the name under which the prosecution originally was commenced) had been continued until April 24, and urged that MacPherson and his wife be present for the trial at that time. The letter of May 3 purported to be in reply to a letter of April 27 from the district attorney, and referred to "your request for Mrs. MacPherson's and my presence in Los Angeles on June 16th." The letter then stated that MacPherson was then constructing "a long line in the states of Wyoming and Nebraska," which would occupy all of his time until the early part of the year 1924, and that it would therefore "not be possible for me or for Mrs. MacPherson to appear against this defendant within that time." In this letter he referred again to the fact that he had given testimony in the case the preceding January.

Counsel for defendant, in arguing his objections in the trial court to the letters and telegram, did not object to the district attorney's statement that the copy of the letter of April 5 was a copy of a letter which he had written to Mr. MacPherson, or that he had received the other letter and the telegram; neither did counsel for defendant stipulate thereto. The emphasis of the objection, as made by defendant's counsel, was laid upon the proposition that:

> "There is nothing before the court going to show that the party whom they desire to call sent that letter; there is nothing going to show that this is the letter coming from him, unless we indulge in the presumption or guess that that is the letter from him."

[1-4] The two objections herein quoted were sufficient in form and substance to raise the point relied upon by the defendant upon this appeal. The letters and telegram were inadmissible for any purpose over the objection of the defendant until the foundation had been laid by some competent evidence of their genuineness. We cannot see that their genuineness was sufficiently established by the internal evidence contained in them, for the reason that there is no competent evidence that they were in reply to any communication from the district attorney. There is no competent evidence that any communication was sent to these witnesses by the district attorney. If he had asked for a stipulation from defendant's counsel to the truth of the statements made by him in court, it may be that such stipulation would have been given. If it had been refused, it would then have been incumbent upon the district attorney to be sworn and testify under oath to the truth of those statements. This not having been done, and the defendant having reserved his exception by a sufficient objection, the letters and telegram were inadmissible.

Disregarding the letters and telegram and the statement of the district attorney, there remains in the case no foundation for the admission in evidence of the depositions of these two witnesses. It is true that, if we examine the deposition of Edwin MacPherson, we find that at said preliminary examination in January he stated that his occupation was "construction"; that he resided at Fort Worth, Tex.; that he had come here for the purpose of testifying at this time; and that he expected to return to Texas. Mrs. MacPherson in her deposition stated that she resided at Fort Worth, Tex., and expected to leave Los Angeles shortly for that place. But, no proper foundation having been laid for the admission in evidence of these depositions, their contents could not be considered for any purpose, not even for the purpose of laying the foundation for their own admission. We are of the opinion that this case comes within the rule of People v. Plyler, 126 Cal. 379, 58 Pac. 904, and that the trial court erred in the admission of these depositions in evidence. When it clearly appears that a verdict of conviction is based upon incompetent evidence, which was admitted over the objection of the defendant, sufficient in form and substance to preserve his exception thereto, we must conclude that the judgment resulting therefrom involves a miscarriage of justice.

The judgment and order appealed from are reversed.

(193 Cal. 482)

In re BOND'S ESTATE.

MASON v. WILBER et al. SAME v. SUPERIOR COURT in and for Los Angeles County et al. (two cases). (L. A. 8095, S. F. 11105, 11115.)

(Supreme Court of California. April 25, 1924.)

1. Executors and administrators ⟹35(12)—Order of superior court removing administrator held within jurisdiction.

An order of the superior court, revoking letters of administration after hearing in a proceeding to compel the administrator to render his past-due account, *held* within court's jurisdiction.

2. Executors and administrators ⟹35(19)—Errors in exercise of jurisdiction over administration of an estate by superior court not assailable by writs.

Errors in proceedings for removal of administrator, in exercise of jurisdiction acquired by superior court, cannot be successfully assailed by application for writ of supersedeas, review, or prohibition.

3. Executors and administrators ⟹35(19)—Filing notice of appeal, without bond, insufficient to stay execution of order removing administrator.

Notice of appeal, filed by administrator, from order of removal directing him to turn over assets to another administrator, no appeal bond or undertaking being filed, was insufficient, under Code Civ. Proc. § 943, to stay execution of such order, and application for supersedeas, and prohibition, should be denied.

In Bank.

Applications by William S. Mason, individually and as administrator of the estate of Emma M. Bond, deceased, for writs of supersedeas, certiorari, and prohibition, to prevent the Superior Court of Los Angeles County from proceeding in the matter of removal of administrator, to review an order appointing special administrator, and to prohibit enforcement of an attachment for contempt. Writs denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

Janeway, Beach & Pratt, of Los Angeles, for respondent Wood.

Oliver O. Clark, of Los Angeles, and Eugene J. Wix and James F. McBryde, both of Glendale, for respondent Wilber.

PER CURIAM. The foregoing three proceedings were heard together by agreement of the parties and upon their submission were decided from the bench, with the understanding that, if deemed advisable, a memorandum opinion would be filed. The original proceeding out of which these three matters arose was that of the estate of Bond, a probate proceeding commenced and still pending in the superior court of the county of Los Angeles. The facts giving rise to these proceedings in the matter of that estate were briefly these. Upon the death of Emma M. Bond, who died intestate, one J. J. Bond was appointed administrator of her estate by said court and duly qualified as such administrator. Subsequently J. J. Bond died, leaving such administration uncompleted. Thereafter W. G. Wilber was duly appointed executor of the will of said J. J. Bond by said court and duly qualified as such. In the Matter of the Estate of Emma M. Bond, William S. Mason was, upon the death of J. J. Bond, appointed administrator of the last-named estate, and duly qualified as such. Thereafter, and during the latter part of the year 1923, said W. G. Wilber filed a petition in the matter of the estate of said Emma M. Bond, alleging that said W. S. Mason, as the administrator of said estate, had failed to render an account as such administrator within the time required by law. Whereupon a citation was issued by said court, requiring the said W. S. Mason, as administrator of said estate, to appear before said court on the 26th day of November, 1923, then and there to show cause why an attachment should not be issued against him to compel the accounting, and why he should not be "discharged" as such administrator. The said W. S. Mason appeared before the said court in response to such petition and citation on the 26th day of November, 1923, and presented his demurrer and answer to said petition, and the said court on said day, over his objection and exception, made an order for his suspension as administrator of said estate and for the holding of his powers as such administrator in abeyance until such time as he should render to said court an account of his receipts and expenditures during his administration, and a full and true report of all proceedings had and taken by him in the course thereof. Thereafter, and on the 17th day of December, 1923, the said Mason presented and filed in said court a verified account of his receipts and expenditures and a report of his proceedings taken in said estate, and also on the 13th day of March, 1924, filed an amended account as said administrator, which included additional funds which had come into his hands as such. Thereupon, a date was fixed by an order of court for a hearing upon said accounts, and the court by its order directed that its previous proceedings with reference to an accounting by said administrator be continued to that date. Thereafter, and on the 14th day of March, 1924, the court made and entered an order in said estate removing said W. S. Mason from his position as administrator of said estate, and revoking his letters of administration, and the court by its same order, but without any previous notice having been given thereof, undertook to appoint the Citizens' Trust & Savings Bank of Los Angeles, a corporation, administrator of the said estate of Emma M. Bond, deceased. The court also, by said order, directed the said W. S. Mason, whose letters of administration had been revoked, to deliver over to said Citizens' Trust & Savings Bank of Los Angeles all of the property and assets of said estate. In so directing the delivery over to said corporation of the assets of said estate, the order of the court did not designate that the said Citizens' Trust & Savings Bank of Los Angeles was to be delivered said assets in its capacity of such administrator, but merely directed such delivery to it, without indicating in what particular trust capacity the said corporation was to hold and keep such assets. Thereafter and on the 15th day of March, 1924, said W. S. Mason filed a notice of appeal from said order of the previous day, but gave and offered no bond or undertaking upon said appeal. Thereafter, and on the 19th day of March, 1924, the said superior court in which the foregoing proceedings had been pending undertook to make an order modifying its said order of March 14, 1924, by inserting in that portion of said order wherein it had appointed the Citizens' Trust & Savings Bank of Los Angeles administrator of said estate, the word "special" before the word "administrator" in said order. Thereupon, and on March 26, 1924, the said W. S. Mason commenced the first of the above-entitled proceedings in this court, wherein he prayed for a writ of supersedeas preventing the said superior court from taking any further proceedings during the pendency of said appeal looking to the enforcement of the order or orders appealed from, or in any way modifying the same, and in his prayer to said petition further asked that this court issue an order to show cause why any orders which the said superior court had made purporting to modify the order appealed from should not be declared void. This court issued an order to show cause upon said proceeding, and the same came on for hearing before this court on its recent Los Angeles calendar.

On April 3, 1924, said W. S. Mason presented and filed in this court a petition for a writ of review, which constitutes the second of the above-entitled proceedings, in which the said superior court was made the respondent, and in which the said petitioner assails the order of said court made and entered on the 19th day of March, 1924, by which the Citizens' Trust & Savings Bank was attempted to be appointed special administrator of the estate of Emma M. Bond, deceased, upon the ground that said order had been made without the notice required by law, and, was, therefore, in excess of the jurisdiction of said court and void. An order to show cause was issued by this court upon said petition, returnable upon the day fixed for the hearing upon the previous proceeding. Thereafter, and on the 3d day of April, 1924, the said superior court made and entered an order reciting certain of its previous proceedings above referred to, having for their purpose the requiring that said W. S. Mason should render a full, true and correct account of all proceedings taken by him in the course of his administration of said estate, and that W. S. Mason had been removed as administrator of said estate because of his failure to render such an account, and that upon his removal as administrator of said estate he had been required by order of said court to turn over to said Citizens' Trust & Savings Bank all of the property and assets of said estate, and that he had failed and neglected to obey said last-named order, whereupon the court directed an attachment to issue against the said W. S. Mason, and that he appear before said court and be required then and there to show cause why he should not be punished for his failure to obey its aforesaid order, and to deliver to said corporation the property and assets of said estate. Thereafter, and on the 9th day of April, 1924, the said W. S. Mason presented and filed in this court his petition for a writ of prohibition, wherein and whereby he sought to have this court prohibit the enforcement by said superior court of the last-named order, upon the ground that said order was in excess of the jurisdiction of said court for the reason that its previous orders purporting to appoint the said Citizens' Trust & Savings Bank special administrator of said estate was void for the reasons stated in his previous application for a writ of review, and for the further reason that the proceedings of said court in the matter of requiring him to turn over the property and assets of said estate had and taken after his appeal from the order of said court purporting to remove him as such administrator and purporting to direct the delivery over of the property and assets of said estate to said Citizens' Trust & Savings Bank of Los Angeles had been stayed by said appeal. This court issued an order to show cause in this matter also, making the same returnable upon the date fixed for the hearing of the two previous proceedings.

[1-3] Upon the hearing and submission of each of said matters at the time fixed therefor, this court was of the opinion, upon the

facts and record of the various proceedings in said estate, that the order of the superior court whereby it undertook to revoke the letters of administration of said petitioner was within the jurisdiction of said court acquired, through the inception of the proceedings, to compel the making and filing of an account by said petitioner as the administrator of said estate, and that, this being so, whatever error, if any, was committed by said court in its order removing said administrator, was an error in the exercise of such acquired jurisdiction, and hence could not be successfully assailed in each or any of the foregoing proceedings. This court was further of the opinion that, in so far as the petitioner's application for a writ of supersedeas was concerned, the appeal which the petitioner herein had taken from the order of said court removing him as such administrator and directing him to turn over to the Citizens' Trust & Savings Bank of Los Angeles the property and assets of said estate was insufficient, under the provisions of section 943 of the Code of Civil Procedure, to stay the execution of said order, and that for that reason the application of the petitioner for a writ of supersedeas should be denied, and that for the same reason the application of the petitioner for a writ of prohibition should also be denied.

In so far as the application of the petitioner herein for a writ of review is concerned, wherein it was sought to have the order of said court appointing the Citizens' Trust & Savings Bank of Los Angeles special administrator of said estate reviewed and annulled, it was made to appear to said court upon the final day of the hearing upon said petitions that the questions presented upon said application had in effect become moot, and for that reason the parties agreed that the order therein attacked should be annulled, and it was so ordered.

(193 Cal. 451)

ANGLO-CALIFORNIA TRUST CO. et al. v. OAKLAND RYS. et al. (S. F. 10384.)

(Supreme Court of California. April 11, 1924. Rehearing Denied May 8, 1924.)

1. Pledges 🔑57—Finding that principal of a note issue was unpaid not inconsistent with other findings.

In an action by trustee of a note issued to recover amount of the notes and to foreclose collateral securing their payment, finding that entire principal of notes was unpaid *held* not inconsistent with other findings.

2. Appeal and error 🔑931(1)—Trial court's findings construed to uphold judgment.

The trial court's findings should be construed to uphold rather than to defeat judgment thereon, and wherever, from facts found, other facts may be inferred which will support judgment, such inferences will be deemed to have been made, and appellate court will not draw from these facts any inference contrary to that which may have been drawn by trial court for purpose of rendering such judgment; this rule being especially applicable to an appeal on judgment roll alone.

3. Pledges 🔑30(4)—Judgment ordering execution on, and sale of, collateral security, merely substitutes judgment as collateral.

A judgment giving trustee a first lien on, and ordering execution against, securities pledged as collateral for a note issue did not alter or extinguish their character as collateral security but merely substituted the higher security of the judgment.

4. Estoppel 🔑78(1)—Under trust agreement, debtor held estopped from claiming that enforcement of collection of collateral notes inconsistent with execution sale of collateral.

Under trust agreement, empowering trustee to sell collateral pledged to secure corporate note issue on corporation's default and to proceed at law or equity to protect rights of holders of notes, *held* that corporation was estopped from objecting that the remedy by enforcement of collection of the collateral notes was inconsistent with remedy of execution sale of the collateral, especially where such judgment inured to the benefit of corporation.

5. Equity 🔑39(1)—Court properly proceeded to complete settlement of matter before it.

Where a court of equity took cognizance of a matter, it could properly proceed to a complete settlement in so far as it could, while keeping within scope of transactions, reflected in proceedings before it.

6. Corporations 🔑479—Trustee to whom debtor pledged note whose payment it guaranteed held to have legal title, entitling trustee to sue maker and guarantor in same action.

Where corporation transferred and pledged certain securities as collateral to a trustee under a trust deed empowering trustee to sell the collateral on default, with right to proceed in law or equity to protect the rights of holders of the notes, and certain note transferred as collateral was guaranteed by corporation, *held* that such transaction vested an estate in trustee and did not merely give him a lien under Civ. Code, § 2872, and section 2888 did not apply, and trustee was entitled to sue maker and guarantor of such note in same action.

7. Guaranty 🔑1—Nature of stated.

A guaranty of a note is an original independent undertaking to pay the debt if maker does not do so.

8. Judgment 🔑875—Judgment on guaranty of note by pledgor held merely security for payment of principal debt, and satisfaction of principal obligation satisfied judgment.

Though guaranty executed as part of same transaction with a note makes obligation of guarantor commensurate with that of maker, where circumstances showed that guaranty of note, transferred by guarantor as collateral, was intended as collateral for a corporate note issue, to give trustee for note holders full benefit of a lien on the pledged property, a judgment on the guaranty was merely collateral security for payment of the principal debt, and satisfaction of the principal obligation satisfied the judgment on the guaranty.

9. Execution ⊂⊃271—Judgment ⊂⊃846—Rule of caveat emptor applies to sale of judgment.

Though a judgment is property which may be transferred, it is not a negotiable instrument, but is a mere chose in action, and the rule of caveat emptor applies, irrespective of whether it is sold voluntarily by judgment creditor or on execution by the sheriff.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Anglo-California Trust Company and others against the Oakland Railways and others. Judgment for plaintiffs, and named defendant appeals. Affirmed.

See, also, 216 Pac. 578.

Werner Olschewski, of San Francisco, for appellant.

McKinstry, Harber & Firebaugh, Lilienthal, McKinstry, Raymond, Haber & Firebaugh, Garret W. McEnerney, Walter Rothchild, and Cushing & Cushing, all of San Francisco, for respondents.

WASTE, J. This is an appeal, on the judgment roll alone, by the Oakland Railways, one of many defendants, in an action brought by the plaintiff, as trustee of a note issue, to recover the amount of the notes and to foreclose the collateral transferred in trust to secure their payment. The findings are comprehensive, and the pertinent facts clearly appear therefrom.

The defendant Oakland Railways was the controlling stockholder of the San Francisco-Oakland Terminal Railways, which latter corporation was formed by the consolidation of four previously existing railroad corporations. On or about the 12th day of August, 1912, Oakland Railways executed and delivered to the plaintiff, Anglo-California Trust Company of San Francisco, as the trustee thereunder, a certain trust agreement to secure the payment of an issue of 6 per cent. collateral trust notes in an aggregate principal amount of $2,500.000. At the same time, as a part of the transaction, and pursuant to and in accordance with the terms of the trust agreement, the Oakland Railways made and executed 100 notes, by the terms of each of which notes the Oakland Railways, for value received, promised to pay the bearer thereof, at the office of the Anglo-California Trust Company in the city of San Francisco, on the 12th day of June, 1913, the sum of $25,000 in gold coin of the United States of America, with interest thereon from the date of such note until paid at the rate of 6 per cent. per annum. These notes were thereafter sold by the Oakland Railways to investors, and at the time of the commencement of this action they were held by various parties.

Contemporaneously with the execution of the trust agreement, and in order to secure the payment of the principal and interest of all of the notes at any time issued and outstanding under its terms, the Oakland Railways "assigned, transferred, mortgaged, and pledged" to and with the plaintiff Anglo-California Trust Company, the following property: (1) 1843 $1,000, 5 per cent. 28-year gold bonds of the Oakland Traction Company, having an aggregate face value of $1,843,000. (2) 1413 $1,000, 5 per cent. 30-year gold bonds of the San Francisco, Oakland & San Jose Consolidated Railway, having an aggregate face value of $1,413,000. (3) A promissory note of the San Francisco-Oakland Terminal Railways for the principal sum of $2,500,000, with interest at the rate of 6 per cent. per annum, dated August 12, 1912, originally payable to Oakland Railways or order, and by it indorsed so as to be payable to bearer. This note was secured by the entire outstanding capital stock of Oakland Terminal Company, less five "qualifying directors' shares," which was pledged to plaintiff to secure its payment. Prior to, or contemporaneously with, its execution and delivery to plaintiff, and as part of the same transaction, the defendant Oakland Railways guaranteed payment of the principal and interest of the note, and waived presentment, demand, protest, and notice. (4) The capital stock of the San Francisco-Oakland Terminal Railways, class A and class B, preferred, of the par value of $4,811,200, and common stock of the par value of $13,710,000.

The defendant Oakland Railways also transferred to, deposited, and pledged with the plaintiff, as part of the property to be deposited and pledged under the trust agreement, a promissory note, dated March 15, 1912, for the principal sum of $128,184, executed by Oakland Traction Company, payable on demand to the United Properties Company of California or order, and by that corporation duly and legally indorsed so as to be payable to bearer.

A collateral trust agreement was made and executed between the defendants Oakland Terminal Company, Oakland Railways, and San Francisco-Oakland Terminal Railways, and the plaintiff Anglo-California Trust Company, as trustee thereunder, pursuant to which 35 notes of Oakland Terminal Company of the aggregate principal sum of $1,100,000, together with certain interest coupons, were executed and delivered by

Oakland Terminal Company to Anglo-California Trust Company as trustee. Concerning this part of the transaction, the trial court found that since the commencement of the action these 35 notes have been paid and discharged, and the lien created by the collateral trust agreement has been extinguished.

It is provided in the trust agreement of August 12, 1912, securing the 100 $25,000 notes, that if any one or more of certain events called "events of default" should happen, "the trustee shall have full power and authority to sell at its option the whole or any part of the collateral pledged hereunder." The trustee in its discretion, however, instead of, or in addition to, exercising the power of sale herein conferred upon it, may proceed by appropriate action or proceedings at law or in equity as the trustee may be advised by counsel, to protect and enforce its rights and the rights of the holders hereby secured and then outstanding. Whenever the notes shall become due and payable by declaration or otherwise, upon the demand or succesive demands of the trustee, Oakland Railways expressly covenants and agrees that it will pay to the trustee for the benefit of the holders of the notes then outstanding the whole amount due and payable at the time of any such demand on all of such notes for principal and interest, with interest upon the overdue principal and installments of interest at the rate of 6 per cent. per annum; and, in case Oakland Railways shall fail to pay the same forthwith upon such demand, the trustee in its own name and as trustee of an express trust for the holders of the notes shall be entitled to recover judgment against Oakland Railways for the whole amount due and unpaid.

> "VI. Upon the happening of any of the events of default previously mentioned the trustee may take such action by legal proceedings or otherwise for the collection or enforcement of such collateral as to it may seem wise or proper."

No part of the principal sum of the 100 promissory notes issued by defendant Oakland Railways was paid. Neither was any payment made on the principal of the promissory note executed by San Francisco-Oakland Terminal Railways to the Oakland Railways. In due time plaintiff, as trustee, gave notice of the nonpayment of the notes, and made written demand upon the defendant Oakland Railways for the benefit of the holders of all of the notes then outstanding that it pay the aggregate principal sum of the notes, together with accrued interest. Payment not being made, the holders of a majority of the face amount of the notes requested the Anglo-California Trust Company, as trustee, to declare the principal of the notes to be immediately due and payable, and to make demand for the payment thereof, and to institute this action, all of which acts were done by the plaintiff in the manner and at the times provided by the trust agreement, and subsequent to the making of such requests.

The only defendants to appear in the action were Oakland Railways and the United Properties Company of California. They appeared by an unverified general denial. Defaults of all other defendants served were entered, the action was dismissed as to others, and the cause proceeded to trial. Upon the evidence taken, the court found the foregoing facts. It also found that plaintiff fully complied with and performed all of the terms, conditions, and provisions of the trust agreement of August 12, 1912, on its part to be complied with or performed, prior to or as a condition for the commencement or maintenance of an action or actions to recover the amounts due and unpaid on the notes and to enforce the trust declared in the trust agreement, and to foreclose the pledge evidenced thereby. It found that the interest on the promissory note dated August 12, 1912, executed by San Francisco-Oakland Terminal Railways, was paid from time to time to and including the 12th day of June, 1923, which was the date of its judgment, leaving unpaid on that date only the principal sum of $2,500,000. It also found that no interest upon the 100 notes of $25,000 remained unpaid. Judgment was directed to be entered against the Oakland Railways, maker of the 100 notes, for the aggregate full amount of the principal, $2.500,000, together with interest at the rate of 7 per cent. per annum from the date of the judgment, and that plaintiff have execution against Oakland Railways for the amount of the judgment. The amount of the judgment, together with plaintiff's costs of suit, was declared a first lien upon all of the personal property pledged with Anglo-California Trust Company by Oakland Railways, pursuant to the terms of the trust agreement of August 12, 1912, and heretofore described, and a sale of all of such collateral was ordered.

It was also ordered that plaintiff have judgment against the San Francisco-Oakland Terminal Railways for the principal sum of $2,500,000, with interest at legal rate from judgment, upon the promissory note executed by it to Oakland Railways and by the latter defendant pledged to plaintiff. This judgment was made a first lien upon the 64,995 shares of stock of the Oakland Terminal Company pledged to secure the note, which were ordered sold to satisfy the amount so found due. A further judgment was ordered in favor of the plaintiff and against defendant Oakland Railways for the sum of $2,500,000, upon its guaranty of the last-mentioned note of the San Francisco-Oakland Terminal Railways, and execution was ordered thereon. Plaintiff was also awarded judgment for $128,814 against San Francisco-Oakland Terminal Railways, due on the note made by Oakland Traction Company, which last corporation, the court found, became a constituent element in the consolidated San Francisco-Oakland Terminal Railways after it made the note.

Concerning the three last-mentioned items in the judgment, it was, in the conclusions of law, provided:

> "That any judgment obtained in this or any other action by the plaintiff, Anglo-California Trust Company, a corporation, against the San Francisco-Oakland Terminal Railways on account of its said note for two million five hundred thousand dollars ($2,500,000) aforesaid, or the said note for one hundred twenty-eight thousand eight hundred and fourteen dollars ($128,814) above described or against the defendant Oakland Railways on account of its guarantee of the said note for two million five hundred thousand dollars ($2,500,000) are subject to said trust agreement dated August 12, 1912, and the lien and pledge thereby evidenced and may be sold under the judgment to be entered herein, as therein provided."

The judgment in this respect, as in all others, minutely follows the conclusions of law, and permits that these three judgments be sold "as a part of the properties held and pledged to secure the payment of the" $2,500,000 found as the principal due from Oakland Railways upon the 100 notes, and the interest on such sum from judgment.

Two appeals have been taken from the judgment in this case. The first was dismissed on motion on the ground that the attorney who signed the notice of appeal and prepared the transcript was not the attorney of record, and that there had been no substitution of attorneys. Anglo-California Trust Co. v. Oakland Railways (Cal. Sup.) 216 Pac. 578.

Several contentions are advanced by appellant in support of the present appeal. The respondent has suggested that certain points raised by the appellant are now moot questions by reason of the fact that all of the collateral by which the 100 $25,000 notes of the Oakland Railways were secured has been sold by the commissioners appointed by the judgment in this case, and in a judgment rendered the same date in another action between the same parties as those to this action, and in which judgment was rendered in favor of this plaintiff and against San Francisco-Oakland Terminal Railways for the sum of $2,500,000, with interest, based upon its note for that amount executed to Oakland Railways, and by that corporation in turn pledged to plaintiff as security for the notes which are the basis of the present action. Respondent has not pointed out the particular matters which its claims have become moot, and we are not inclined to pursue that subject any further, for the appeal may be readily disposed of on the points raised by appellant.

[1] One of the contentions of the appellant is, in effect, that the findings of the trial court do not support the judgment. It contends that upon the facts found the court below could not award a judgment for $2,500,000 in favor of plaintiff and against Oakland Railways upon the 100 $25,000 notes because, under the findings, Oakland Railways is entitled to a credit upon those notes in the sum of $1,500,000, the amount of the interest paid by San Francisco-Oakland Terminal Railways upon its $2,500,000 note to the Oakland Railways, from the date of the default of the latter corporation upon its 100 $25,000 notes, June 12, 1913, to June 12, 1923, at the rate of $150,000 per year for 10 years, the court having found that all of the interest on the 100 $25,000 notes had been paid from the date of said notes to the date of the entry of judgment. This contention amounts to the assertion that the plaintiff had in its hands, applicable to the payment of the 100 $25,000 notes, $1,500,000 in cash, which it ought to have applied against those notes, leaving unpaid but $1,000,000, for which amount the judgment should have been entered. No such defense was pleaded. No evidence has been brought here in support of any such claim, and there is no finding which warrants the drawing of any inference to support appellant's contention. The finding that the entire principal sum of the 100 promissory notes is unpaid is not overthrown by, and is not inconsistent with, any other finding. It is directly responsive to the issue raised by the allegation of the complaint and the general denial of the two answering defendants, and which appears to have been regarded by all the parties in court as sufficient to put them on proof as to the fact of the payment or nonpayment of the notes and the amount due thereon.

[2] Appellant asserts that it is not attempting to overthrow the finding that the entire principal sum of the $2,500,000 of the Oakland Railways' notes is unpaid, but argues that inferences which must be drawn from the findings made do not permit such an assumption. No good purpose will be served by attempting here to follow the appellant in its contentions as to the inferences it argues should be drawn. Findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from the judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment. Breeze v. Brooks, 97 Cal. 72, 77, 31 Pac. 742, 22 L. R. A. 257. The rule has especial application

where, as in this case, the appeal is upon the judgment roll alone. Cutting Packing Co. v. Canty, 141 Cal. 692, 695, 75 Pac. 564.

[3] Another contention of the appellant is that plaintiff cannot recover judgment against the San Francisco-Oakland Terminal Railways, maker of the $2,500,000 collateral note, and, at the same time, procure a sale of the collateral. Its theory is that the remedy for the enforcement of the collection of the pledged note is inconsistent with the remedy of sale thereof. The defense of "inconsistent remedies" was not pleaded by the appellant, and appears to be raised for the first time on this appeal. This contention is embodied in an attack upon that part of the judgment which authorizes the sale of the judgments obtained and entered in this action on the two promissory notes for $2,500,000 and $128,814. Appellant denies the power of the court to order a sale of the judgments on the collateral notes as part of the property pledged to secure its primary obligation. It says:

> "The notes could not be collected and then sold, nor sold and then collected, by the trustee. The remedies being inconsistent, the trustee, when filing the action on the pledged notes and obtaining judgment thereon, was concluded from proceeding under the power of sale. It could not stop short with one remedy, that of collection, and make use of the other remedy, that of sale, and sell the judgment. It could only proceed and exhaust its choice of remedy."

[4, 5] There appear to be several reasons why the appellant may not be heard to complain in this manner. In the first place, the defendant against whom this part of the judgment was rendered has not appealed. In the next place, appellant was not aggrieved by the action of the court, but, on the contrary, was actually benefited thereby. The rendition of the judgment on the notes in question did not alter or extinguish their character as collateral security. The judgments were as much collateral as the notes were before judgment was rendered. Lynch v. Burt, 132 Fed. 417, 428, 67 C. C. A. 305. They are the same security in another and higher form. 1 Freeman on Judgments, par. 229; Jones on Pledges and Collateral Security (2d Ed.) par. 591. Only the form and not the substance was changed, and that was done, we may assume, primarily to prevent the interposition of the bar of the statute of limitations. The action of the court in this regard benefited the appellant. If, for any reason, the value of the notes as collateral for the payment of its own obligations had become lost, its direct burden of payment would have become so much greater. As it was, their character as collateral was preserved by merger into the judgment. Again, if we should assume that respondent had pursued inconsistent remedies in the particular complained of, appellant is estopped by its contract from raising the question. By the terms of the trust agreement of August 12, 1912, as already pointed out, it was provided that the plaintiff was empowered to sell the collateral pledged by the appellant upon the happening of any of the events of default, and might proceed by appropriate action or proceedings at law or equity to protect and enforce its rights and the rights of the holders of the notes of appellant. It was also provided that the remedies conferred upon, or reserved by the terms of the trust agreement to plaintiff as trustee, or the holders of the notes, were not intended to be exclusive of any other remedy, but should be cumulative and in addition to every other remedy given thereunder. It would be hard to conceive how broader powers could have been conferred upon plaintiff in the matter of taking whatever steps it might deem necessary or proper, on default of the appellant being established, even to the pursuit of inconsistent remedies. For these reasons we deem it unnecessary to pursue further the discussion as to whether or not the action of the court did involve a situation where inconsistent remedies were pursued. The trial court very properly regarded the judgments against the San Francisco-Oakland Terminal Railways as but a continuation, in different form, of the two collateral notes which were the foundation of the judgments. So regarded, it ordered them sold "as part of the properties held and pledged to secure the payment of the amounts found due" by the judgment against appellant on the 100 notes for $25,000 each executed by it and secured by the trust agreement of August 12, 1912. Its action thus enured to the benefit and avantage of the appellant. It was proper for the court, sitting in equity and having taken cognizance of the entire matter, to proceed to a complete settlement of the affairs of the parties to the litigation, in so far as it could, while keeping within the scope of the transactions reflected in the proceedings before it.

[6] Appellant makes the further contention that under no conditions could the Anglo-California Trust Company, as a mere pledgee of the $2,500,000 note of the San Francisco-Oakland Terminal Railways, sue it (the Oakland Railways) payee of such note, upon its guaranty of payment of a collateral obligation, but was confined to its remedy against the maker. It relies upon Sparks v. Caldwell, 157 Cal. 401, 108 Pac. 276. It was held in that case that the holder of a promissory note, executed by one who as payee of the note of a third person expressly guaranteed payment of such second note, and transferred it to his creditor as collateral security for the payment of the principal obligation, was confined to his remedy against the maker of the collateral note, and could not maintain an action against the pledgor upon the express guaranty. Respondent, on the other hand, contends that Sparks v. Caldwell was overruled by the later decision of this court

in Cooke v. Mesmer, 164 Cal. 332, 128 Pac. 917. In that case a recovery was had against guarantors, who were the payees, of certain notes executed and payable to the defendants, which had been deposited as security by the payees for money loaned to still other parties. The judgment was affirmed on appeal, and the court said (164 Cal. 340, 128 Pac. 920):

> "It is thoroughly settled that an action on such a guaranty is one upon an independent contract of the guarantor, with which the principal debtor has nothing to do."

Neither of these cases is in exact point with the case at bar. In Sparks v. Caldwell, the one question presented was whether or not a pledgee could sue a pledgor as guarantor of a collateral security in the nature of a negotiable instrument, and the court said he could not for the reason that, "as between the pledgor and pledgee, the general property in a pledge remains in the pledgor" (citing Civ. Code, § 2888), and the transfer of the pledged note did not transfer the title any farther than to entitle the pledgee to collect the note from the maker. In Cooke v. Mesmer the guaranty sued on was an "independent contract" made to secure the payment of money loaned to third parties on the strength of such guaranty. We are not concerned, for the purpose of this case, in determining whether or not Sparks v. Caldwell has been overruled by the decision relied on by respondent, for there are features, both in relation to the law and the facts, which distinguish the instant case from both of the foregoing decisions. Section 2888 of the Civil Code, on the authority of which Sparks v. Caldwell, supra, was decided, provides that—

> "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

The court held in that case, therefore, that the title to the note was the all-significant matter and that, as the title remained in the pledgors, the pledgee was clothed only with the power, as their agent, to collect the amount due from the maker of the note, and to apply such sum to the payment of his debt. 157 Cal. 405, 108 Pac. 276. A different situation is presented here. The instant case is one in which there was an actual assignment, transfer, mortgage, and pledge to and with the respondent as trustee "upon the trusts and subject to the terms and conditions" expressed in the trust agreement of August 12, 1912. Section 2872 of the Civil Code declares:

> "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act."

The entire estate and interest of the appellant in the property subject to the trust agreement was vested as an estate, and not as a lien, in the respondent as trustee (Weber v. McCleverty, 149 Cal. 316, 322, 86 Pac. 706) and the trustee cannot be held to have had only a mere lien on the property (Hollywood Lumber Co. v. Love, 155 Cal. 270, 273, 100 Pac. 698).

Consequently the note of the San Francisco-Oakland Terminal Railways, having been conveyed to respondent as collateral, and the legal title to the paper having been transferred to respondent, we see no reason why, under the very broad power conferred upon it by the trust agreement, it should not be allowed to maintain the action against the maker, and also against this appellant as guarantor in the same action. That would seem to be a very reasonable thing to do in this particular action, wherein, it is evident, the court endeavored to dispose of the whole subject-matter of the controversy at one time —not piecemeal—a practice worthy of emulation. Cramer v. Tittle, 79 Cal. 332, 335, 21 Pac. 750. In answer to the further contention that the judgment on the guaranty is not supported by any allegation in the complaint, or anything that appears on the face of the record, it may be said that the proceeding adopted by the court was wholly consonant with the principle that where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, its duty, when the parties to the controversy are before it, to adjust the rights of all and leave nothing open to further litigation. Swan v. Talbot, 152 Cal. 142, 147, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

[7, 8] Finally appellant urges upon our consideration the contention that if the judgment obtained against it on the guaranty of the note of the San Francisco-Oakland Terminal Railways is permitted to stand, the result will be "that by reason of its principal obligation of $2,500,000, the Oakland Railways now has judgments against it of $5,000,000." This contention rests upon the assumption that appellant is primarily liable to respondent in the sum of $2,500,000 on the judgment against it for the amount of its note issue, and in an equal amount on its guaranty of the collateral note. For legal support of its contention, appellant looks to the proposition of law that in ordinary acceptance of the term "collateral security" implies the transfer to the creditor of an interest in some property, or lien on property, or obligation, which furnishes a security in addition to the responsibility of the debtor (11 Cor. Jur. p. 961), and that therefore an additional promise of a debtor to pay money cannot, from the very nature of the case, be treated as collateral security for his own debt. Dibert v. D'Arcy, 248 Mo. 617, 643, 154

S. W. 1116; In re Waddell-Entz Co., 67 Conn. 324, 334, 335, 35 Atl. 257. This rule seems to apply, however, only when the undertaking is considered solely in the light of a mere additional promise of the maker of the notes to pay money. The nature of the obligation changes with attending circumstances. The two cases just noted, and which are so strongly relied on by appellant, hold that, should the debtor secure his second note, or contract, by a mortgage upon property, the note and mortgage may be treated as collateral to the principal indebtedness so far as is necessary to give the creditor in the first note the benefit, with respect to his indebtedness, of the lien upon the mortgaged property normally created as security for the collateral note. Dibert v. D'Arcy, supra; In re Waddell-Entz Co., supra.

It has become necessary, therefore, to determine just what was the nature of the transaction in the present case. Considered aside from the circumstances under which it was made, appellant's guaranty was an original, independent undertaking to pay the debt of the San Francisco-Oakland Terminal Railways, in the event the maker of the note did not pay it. Cooke v. Mesmer, supra. So regarded, the note and the guaranty must be construed to be but one instrument, constituting a single contract, upon which the liability of the guarantor, to the extent of its obligation, was commensurate with that of the maker of the note. Reios v. Mardis, 18 Cal. App. 276, 281, 122 Pac. 1091; Bagley v. Cohen, 121 Cal. 604, 606, 53 Pac. 1117. But the findings of the trial court, the sufficiency of which are not here attacked, indicate very clearly that the guaranty was but one step of the entire transaction, which resulted in the trustee being given power and authority to pursue every means, or form of action, permissible to secure payment of the notes issued by appellant. We must not lose sight of the fact that by the terms of the trust agreement appellant "as the controlling stockholder of said San Francisco-Oakland Terminal Railways" made certain agreements and representations concerning the amount of the stock of that corporation: That it would not be increased until all of the notes issued by appellant should be fully paid; that neither the maker of the collateral note nor appellant should issue, sell, or otherwise dispose of any bonds of the two corporations, or either of them, unless the first proceeds resulting from the sale, or other disposition, of such additional bonds be paid to the trustees for the purpose of application to the payment of the notes, and interest, secured by the trust agreement. Appellant further covenanted and agreed that it would "also do, execute, and deliver, or cause or procure to be done, executed, acknowledged, and delivered, all and every such further act, deed, transfer, and assurances for the better assuring, conveying, and confirming unto the trustee of all and singular the property pledged hereby, as the trustee shall reasonably require."

The trial court found that—

> "Contemporaneously with the execution and delivery of said trust agreement and as a part of the same transaction, said Oakland Railways delivered to and pledged with said Anglo-California Trust Company, pursuant to said trust agreement, * * * a promissory note dated August 12, 1912 [which is the date of the trust agreement], legally executed and delivered by San Francisco-Oakland Terminal Railways * * * for the principal sum of $2,500,000; * * * and which said note, prior to or contemporaneously with its execution and delivery, and as part of the same transaction, was guaranteed by defendant Oakland Railways."

It also found that the judgment obtained by plaintiff against appellant on its guaranty is subject to the trust agreement and the lien and pledge thereby evidenced, and might be sold under the judgment to be entered in this action. In the light of these findings, therefore, we may safely assume that the trustee required appellant to execute the guaranty for the "better assuring, conveying, and confirming unto" it the note of the San Francisco-Oakland Terminal Railways and the collateral pledge of capital stock. To accept the view of appellant would be to hold that the parties to this particular transaction merely intended to accomplish an idle act. The facts found, and the judgment of the lower court, must be supported by every reasonable inference and intendment. It is not at all unreasonable to conclude that the guaranty of appellant in this case was properly considered as collateral in so far as it was necessary to give the respondent, as trustee for the holders of the notes of the appellant, the full benefit of the lien upon the pledged property. Judgment on this collateral undertaking is the collateral promise reduced to a judgment which has taken the place of the guaranty, and stands as security merely for the payment of the principal debt of appellant on its notes. When that obligation is satisfied, such collateral judgment will become extinguished, and no action or rights can thereafter be maintained upon it. Harding v. Hawkins, 141 Ill. 572, 579, 31 N. E. 307, 33 Am. St. Rep. 347. When the principal obligation or debt is satisfied, the only purpose for which the guaranty was executed or can be used has been accomplished. The satisfaction of the judgment against appellant upon the principal obligation will amount to a satisfaction of the judgment upon the collateral note. Lynch v. Burt, supra; Vanuxem v. Burr, 151 Mass. 386, 24 N. E. 773, 21 Am. St. Rep. 458. In the latter decision reference is made to Corn Exchange v. Babcock, 8 Abb. Prac. (N. S.) 256, where it is said (at page 259):

> "As a general if not a universal proposition, remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, though but one satisfaction can be obtained therefor. * * * If an attempt be made to collect the judgment both upon the original and the collateral security, that can always be prevented or remedied by the order of the court."

Therefore the judgment rendered against appellant on its guaranty of the note of the San Francisco-Oakland Terminal Railways has not increased and cannot add to the burden of payment to which it has already been subjected by reason of the judgment against it on its primal obligation to pay the amount found due on its own note issue. Appellant is not aggrieved thereby, and it becomes unimportant to consider further whether or not the trial court committed error in its rendition in this particular action.

[9] If it be urged that the trial court erred in decreeing that the judgment against appellant on the guaranty might be sold under the judgment entered on the trust agreement "as part of the properties held and pledged to secure the payment of the amounts found due" on the promissory notes executed by appellant, the first answer to such contention is that its action is supported by the finding that the judgment on the guaranty is "subject to said trust agreement dated August 12, 1912, and the lien and pledge thereby evidenced." The next answer is that as long as the trustee remains owner of the judgment it cannot collect upon both the original debt and the collateral security, as already pointed out. In so far as a sale of the judgment to a third party is concerned, while a judgment is property which can be transferred, the rule of caveat emptor applies to such transactions. Curtin v. Kowalsky, 145 Cal. 431, 435, 78 Pac. 962. A judgment is not a negotiable instrument, but is a mere chose in action vesting an equitable right in the assignee to the proceeds of it, with a right to the usual and legal means of collecting the amount due on it. There is no difference, so far as affects the equity of the interest conveyed, between a sale made voluntarily by a party himself and a sale made for him by a sheriff or commissioner who, in making it, acts as his agent. Fore v. Manlove, 18 Cal. 436, 438. A sale by a sheriff or commissioner is in effect only an assignment. Southard v. McBrown, 63 Cal. 545, 547. If the assignor or holder of the judgment has no title, the assignee or purchaser at such sale will take none, whether he had notice or not. We think it must follow that any purchaser of the judgment entered against appellant on the guaranty in this case must take it subject to all the rights appellant has in the premises arising out of its relation to respondent by reason of the nature of the transaction. The exact nature of these rights does not need to be determined in this action.

The judgment appealed from is affirmed.

We concur: MYERS, C. J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.

(66 Cal. App. 86)

NEW AMSTERDAM CASUALTY CO. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA. (Civ. 4615.)

(District Court of Appeal, Second District, Division 1, California. March 5, 1924.)

1. Master and servant 🔑397—Jurisdiction not acquired by Industrial Commission by consent.

Jurisdiction cannot be acquired by Industrial Accident Commission by consent.

2. Master and servant 🔑397—Stipulation Commission had jurisdiction without effect.

A stipulation that Industrial Accident Commission had jurisdiction of proceeding, under Workmen's Compensation Act, was of no effect.

3. Master and servant 🔑398—Stipulation Commission had jurisdiction not waiver of limitations.

A bare stipulation that Industrial Accident Commission had jurisdiction of proceeding, under Workmen's Compensation Act, did not constitute waiver of defense of limitations.

4. Master and servant 🔑416—Referee's failure to find on issue of limitations did not deprive insurer of defense.

Failure of referee in proceeding under Workmen's Compensation Act to clearly state issues or to find on issue of limitations did not deprive insurer of defense of limitations.

5. Master and servant 🔑403—Burden of proof as to limitations.

Where pleadings of petitioner before Accident Commission showed action was barred by limitations, burden was cast upon him to prove that one of exceptions of statute existed in order that claim might be relieved from bar of limitations pleaded.

Application for certiorari by the New Amsterdam Casualty Company to review an order of the Industrial Accident Commission of State of California awarding compensation for injury. Order annulled.

Kidd, Hardy & Elliott, of Los Angeles (Walter O. Schell, of Los Angeles, of counsel), for petitioner.

Warren H. Pillsbury and Edward O. Allen, both of San Francisco, for respondent.

George H. Moore, of Los Angeles, amicus curiæ.

HOUSER, J. Certiorari. The point which is suggested by counsel for petitioner, and which is accepted by respondent as being proper for the consideration of this court, has to do with the statute of limitations. Ordinarily it might be contended that a writ of certiorari would not lie herein; but, in view of the fact that the controversy arises under the Workmen's Compensation Act (St. 1917, p. 831), and that the ordinary functions of the writ of certiorari are largely extended by its provisions as affecting cases arising thereunder, together with the further consideration that both the Supreme Court and the appellate court of this state in analogous cases have heretofore recognized the broadened powers of this court in such proceedings, it may be assumed in the instant case that this court is not without authority in the premises.

Without reference to the underlying facts in the case, it may be stated that the application for the adjustment of the claim before the Accident Commission was in the usual form in such matters, and from the return to the writ it appears that the accident which resulted in the injury of which complaint is made occurred on the 28th day of November, 1922, and that the application by the injured person for adjustment of his claim was not filed with the Industrial Accident Commission until July 6, 1923. The act on which the proceeding is based provides in effect that, unless compensation be made, or an agreement for its payment be made, within six months from the date of the injury, except as otherwise provided in the act, such proceedings shall be barred.

On the face of the record it appears that more than six months elapsed between the date of the injury and the date of the filing of the application. Among other defenses the answer of the defendant New Amsterdam Casualty Company contained the following:

> "It sets up the defense that the time limit of applicant for making claim against the New Amsterdam Casualty Company has expired, inasmuch as over six months have elapsed since the time of injury, and no request for any payment of any nature has ever been made by applicant, or any one on his behalf, to the New Amsterdam Casualty Company, and the said New Amsterdam Casualty Company has never made any such payments to any one."

On the hearing before the referee a stipulation was entered into which, among other things, showed that certain compensation in payment of medical services and for disability of the injured person had been paid by one of the defendants in the proceeding, but that nothing had been paid by the defendant New Amsterdam Casualty Company. It was also stipulated "that the Commission has jurisdiction in this proceeding." In stating the issues in the proceeding before the Commission, the referee omitted to mention the fact that there was any issue regarding the statute of limitations. No evidence was offered by either party to the controversy touching any of the exceptions mentioned in the act which would have had the effect of preventing the operation of the statute of limitations as therein provided. Nor was any finding made by the referee with respect to such statute.

[1-4] On behalf of the respondent herein it is urged that the stipulation of the parties as to the jurisdiction of the Commission, together with the failure of the defendant at the hearing to offer any evidence with reference to the statute of limitations and especially as to the exceptions mentioned in the statute, constituted a withdrawal and a waiver of such defense. The general rule is that jurisdiction cannot be acquired by consent, and whatever exceptions may exist thereto are certainly not within the facts of this matter. It is apparent that the Commission either had or that it had not jurisdiction. If it already had jurisdiction, the stipulation was not only unnecessary but was also a superfluity; and, if it had not jurisdiction, the stipulation could not confer it. It must be true that, if jurisdiction existed, the question of the applicability of the statute of limitations to the facts of the case could not in any wise affect the right of the Commission to adjudicate concerning the subject-matter in the proceeding before it. In a proceeding of this nature the question of whether or not the tribunal has jurisdiction cannot be made to depend upon the conclusion as to which party should recover judgment, whether dependent upon the statute of limitations or any other single issue in the case. Holding that the issue of the statute of limitations was determinative of jurisdiction, that is, the legal right of the tribunal to decide the case, would in effect mean that, eliminating such issue, the court would have no power to decide for either of the parties to the action. The stipulation contained no statement of facts from which jurisdiction of the tribunal would necessarily follow; it was but a bald statement "that the Commission has jurisdiction in this proceeding." The result must be that by the stipulation the jurisdiction of the court was entirely unaffected. Nor did it constitute any waiver of the defense of the statute of limitations; it had no bearing upon, nor had it any relation to, such issue. Neither could the failure of the referee to correctly state the issues in the proceeding, or to find on the issue of the statute of limitations, deprive defendant of its defense. It was no part of its duty to see that the referee was properly performing his duty. The defendant had interposed the defense according to the usual and accepted form in such matters—at least no objection is made on such grounds—and it had the undoubted right, if findings were to be made at all, to have a finding made upon such issue.

[5] It is contended that the burden was upon the defendant, not only to prove that the statute of limitations applied, but also to prove that none of the exceptions of the statute prevented it from taking effect in the defendant's favor. In 17 R. C. L. 1004, 1005, where the authorities are cited, the general

statement is made to the effect that, where a party to an action in which the statute of limitations is pleaded claims the benefit of an exception, all presumptions are against him, and the burden is upon such party to show that he is entitled to the exception. And in volume 8 Ann. Cas. p. 341, where a large number of cases are collected, it is said that—

> "When the plaintiff's pleadings show upon their face that the claim sued upon is actually barred by the statute of limitations, then a plea of the statute interposed by the defendant will in effect shift the burden to the plaintiff, who will be obliged to produce evidence to relieve his claim from the bar of the statute. Of course in the first instance the burden is upon the defendant to prove his plea, but he may rely for such proof upon the admissions contained in the plaintiff's pleadings and rest without producing other evidence."

In the instant case the pleadings of the petitioner before the Accident Commission show that the action is barred by the statute. The burden was therefore cast upon the petitioner to prove that one of the exceptions of the statute existed in order that the claim might be relieved from the bar of the statute. The record herein discloses the fact that no evidence was introduced to offset the defense made by the defendant on the face of the pleadings. The defense of the statute must therefore prevail.

It is ordered that the award of the Commission as against the defendant New Amsterdam Casualty Company be and the same is annulled.

We concur: CONREY, P. J.; CURTIS, J.

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66 Cal. App. 140

PEOPLE v. LEONARD et al. (Cr. 1000.)

(District Court of Appeal, Second District, Division 2, California. March 7, 1924.)

1. Insurrection and sedition ⚿2—Evidence insufficient to sustain conviction.

In a prosecution for criminal syndicalism, evidence *held* insufficient to sustain conviction.

2. Insurrection and sedition ⚿2—Certain evidence held not sufficient to sustain conviction.

Evidence that upon arrest defendant was possessed of an I. W. W. button and suit case containing I. W. W. literature could not support conviction for criminal syndicalism.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Roy Leonard and others were convicted of criminal syndicalism, and appeal. Reversed.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. Defendants were charged with the crime of criminal syndicalism under an indictment in two counts, each count averring that the crime was committed in Los Angeles county. In the first count it is charged that each of the defendants did "organize and assist in organizing and knowingly became members" of the Industrial Workers of the World, the nature and character of which organization is then averred. The second count charges, "for a second and separate cause of action, * * * and being a different statement of the same offense charged," in the first count, that—

> "The said defendants are accused * * * of the crime of criminal syndicalism, a felony, * * * to wit: That the said defendants, and each of them, * * * and the members of said Industrial Workers of the World, by joining and becoming members of said organization, agreed to enter into and did enter into a conspiracy * * * to bring about a change of industrial ownership and effecting political changes" in California and the United States, "and as a part of said conspiracy, * * * to use force and violence and unlawful methods of terrorism to bring about such changes, and * * * to teach, advocate, aid and abet, commit and attempt to commit criminal syndicalism, * * * said organization, its members and the defendants herein did print, * * * distribute and circulate and publicly display books, papers, * * * and other * * * matter containing and carrying written and printed advocacy, teachings and aiding and abetting and advising criminal sydicalism * * * in order to organize and assist in organizing and inducing persons to become members of said organization, * * * to advocate, teach, aid and abet criminal syndicalism; that in furtherance of said conspiracy the said organization, its members, and the defendants herein, caused to be printed and distributed and circulated, and did print, teach, distribute and circulate * * * the preamble of the Industrial Workers of the World. * * *"

Defendants Duffy, Larson, and Oria were convicted under the first count of the indictment. Defendants Leonard, Fink, Erwin, Gross, and Allen were convicted under both counts. All appeal from the judgment of conviction.

It is contended that there is in the record no evidence to support the verdict convicting any of appellants. This point may be summarily settled as to each of appellants and speedy disposition thus be made of the appeal.

[1, 2] There is no evidence that either appellant Erwin, or appellant Gross, or appellant Oria was ever in Los Angeles county prior to the date upon which the indictment was found. There is some evidence of the commission by appellant Leonard, in the county of Imperial, of acts of a nature simi-

lar to those charged in the indictment, but no evidence that he committed any such acts in the county of Los Angeles.

Appellant Fink, at the time of his arrest, which occurred before the indictment was found, was possessed of a membership card in the Industrial Workers of the World, which we shall henceforth refer to as the I. W. W. This card recited, "Issued by authority of the general executive board of the I. W. W.," and showed that Fink was "initiated T. S. Waller, M. T. W. Union No. 8—April 8, 1920." The arresting officer testified:

> "I told him [Fink] that I was surprised to see him down in this hall [at the time of the arrest] in a big meeting that had taken place that afternoon; was surprised to see him there in that hall with those papers, selling those papers there; and found these books and all this stuff on him."

The papers referred to by the witness were six copies of a newspaper, seven copies of a "demand," or circular, and one copy of a pamphlet, all apparently issued by the I. W. W. They were introduced in evidence. All of them, except the pamphlet, were identified by an affirmative answer of the witness to a question of the prosecutor: "Are these the papers you refer to as being in his possession there in the hall?" The witness identified the pamphlet as having been "taken off him at the time he was arrested." This was all the evidence offered to show the commission by Fink of the acts charged in the indictment. It is plain that it was insufficient to support the verdict on either count. The record fails to show that Fink organized or assisted in organizing the I. W. W., or that he became a member thereof in Los Angeles county, or that he printed, distributed, circulated, or publicly displayed any written or printed matter whatever.

The evidence offered to show the commission by appellant Allen of the acts charged in the indictment was in the testimony of the officer who arrested him. This officer talked with Allen in jail the next day after the arrest. Allen then said he was a member of the I. W. W. and had been for some time. The officer, along with others, then took Allen to a place which some person other than the prisoner had said was his residence and they there found I. W. W. literature. This evidence, all that was offered to prove Allen's alleged criminal acts, was palpably insufficient as a support for the verdict against him.

The only evidence introduced for the purpose of showing the commission by appellant Duffy of the acts charged in the indictment was that, upon his arrest, he was possessed of an I. W. W. button and of a suit case in which was contained some I. W. W. literature. This evidence, of course, gave no support to the verdict.

It was only shown against appellant Larson that the officer who arrested him had a "conversation with him about his membership in the I. W. W." The prosecution offered a membership card in the organization, but it was rejected by the court upon objection that it was not shown to have been issued to Larson. It was superfluous to say that there was no evidence against that appellant.

It is just to remark that the Attorney General, in the brief filed by him, practically concedes that the judgment must be reversed.

Judgment reversed as to each appellant.

We concur: FINLAYSON, P. J.; CRAIG, J.

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66 Cal. App. 154

PEOPLE v. ORTIZ. (Cr. 1118.)

(District Court of Appeal, First District, Division 2, California. March 11, 1924.)

1. Criminal law ⚷1170(2)—Exclusion of evidence otherwise supplied immaterial.

It was immaterial that evidence was excluded, where matters sought to be proved were otherwise established.

2. Criminal law ⚷650—Defendant properly asked to illustrate manner in which he took knife from pocket.

In prosecution for assault with deadly weapon, where defendant testified that he cut plaintiff in self-defense, court properly permitted district attorney to request defendant to illustrate to jury manner in which he took knife from his pocket and opened it.

3. Criminal law ⚷1170(1)—Exclusion of evidence held not prejudicial.

In prosecution for assault with deadly weapon, where only question was whether defendant cut in self-defense, exclusion of evidence that defendant had written no letter threatening violence, as testified by witness, *held* not so prejudicial as to warrant reversal.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

John Ortiz was convicted of simple assault, and appeals. Affirmed.

Oscar Hudson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment and order denying his motion for a new trial after a conviction of simple assault upon an information charging defendant with assault with a deadly weapon.

The facts appearing from the record are substantially as stated by the appellant. On August 16, 1922, the defendant saw his wife leave their home in San Francisco, Cal., and take a street car going to the waterfront.

Defendant is a stevedore by occupation, and had left his home in the morning ostensibly to go to his work; but, instead of doing so, he had placed himself in a position where he could watch his home. In an automobile he followed his wife to the Ferry building in San Francisco and saw her meet Albert Donaso and proceed with said Donaso back to her home. Defendant then went to the police station and asked the aid of the police to have Donaso ejected from his home, but was informed that it would be necessary for him to secure a warrant before the police department could aid him. Defendant then left the police station, went directly to his home, and, finding the front door locked, went around to the window of his bedroom, broke a pane of glass, opened the window, and entered his home. He found his wife, her aunt, and Donaso drinking wine together in the kitchen while they were preparing food for their lunch. When the defendant entered the kitchen, the two women fled from the house, and defendant and Donaso engaged in a struggle in which Donaso was repeatedly cut with a pocketknife.

[1] The first objection made by the appellant is that the court erred in sustaining the objection of the district attorney to a question asked by counsel for defendant of the witness Donaso, as to where he first met the wife of defendant on the day of the assault. At the place in the record to which we are referred by appellant, we find that the question was answered without objection; the following appearing: "Q. Where did you first meet Mrs. Ortiz on that day? A. Down to the wharf—on the Vallejo boat wharf." The next question asked was: "Q. Who was with her, if any one?" An objection was sustained to this question. The materiality of the question is not apparent to us, but, nevertheless, the jury was informed upon the question of who accompanied Mrs. Ortiz to the Ferry building by the testimony of her husband, who stated that he saw his wife leave the house with her baby and take the street car to the waterfront.

The next objection made by appellant is that the court sustained an objection to a question asked of Mrs. Carion, an aunt of Mrs. Ortiz, as to why she ran from the house when she saw the defendant enter. We do not find that any objection was made to this question, and the answer to the same appears in the record presented to us.

[2] Complaint is made to the action of the trial court in overruling the objection of counsel for defendant to the request of the district attorney that the defendant illustrate to the jury the manner in which he took from his pocket and opened the small pocketknife with which Donaso was cut. We think the request was a proper one upon cross-examination under the facts of this case. The defendant had testified that he cut Donaso in self-defense; that he entered the room with no weapon in his hands; and that Donaso rushed at him with a knife, whereupon he pulled his pocketknife out of his pocket, opened it, and cut Donaso in self-defense. As a test of the witness' ability to hastily take the knife from his pocket and open it during the struggle between the two men, the district attorney asked him to repeat the act of drawing the knife from his pocket and opening it for the jury. We think this was proper upon cross-examination in view of the defense offered by the defendant.

[3] The record contained testimony by Donaso that Mrs. Ortiz had come to the wharf to meet him because she wished to tell him of a letter which Ortiz had written to his sister, threatening the life of Donaso. Another witness, the aunt of Mrs. Ortiz, stated that she had run out of the house when Ortiz entered it because he had written a letter to his mother-in-law stating that he would come around there some time. Later the mother-in-law was placed upon the witness stand and asked if she had received a letter from Ortiz threatening violence against either Donaso or Mrs. Ortiz. She replied that she never had received such a letter. Objection was made to the relevancy of the testimony, and the court ordered the same stricken out. The appellant now urges that error was committed in this ruling, as the evidence stricken out would tend to prove that there was no such letter as that testified to by Donaso and the aunt of Mrs. Ortiz and that the story was a fabrication. If the fact of whether the mother of Mrs. Ortiz had or had not received such a letter had any bearing upon the question of defendant's guilt, it was a remote bearing. The record is clear that the defendant cut Donaso with a knife. The question for the jury was whether or not he had done so in self-defense. Whether or not the defendant had also written threatening letters was a collateral issue, and failure to go into this matter does not warrant a reversal of the judgment.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(66 Cal. App. 153)

MAIDEN v. SUPERIOR COURT, ALAMEDA COUNTY. (Civ. 4904.)

(District Court of Appeal, First District, Division 2, California. March 11, 1924.)

Prohibition 🔑13—Application for writ held to present only moot question.

Where, at time of application for a writ to prevent modification of interlocutory divorce decree, parties have compromised their disagreements by contract, only a moot question is presented and writ will be discharged.

Action by Walter Maiden for writ of prohibition to be directed to the Superior Court of Alameda County, T. W. Harris, Judge thereof. Writ discharged.

John T. Wentz, of San Leandro, for petitioner.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for respondent.

Opinion of the court, stated by Mr. Justice GEORGE A. STURTEVANT (from the bench):

Assuming that Mr. Leo and Mr. Halsey had been called as witnesses, as has been stipulated, they would have testified that they did not threaten Mr. Maiden regarding the making of the contract. There is here Mr. Maiden's affidavit that he was threatened, but the preponderance of testimony is against him. That rule would have special application in a fraud charge. The court would not be burdened at all in determining against Mr. Maiden that he was not threatened and imposed upon.

He and his wife have compromised these matters. There are two distinct subjects, one touching their property rights and one touching the divorce. As to the property rights, they had the unquestionable right to make a settlement. Now, then, assuming that in the contract they inserted something regarding the entering of the final decree. That is somewhat cleared up as between them, but there is a third party who has not been heard from on that subject yet, and that is Judge Harris. This court may not assume, in advance, that Judge Harris will accept and will act upon any such contract purporting to confer jurisdiction, if jurisdiction had expired. Nor may we assume that he will use such a contract as conferring jurisdiction to modify the interlocutory decree in any respect provided that he reaches a conclusion that a sufficient showing has not been made that these parties cohabited subsequent to the entry of the interlocutory decree and come within the rule of Olson v. Superior Ct. of Merced County, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589.

It patently appearing that at the time this application was made for a writ of prohibition the parties themselves had compromised their several disagreements by contract, it is a moot question that is before us, and, basing our order solely upon that, we discharge the writ.

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65 Cal. App. 704

PEOPLE v. WAGNER et al. (Cr. 711.)

(District Court of Appeal, Third District, California. Feb. 21, 1923. Hearing Denied by Supreme Court April 21, 1924.)

1. Constitutional law 🔑90, 250, 258—Insurrection and sedition 🔑2—Criminal Syndicalism Act does not abridge freedom of speech, deny equal protection of laws, or due process of law.

The Criminal Syndicalism Act is not unconstitutional as abridging exercise of the right of freedom of speech, or as denying equal protection of the laws, or due process of law.

2. Insurrection and sedition 🔑2 — Criminal Syndicalism Act not unconstitutional as not requiring guilty knowledge.

That part of Criminal Syndicalism Act, § 2, subd. 4, which declares that any person who "is" a member of any organization, etc., the purpose of which is to advocate, teach, etc., criminal syndicalism, as said offense is defined in section 1 of such act, is guilty of felony, is not unconstitutional as permitting conviction under the act though convicted person had no knowledge of alleged criminal character of organization.

3. Insurrection and sedition 🔑2—Evidence held admissible as tending to show objects of organization to be violative of Criminal Syndicalism Act.

In prosecution of members of Industrial Workers of the World under Criminal Syndicalism Act, testimony as to finding of pamphlets and publications having reference to principles of the Soviet Russia organization in canvas bag carried by one of defendants while distributing literature, *held* properly admitted in evidence, in that they were found among papers concerning purposes of I. W. W. organization, and in view of testimony as to similarity of the two organizations.

4. Criminal law 🔑419, 420(11)—Evidence of conversations with third parties held inadmissible as hearsay.

In prosecution of members of Industrial Workers of the World under Criminal Syndicalism Act, permitting witness to narrate substance of conversation with members of I. W. W., not defendants, relating to crimes claimed to have been committed by them in pursuance of policy of the organization was error; such testimony being wholly hearsay.

5. Criminal law 🔑1186(4) — Admission of hearsay evidence held harmless error.

In prosecution of members of Industrial Workers of the World for violation of Criminal Syndicalism Act, error in admitting hearsay evidence as to crimes committed by members not defendants in pursuance of policy of organization *held* harmless, where same matter was testified to by other witnesses, and in view of evidence tending to show guilt, and of Const. art. 6, § 4½.

6. Criminal law 🔑451(4) — Conclusions of witness that amendments to platform and principles of I. W. W. camouflage held admissible.

In prosecution of members of Industrial Workers of the World under Criminal Syndicalism Act, § 2, subd. 4, court did not err in permitting former member to testify that purported changes in principles and platform of the I. W. W. organization was mere camouflage, witness stating facts on which he based conclusion.

7. Criminal law 🔑1169(2)—Admission of evidence held harmless if erroneous.

In prosecution of members of Industrial Workers of the World under Criminal Syndicalism Act, error in permitting ex-member to testify that the organization believed in free love, that religion and churches were sham, that courts should be done away with, etc., *held* not prejudicial, in view of evidence tending to establish objects of organization.

8. Insurrection and sedition 🔑2—Evidence of past violence held admissible in prosecution under Criminal Syndicalism Act.

In prosecution of members of Industrial Workers of the World under Criminal Syndicalism Act, § 2, subd. 4, criminal acts committed by members of the I. W. W. in pursuance of its policy of obtaining control of government by violence, were admissible, though remote in time from the time at which defendants were arrested and prosecuted, though there is no presumption to be applied under Code Civ. Proc. § 1963, subd. 32, in view of sections 1959, 1960.

9. Insurrection and sedition 🔑2—Guilt under Criminal Syndicalism Act held for jury.

In prosecution of members of Industrial Workers of the World under the Criminal Syndicalism Act, guilt *held* for the jury.

10. Criminal law 🔑449(1)—Interpretation by outsider of principles of Industrial Workers of World held properly excluded in prosecution under Criminal Syndicalism Act.

In prosecution of members of Industrial Workers of the World under Criminal Syndicalism Act, *held* proper to exclude publication by a certain publicist to effect that principles and purposes of the I. W. W., were of a high character; such testimony involving mere opinion of an "outsider."

11. Insurrection and sedition 🔑2—Instruction requested as to evidence necessary to establish conspiracy held properly refused as misleading.

In prosecution of members of the Industrial Workers of the World under Criminal Syndicalism Act, court properly refused instruction that "the mere fact that two or more persons are instrumental in bringing about the same result, is not, in itself, sufficient to establish conspiracy between such persons, unless there is an agreement or understanding between such persons to bring about, or attempt to bring about, such result," being misleading, as under conceivable circumstances the fact recited might be sufficient evidence of the required previous agreement or understanding.

12. Criminal law 🔑829(3) — Requested instruction covered by given instructions properly refused, where containing misstatement of law.

In prosecution of members of I. W. W. under Criminal Syndicalism Act instructions *held* to sufficiently convey to jury proposition that knowledge of character of the organization was an essential ingredient of the crime, and court did not err in refusing to give a requested instruction thereon which included misstatement of the law.

13. Criminal law 🔑824(1)—Instruction on criminal intent or knowledge should be given, though not requested.

In prosecution of members of I. W. W. under Criminal Syndicalism Act, § 2, subd. 4, even if such an instruction is not requested by either defendants or the people, it is nevertheless duty of court sua sponte to clearly explain that, knowledge of alleged criminal character of the organization is as necessary to be proved as fact of being or becoming member thereof.

14. Insurrection and sedition 🔑2—Place of organization immaterial in prosecution for being member of society to abet criminal syndicalism.

In prosecution under Criminal Syndicalism Act, § 2, subd. 4, it is immaterial whether alleged unlawful organization was organized in the county of the prosecution or anywhere in the state, or whether the defendants were members of the local organization.

15. Criminal law 🔑830—Instruction containing misstatement of law may be rejected.

A requested instruction, though in some respects involving a correct statement of the law, may be rejected by the court, if in other particulars it contains a misstatement of the law.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Joe Wagner and others were convicted of criminal syndicalism, and appeal. Affirmed.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants Wagner, Brooks, and Russell were indicted by the grand jury of Sacramento county for the crime of criminal syndicalism. The defendants Vargo and Hewitt were likewise charged with the same offense. The indictment against the first-named defendants was presented and filed in the superior court of said county on the 2d day of March, 1923, and the indictment against Vargo and Hewitt presented and filed in the same court on the 10th day of August, 1923. The same attorneys represented all the defendants under both indictments. By stipulation between said attorneys and the district attorney, the two cases or indictments were consolidated for the purposes of the trial, and accordingly the defendants under both indictments were jointly tried.

The jury found the defendants Wagner, Vargo, and Russell guilty as charged. The record does not appear to show what disposition was made of the cases against the defendants Brooks and Hewitt. This, however, is of no material consequence. A motion for a new trial in behalf of each of the convicted defendants was made and denied, and they appealed from the judgment of conviction and the order refusing to grant them a new trial.

The two indictments are founded on subdivision 4 of section 2 of the act designated and known as the Criminal Syndicalism Act. Stats. 1919, p. 281. The said section reads as follows:

> "Any person who * * * organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group, or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism,"

—is guilty of a felony, etc.

The first section of said act defines "criminal syndicalism" as—

> "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence, or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

The points urged for a reversal are numerous, but many of them call for but passing, if any, notice herein. It is contended that the evidence, as brought before the jury in support of the indictments, is insufficient to sustain the verdicts. It is further claimed that much of the evidence presented by the people in support of the indictments was legally improper and seriously prejudicial to the rights of the accused. The assignments so made, together with objections to certain instructions, constitute the principal grounds upon which it is insisted that the cases should be sent back for trial de novo.

It is expressly conceded by counsel for the defendants that the evidence sufficiently shows that the appealing defendants were members of the organization known as the Industrial Workers of the World.

It is not necessary that the testimony presented by the people should be minutely examined herein. We have read the evidence, as it is disclosed by the record, and we find that it is substantially the same character of proof as was adduced at the trial of other cases, in which precisely the same offense as is charged in the indictments here was charged against the accused. See People v. Steelik, 187 Cal. 361, 203 Pac. 78; People v. Taylor, 187 Cal. 378, 203 Pac. 85; People v. Roe, 58 Cal. App. 690, 209 Pac. 381; People v. La Rue et al. (Cal. App.) 216 Pac. 627; People v. Flanagan et al. (Cal. App.) 223 Pac. 1014. The literature embraced in numerous publications in the form of books, magazines, pamphlets, and leaflets introduced in the instant case to show the principles and objects of the I. W. W. organization is the same, or of the same general character, as that received in the cases just mentioned. Certain of the witnesses (former members of the I. W. W.) giving testimony in this case of the commission of criminal acts in furtherance of the general program to which the I. W. W. organization is, according to its literature, committed, are, we judge from their names (idem sonans) the same witnesses who gave substantially the same testimony in the cases above named. As it was held in those cases, so it must be held here, that the testimony in the record now before us affords sufficient support to the verdicts. To some of the testimony, however, the objection is urged that it is incompetent. It is also objected that the acts of violence and other criminal performances which were shown to have been perpetrated by certain members of the Industrial Workers of the World having been committed some four or five years before the trial of this action, were improperly allowed to be brought into the case because of the remoteness of the time at which they were committed from the time of the arrest and prosecution of the defendants, the argument being that there is no presumption that, even if said organization had then advocated, taught, and practiced such criminal acts for the purpose of carrying out its principles and doctrines, said organization had not since changed in that respect and had not adopted lawful and peaceable means for accomplishing its objects and purposes. The objection in this behalf will be later considered.

[1] The contention that the Criminal Syndicalism Act is unconstitutional, in that its effect is to abridge the exercise of the right of freedom of speech as guaranteed by the state and federal Constitutions, has been held in numerous cases in which said act and other similar statutes of other states have been considered to be without force. People v. Steelik, 187 Cal. 361, 203 Pac. 78, supra; People v. Gitlow, 195 App. Div. 773, 187 N. Y. Supp. 783; Schenck v. U. S., 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470. Nor is the act in conflict with the guaranty of the federal Constitution interdicting legislation, the effect of which would be to deny to persons the equal protection of the laws or contravene the right of due process of law. State v. Dingman (Idaho) 219 Pac. 760. See, also cases above cited.

[2] There is no merit in the contention that that part of subdivision 4 of section 2 of the Syndicalism Act, which declares that any person who is a member of any organization, etc., the purpose of which is to advocate, teach, etc., criminal syndicalism, as said offense is defined in section 1 of said act, is unconstitutional, in that the word "is" is not modified by the word "knowingly," and that therefore a person who is or remains a member of said organization would be guilty of a felony under the act, even though he had no knowledge of the alleged criminal character of the organization. In the opinion by Presiding Justice Finch of this court, in the recent case of People v. Flanagan et al., 223 Pac. 1014, supra, it was held that scienter or guilty knowledge or criminal intent was an essential element of the offense of criminal syndicalism. The question is exhaustively considered in that case. To the conclusion reached therein upon that proposition we unqualifiedly adhere. Indeed, we are not reluctant to take a step further and say that, in our opinion, even if the word "knowingly" were altogether eliminated from subdivision 4 of section 2 of the act, it would still remain true that knowledge of the unlawful character of the organization would be a necessary element of the crime denounced by said subdivision.

[3] The next points which may briefly be considered are the rulings of the court upon matters of evidence. The defendant Wagner, when arrested, was distributing certain I. W. W. literature, carrying the same in a canvas bag. In his room was also found a large quantity of literature, among which were certain pamphlets and publications having reference to the principles of the Soviet Russia organization and Communists' party principles. These were received in evidence over objection by the defendants; the claim being that said organizations are not related to, or connected in any way with, the Industrial Workers of the World, and that the principles they advocated were not those of the latter organization. We think that the court made no error in the rulings allowing in evidence the literature just referred to. The witness Townsend testified that the only difference between the program of the Soviet Russia organization and the Industrial Workers of the World is that the former undertake to secure industrial freedom by or through political methods, that is, through ballot box, while the Industrial Workers of the World advocate direct action, that is, forcibly taking control of the industrial machinery of the world and appropriating it and using it according to their conception of the kind of government that should rule society. The said pamphlets and publications were found in the possession of the defendant Wagner and were among books, papers, and pamphlets admittedly containing literature regarding the purposes and objects of the I. W. W. organization. They were admissible for the purpose of showing the general character of the latter organization since their general principles were the same, and the fact that the defendant had knowledge of the plans of the I. W. W. organization.

[4, 5] It is further objected that the court erred in permitting the witness Townsend to narrate the substance of a conversation occurring between the witness and William Weyh, a member of the Industrial Workers of the World, relating to a certain crime which said Weyh claimed to have committed in pursuance of the policy of said organization to destroy property for the purpose of creating a reign of terror among the people. A similar objection is made to the rulings of the court allowing said Townsend to testify that one Connellan, a member of the I. W. W., told him (the witness) that that he (Connellan) and others had deposited potassium hydroxide in the shoes of one Joe Arada who was employed in digging potatoes for a farmer in the San Joaquin Valley; that Connellan, so Townsend was permitted to testify, stated that the effect of putting that chemical in the shoes of Arada was to burn his feet and so cripple him that he could not proceed further in the employment in which he was engaged. The objection to this testimony was well taken. The precise proposition was considered in the cases of People v. La Rue, supra, and People v. Flanagan, supra, and in those cases it was properly held that such testimony was wholly hearsay and, therefore, inadmissible. See, also, People v. Irvin, 77 Cal. 494, 504, 20 Pac. 56; State v. Dingman (Idaho) 219 Pac. 760; State v. Gibson, 115 Wash. 512, 197 Pac. 611; State v. Petilla, 116 Wash. 589, 200 Pac. 332; People v. Smith, 151 Cal. 619, 626, 91 Pac. 511; People v. Sullivan, 59 Cal. App. 633, 211 Pac. 647. As was said in the Flanagan Case, so it is true here:

> "The hearsay statements erroneously admitted were not made at any meeting of the organization, or to or by an officer or representative thereof, or in the way of propaganda to further its purposes, but the facts sought to be proved by the declarations were the commission of criminal acts by its members."

who, it may be added, were not on trial either in the Flanagan Case or in this. The record shows, however, that said Arada was a witness in this case and testified in detail to the fact of the placing of potassium hydroxide in his shoes at the time and under the circumstances as explained by Connellan to the witness Townsend and the effect of the chemical upon his feet, stating that his feet were so severely burned from contact with the chemical that he became, for a time, helplessly crippled, and that by reason thereof he was compelled to remain in a hospital and under medical treatment for several months. There is also in the record evidence of many circumstances tending strongly to fix responsibility for the said act upon the members of the Industrial Workers of the World. In view of this first-hand testimony of the happening of the act and the competent testimony of circumstances tending to prove it was the work of certain members of said organization, it well may be concluded that the admission of Townsend's hearsay testimony relative to the circumstance could have done very slight damage to the substantial rights of the accused. Furthermore, the record contains a mass of relevant and competent testimony tending to show the guilt of the defendants, and we think that, as to the rulings here considered, as well as to some other erroneous rulings to which reference will later be made, section 4½ of article 6 of the Constitution applies—that is to say, that even with these errors, a miscarriage of justice has not followed the conviction of the accused, in view of the vast amount of incriminatory evidence which was received in the case.

[6] It is also contended that one of the witnesses, who was a former member of the organization, was erroneously permitted to give his opinion regarding some alleged recent amendments which had been made to the platform of principles of the I. W. W. organization, whereby language expressly or impliedly advocating and teaching acts of sabotage and other criminal acts theretofore contained in said platform was eliminated therefrom. The witness stated that, while it was true that since the enactment of the criminal syndicalism law a change in the principles of the organization had been effected so as to make it appear that criminal acts or acts of violence were no longer to be resorted to in order to accomplish the purposes of the organization still the purported change was a mere camouflage, and that the organization and its members intended to proceed upon the same lines that it always had adopted in carrying out or crystallizing its principles or securing control of the machinery of industry of the country and changing our system of government. The witness stated that he knew this to be the fact because he had heard the matter discussed at meetings of the organization. We cannot say that this testimony was erroneously admitted. It is true that the witness now and then expressed his conclusion regarding the matter, but in the main his story in this regard involved a statement of a fact, that is, of the fact that in the discussions which he had heard at the meetings of the organization with reference to the purported change the determination of the members was that acts of violence and crime should go on until the organization had succeeded in accomplishing its ultimate purposes.

[7] Over objection by the defendants, an ex-member of the Industrial Workers of the World was allowed to testify that among the tenets of that organization was the doctrine of free love or the abolition of the marriage institution, and therefore no marriage relation; that, if the organization succeeds in attaining its ultimate ends, there will be no churches, since, as the members thereof contend and proclaim, religion is the most dangerous and implacable enemy that the radical movement has; that religion is a sham to keep people in ignorance; that the courts will be done away with; that jails and penitentiaries will be abolished and that all persons confined therein will be liberated; that the members of the organization refer to the Savior as "Jerusalem Slim," etc. The ruling admitting substantially the same testimony was criticized in the case of People v. Flanagan, supra, and therein declared to be erroneous; but, as above stated, there is so much evidence in the record tending to establish the fact that the I. W. W. organization teaches and advocates and encourages the commission of any and all kinds of crimes in furtherance of the objects of the organization that we feel that we are forbidden to hold that a miscarriage of justice would or could result from the verdicts even in the face of the ruling referred to.

[8, 9] The complaint that the criminal acts to which the witness Townsend, Cox, and Coutts testified were committed by members of the Industrial Workers of the World in pursuance of its policy of obtaining control of the government by violence were perpetrated at a time too remote from the time at which the defendants were arrested and prosecuted to render them competent as testimony against the accused cannot be sustained. It was certainly competent and relevant testimony. There is some discussion in the briefs to the effect that, since it is true that the I. W. W. organization at some past time advocated, practiced, and committed sabotage and other crimes and acts of violence generally as in furtherance of its objects, the presumption "that a thing once proved to exist continues as long as is usual with things of that nature" (section 1963, subd. 32, Code Civ. Proc.) is applicable. We doubt the soundness of that position. Section 1959, Code of Civil Procedure, declares that a "presumption is a deduction which the law expressly directs to be made from particular facts." Section 1960 declares:

> "An inference must be founded: 1. On a fact legally proved; and 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

To apply the presumption declared in subdivision 32 of section 1963, supra, in a case of this character would almost be tantamount to declaring it to be a maxim of the law that "once a criminal always a criminal." It is true that said presumption is subject to be controverted, but it is not the law that a jury in a criminal case is compelled as a matter of law to make the deduction from the fact that a person or combination of persons has once been engaged in the business of committing crimes, that such person or combination is guilty of the particular crime for which he or it is on trial. In this case the proved fact that the I. W. W. organization at a previous period in its existence habitually advocated as a part of its principles and policies the commission of crimes by its members to effect its ultimate objects affords a ground for an inference by the jury that its principles and policies in that respect are now the same as they had always been prior to the trial of the particular case. The remoteness of the time of the alleged commission of the acts from the time of the arrest and prosecution of the defendants was one which would go to the weight or evidentiary value of the testimony of those acts, and obviously this would be a matter for the jury to determine. In this connection it should be stated that the witness Townsend testified that certain criminal acts were committed by the members of the organization, for the purposes of the organization, as late as the year 1921. The defendants were at liberty and entitled to show that, since the commission of the acts above referred to, the organization had changed its policy and condemned, rather than advocated, such acts. This would have been a proper defense. In this connection it should be stated that the defendants did not themselves take the witness stand. Several witnesses, however, testified in behalf of the defendants and gave testimony negativing the testimony by the people that the resort to violence of any character was a part of the program or platform of principles and policies of the I. W. W. organization. There were also introduced by the defense a number of printed articles containing a favorable analysis and interpretation of the principles of said organization. The probative force of this evidence was for the determination of the jury. In other words, it was for the triers of the fact to say whether or not the evidence presented by the defense was sufficient to overcome the case made by the people in support of the indictments. It may be added that the criminal acts committed before the enactment of the criminal syndicalism statute were proper to be shown for the purpose of determining the character of the organization. People v. Steelik, 187 Cal. 361, 203 Pac. 78; People v. Lloyd, 304 Ill. 23, 136 N. E. 505.

[10] It is claimed that the court committed error in disallowing the defense to introduce the interpretation published by a certain publicist of the principles of the Industrial Workers of the World. The said interpretation involved an analysis of the principles and purposes of said organization and the author undertook to demonstrate thereby that said principles and purposes were of a high and commendable character and if concretely applied would tend to ameliorate the condition not only of all laboring men, but of all mankind living under a government founded upon such principles. The court refused to allow the proffered literature or essay on the ground that it was not shown that the author was a member of the Industrial Workers of the World and on the further ground that it involved the mere opinion of an "outsider." We think the ruling was proper. If such testimony were admissible in a case of this character, many opinions of the principles and purposes of said organization of diametrically opposite trend could be introduced in evidence and none lead to the establishment of any substantial fact or any fact or facts from which a jury could intelligently form a conclusion as to the guilt of the defendants of the charge made in the indictments. People v. Lloyd, 304 Ill. 23, 136 N. E. 505; People v. Gitlow, supra.

There are several other rulings of the court upon the question of the admissibility of evidence which are criticized as erroneous and prejudicial, but which need not be specially considered herein, since they are of the same general character as those assignments which have already been considered. We have carefully examined all the assignments under this head and feel well convinced that, even with errors that have been noticed and others of a similar general kind which will not be noticed herein, the verdicts are so well buttressed by strong competent proof of guilt that a miscarriage of justice will not be the result of the verdicts here complained of. As was said by the Illinois Supreme Court, in People v. Lloyd, 304 Ill. 23, 136 N. E. 505, 531, so with equal pertinency and force may it be said of the record here and our examination thereof:

> "There are many other objections to the court's ruling on the admission of special items of evidence, but it would serve no useful purpose to consider them in detail. We have considered with care each and every objection urged by plaintiffs in error with respect to the admission and rejection of evidence, and while we do not hold that the record is free from error in this respect we do hold that no substantial error was committed. Granting that there were minor errors committed by the trial court, it does not follow that the judgment must be reversed. Plaintiffs in error make no defense on the merits. Not one of them took the stand to explain his participation in this conspiracy, or his conduct in connection with it. The competent evidence in the record in our judgment, leaves no room for the slightest doubt of the guilt of plaintiffs in error."

In dismissing now this branch of the case, we feel constrained, in view of some of the errors to which we have herein called special attention—errors which, in very recently decided cases in California, involving the same charge that is stated in the indictments here, have been pointed out and so characterized in language of singular perspicacity—to venture the earnest wish that such errors may not in the trial in the future of cases of like character be repeated.

[11] It is contended that the court erred by its refusal to submit to the jury the following instruction requested by the defendants:

"The mere fact that two or more persons are instrumental in bringing about the same result, is not, in itself, sufficient to establish a conspiracy between such persons, unless there is an agreement or understanding between such persons to bring about, or attempt to bring about, such result."

The above instruction is a misleading statement of the law. It is true that there must be an agreement or understanding between two or more persons to do an unlawful act or a lawful act by unlawful means to constitute a conspiracy, but it is also true that the fact that two or more persons were "instrumental in bringing about the same result," if such result or the means adopted to accomplish it be unlawful would be at least prima facie and, under conceivable circumstances, sufficient evidence of a previous agreement or understanding between such persons to bring about such result. The court, however, submitted to the jury several instructions clearly explaining the elements or essentials of a conspiracy, as follows:

"* * * A conspiracy exists when two or more persons conspire or combine together to commit an unlawful act." "A conspiracy is an illegal agreement between two or more persons to do an illegal act or a legal act in an illegal way. The gist of the conspiracy is the agreement, or meeting of the minds of the conspirators. While you may find the existence of a conspiracy from circumstantial evidence, that evidence must be of sufficient strength to convince your minds. A conspiracy cannot be established by a mere guess or suspicion. It must be founded upon the evidence."

The defendants proposed, and the court refused to embrace within its charge the following instruction:

"Before you can convict any one of these defendants you must find that three facts existed, to a moral certainty, and beyond every reasonable doubt. These facts are as follows: (1) That at, or about, the time mentioned and charged in the indictment against him such defendant was a member of the Industrial Workers of the World, in the county of Sacramento, in the state of California; (2) that, at such time as you have found such defendant to be a member thereof, the Industrial Workers of the World was organized in the said county of Sacramento to advocate, teach, or aid and abet criminal syndicalism as that term has elsewhere been defined to you in these instructions; and (3) that at the time such defendant has been found to be a member of that organization, that defendant knew that the Industrial Workers of the World was organized for such purpose. Unless you find each of the foregoing facts to exist with regard to each defendant, it will be your duty to acquit such defendant."

The court included within its charge section 1 of the Criminal Syndicalism Act, defining the offense of criminal syndicalism, and also subdivision 4 of section 2 of said act, which, as seen, in effect provides that knowledge is an element of the offense specifically charged in the indictments in this case. The court further instructed the jury as follows:

"You are instructed that if you believe from the evidence beyond a reasonable doubt that the I. W. W. organization and its members was at the time charged in the indictments engaged in a conspiracy which had for its object the commission of the acts denounced by the criminal syndicalism statute of this state and which I have read to you, and if you further believe from the evidence beyond a reasonable doubt that such conspiracy, if conspiracy there be, on the part of the I. W. W. organization and its members, was still continuing, at the time charged in the indictments, not having yet accomplished its purpose, and if you further find that the defendants knowingly became members of the said I. W. W. organization, then I instruct you that by so knowingly becoming members of such organization they thereby adopted and became coconspirators."

[12-15] It seems to us that the instruction last above quoted herein, together with a statement of the provisions of subdivision 4 of section 2, upon which the indictments were predicated, sufficiently conveyed to the jury the proposition that knowledge of the character of the organization was an essential ingredient of the crime for which the accused were on trial. It would manifestly have been the better course, and certainly only just, for the court to have amplified the fact that scienter or knowledge is an element of the offense which had to be proved to the satisfaction of the jury to justify a conviction, and if a proper instruction of that character had been requested by the defendants, it would have been error—whether sufficiently prejudicial to require a reversal, we need not here say—for the court to have rejected it. Indeed, we are of the opinion that even if an instruction upon the question of knowledge were not requested by either the defendant or the people it would, nevertheless, be the duty of the court, sua sponte, to have given an instruction clearly explaining that, as in every crime in which, to consummate it, intent is as essential as the act, knowledge of the criminal character of the organization was as necessary to be proved as the fact of being or becoming a member thereof. But the above instruction, offered by the defendants upon the subject, does not, as must be readily ap-

parent upon reading it, state the law correctly. It will be observed that it declares that to warrant a conviction the defendants must have been shown to have been members of the Industrial Workers of the World in the county of Sacramento; that "at such time as you have found such defendant to be a member thereof, the Industrial Workers of the World was organized in the said county of Sacramento to advocate, teach, or aid and abet criminal syndicalism," etc. It is a proposition too obviously sound to require discussion that it is immaterial, so far as that phase of the case is concerned, whether the Industrial Workers of the World was organized in Chicago, Los Angeles, San Francisco, Sacramento, or Seattle, or whether the defendants were members of the organization in Sacramento city or any other place where a branch of the organization may exist. It is only necessary to prove so far as that element of the crime is concerned, that they have become or are members of said organization. An instruction, though in some respects involving a correct statement of the law, may be rejected by the court if, in other particulars, it contains a misstatement of the law. This does not mean, however, as we have before pointed out, that, as to a vital element of a crime, the court will be excused if it gives no instruction explaining to the jury that such element must be shown to have existed in connection with the act or the crime will not be proved.

As stated above, we think that, in view of the instructions which the court did give upon the subject of knowledge, though not amplified as they should have been, and in view of the further fact that the defendants' proposed instruction upon the subject contained a misstatement of the law in certain particulars, the action of the court in failing to give a more explicit and amplified explanation of the proposition that knowledge was an essential element of the offense, and therefore required to be proved to the satisfaction of the jury beyond a reasonable doubt, does not justify us in reversing the case. The situation in this case with respect to the question of scienter is very much different from that in the case of People v. Flanagan, 223 Pac. 1014. In the latter case, the jury, after the case was submitted to them and they had retired to consider their verdict, returned into court and, in effect, inquired whether knowledge of the character of the organization was necessary to be shown, and the court replied that "the law does not require, that the prosecution establish that he knew the character of the organization. * * * It does not require that they know the character of the organization when they joined it. * * * The word 'knowingly' there means that he must know that he joined the organization." Thus, it is to be seen, the court in the Flanagan Case, misinterpreted the word "knowingly" as the same is used in the statute and in its written instructions, and consequently erroneously told the jury that knowledge of the alleged criminal character of the organization was not an element in the offense charged. No such an incident occurred in the instant case.

We have now given consideration to all the points that we believe deserve special notice herein, and, after an examination of the record and all the points urged for a reversal, we have been persuaded to the conclusion that the judgments and orders appealed from should not be disturbed.

Accordingly the judgment and the order as to each of the appealing defendants are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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HARLOW v. SILVERIA et al. (Civ. 4675.)

(District Court of Appeal, First District, Division 2, California. March 6, 1924.)

1. Appeal and error ⚿1008(1)—Finding as to meaning of ambiguous contract conclusive.

Finding of trial court as to meaning of contract, as to which contract appellant could, at most, claim that its express language was not conclusive against him, *held* conclusive on appeal.

2. Appeal and error ⚿1056(6)—Exclusion of evidence excusing delayed performance held harmless in view of proof of no performance.

In contract action, exclusion of evidence excusing plaintiff appellant's performance within contract time was harmless where record showed there was no performance by him at any time.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by George T. Harlow against Charles M. Silveria and others and Edward L. Shadbolt, Addie Offutt, and Addie Offutt, special administratrix of the estate of John Offutt. Judgment for the last-named defendants, and plaintiff appeals. Affirmed.

W. F. Cowan, of Santa Rosa, for appellant.

Russell P. Tyler, of San Francisco, and Carl Barnard, of Santa Rosa, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment in favor of the defendants Edward L. Shadbolt and Addie Offutt, individually and as special administratrix of the estate of John Offutt, deceased, in an action brought to recover $14,990, the balance due upon the purchase price of certain mining stock alleged to have been purchased by the defendants from the plaintiff. Plaintiff also asked for $2,600 alleged to have been expended by him upon the mining property in controversy at the request and for the benefit of defendants under the terms of the contract between him and the defendants for the purchase and sale of said stock.

The defendants Charles M. Silveria and Edwin D. Casterline were never served with process and did not appear in the action. Subsequent to the commencement of the action the defendant John Offutt died, and, thereafter, the defendant Addie Offutt was duly appointed as special administratrix of the estate of John Offutt, deceased, for the purpose of representing said estate in the said action, and said Addie Offutt, as such special administratrix, was substituted as and for the defendant John Offutt in this action.

The plaintiff and the defendants entered into a written contract by which the plaintiff, through his attorney in fact, agreed to sell to the defendants for the sum of $15,000 all the capital stock of the Alaska Gold Dredging & Improvement Company owned by plaintiff, amounting to 480,000 shares, together with all claims or liens which said Harlow might have against said company. It was further provided that the purchase price should be paid as follows: $10 cash upon the execution of the agreement and $14,990 within 30 days. The following clause then appears:

> "And the said party of the first part [plaintiff] further agrees that he will furnish to the parties of the second part [defendants] an abstract of title to the property owned by said Alaska Gold Dredging & Improvement Company as originally deeded to it by the Houston Hydraulic & Dredging Company, on or before the expiration of said thirty days, which said abstract of title shall show title in the said Alaska Gold Dredging & Improvement Company, free and clear of all incumbrances whatsoever on said date."

There are further provisions in the agreement as to the delivery of the seal, stock books, and records of the company by the plaintiff to the defendants and an agreement that the defendants, upon the fulfillment of the obligations of the plaintiff under the contract, would fully satisfy and discharge a certain money judgment theretofore entered in favor of defendant Addie Offutt and against the plaintiff.

The complaint sets out this contract, alleges plaintiff's offer of performance of the same, and that the defendants failed and refused to meet their obligations thereunder, and asks for a judgment for $14,990, the balance due upon the purchase price of the stock, and also for $2,600, alleged to have been expended under the contract for the benefit of defendants upon assessment work upon the property required by law. The answers denied that the plaintiff offered to deliver the stock or the abstract contemplated by the contract, and alleged that the plaintiff refused ever since the execution of the said contract and still refused to deliver to defendants the property which he was required by said contract to deliver. The trial court found that subsequent to the execution of said contract, and within the time provided for by said agreement, the plaintiff did not tender nor offer to deliver to defendants the capital stock covered by the contract, but that, on the contrary, at the time the contract was entered into and at all times subsequent thereto, the plaintiff did not own, have in his possession, or control 480,000 shares of said capital stock, or any shares whatsoever, and that the plaintiff was not in a position to deliver to defendants said number of shares or any number of shares of said stock upon the date of the signing of the contract nor at any time subsequent to the execution of the same; that the plaintiff did not tender nor offer to deliver to any of the defendants, within the time provided for by said contract an abstract of title to the property owned by the Alaska Gold Dredging & Improvement Company, as provided for in the said contract.

Appellant attacks these findings as being unsupported by the evidence. We think, however, that his position is without merit. The evidence appearing in the record and the possible inferences from the same which support these findings are all with which we are concerned upon appeal. The contract provides for an abstract showing title free and clear of all incumbrances in the Alaska Gold Dredging & Improvement Company to all the property originally deeded to said company by the Houston Hydraulic & Dredging Company. The purported abstract offered by plaintiff to the defendants in compliance with his obligation under the contract appears in the record, and, irrespective of the time at which the document was furnished to the defendants, it in no manner indicates what property was conveyed to the Alaska Gold Dredging & Improvement Company by the Houston Hydraulic & Dredging Company, nor whether the mining claims enumerated in said document represent all or any part of such property. It is merely a purported copy from the official records of a mining district in the territory of Alaska of all instruments filed and of record affecting certain enumerated mining claims and water rights. Such instruments consist of affidavits of annual assessment work done by the Alaska Gold Dredging & Improvement Company and a statement that the records of said mining district show no judgments, suits pending, liens, or taxes outstanding against said mining claims and water rights. There is an affidavit by one Curtis R. Morford to the effect that he, personally, compiled the aforementioned instruments, and that said compilation is a full and complete abstract of all instruments affecting said property appearing of record in the mining district.

Appellant meets this situation, however, by urging that the defendants did not object to the sufficiency of the abstract furnished, nor point out its alleged deficiencies, and, consequently, they are precluded now from making any objections thereto, because of the provisions of section 2076 of the Code of Civil Procedure. If appellant's position be correct, there yet remains as an obstacle to his recovery the finding of the trial court that he never owned nor controlled the 480,000 shares of stock which he was to transfer to the defendants, and never at any time was in a position to deliver the same. The record contains evidence that prior to the execution of the contract between the parties the 480,000 shares of stock which had theretofore belonged to plaintiff had been sold by the sheriff at public auction in satisfaction of a judgment against Harlow, and that Harlow never owned nor controlled any other stock.

The appellant meets this situation with an argument that because of the evidence in the record regarding the situation of the parties to the contract at the time it was entered into the court should have interpreted the contract between them as calling upon the plaintiff to surrender not 480,000 shares of stock, but only whatever rights or interests in the same he might have been able to assert after the sheriff's sale. The interests which the appellant suggests are: That Harlow was in physical possession of the certificates of stock after the interest which they represented had been sold at auction by the sheriff, and that he was in possession of the corporate books, seals, and other records of the company; that the judgment against him under which the stock was sold by the sheriff had been obtained by default, and at the time of the execution of the contract between plaintiff and defendants plaintiff had a right to move to set said judgment aside; and, further, that the corporation owed him considerable money as salary. However valuable these various interests of the plaintiff might have been, the contract in express language provides that he is to sell to the defendants "all the capital stock of the Alaska Gold Dredging & Improvement Company owned by the party of the first part [plaintiff] * * * amounting to 480,000 shares, together with all claims, liens, sums due, demands, and causes of action or otherwise which he may own, claim, or possess or have against the said Alaska Gold Dredging & Improvement Company by reason of any matter or thing whatsoever."

[1] It seems, therefore, that the most that can be said for the appellant is that the court might have concluded from the evidence that the parties intended to contract for the sale of something other than what was expressly stated in the contract—that is, that they did not mean to contract for the sale of 480,000 shares of stock, together with all claims and liens of plaintiff against the company, but merely for the transfer of valueless certificates which no longer represented the property right in such shares of stock, and the claims and liens of plaintiff against the company. However, the court did not so conclude, and surely the express language of the written contract raises a conflict in the evidence as to what was required to be delivered by the plaintiff, and consequently the findings of the trial court that the plaintiff was required to deliver 480,000 shares of stock which he never owned nor controlled after the execution of the contract may not be disturbed by us upon this appeal, and are conclusive of the rights of the parties in this action.

[2] The appellant complains of the ruling of the trial court in excluding the judgment roll in a proceeding to revive the corporation, Alaska Gold Dredging & Improvement Company. The written contract between the plaintiff and defendants, which forms the basis of this action, provides:

> "And it is further understood and agreed that proceedings are now pending in the superior court of Sonoma county, Cal., for the appointment of trustees of said Alaska Gold Dredging & Improvement Company, who shall make application to the state of California for the reinstatement of said corporation; and that if such reinstatement shall be impossible to be accomplished within thirty days from this date, without neglect upon the parties of the second part, or the agents of said company, that in that case this agreement shall be extended for a period of thirty days from the expiration hereof."

It is clear from the record that no attempt was made by plaintiff to furnish an abstract within 30 days from the date of the contract, which time would have expired on the 18th day of July, 1919. However, a receipt from the defendants for a purported abstract, bearing date of August 12, 1919, was introduced in evidence, and appellant now contends that the said judgment roll in the reinstatement proceedings was relevant to prove that plaintiff was entitled to an additional 30 days within which to perform his obligations under the contract because of the pendency of proceedings for reinstatement of the corporation. The offer of this evidence was not made for this purpose, and, had it been, the evidence might have been admitted without objection. On the contrary, when the attorney for the plaintiff was called upon by the court to state the purpose of the offered evidence, he stated a purpose which did not warrant the admission of the evidence, and did not state the purpose which he now urges. However, even though we concede to the appellant that the ruling upon the admission of this evidence was error, such ruling could only be prejudicial if the judgment rested solely upon the failure of the plaintiff to perform his obligations under the contract within 30 days. But the record and findings go further, and find that the plaintiff never did perform his obligations, neither within 30 nor 60 days from the date of the contract, nor up to the time of the bringing of the action. Therefore the error, if any, of the trial court in refusing to admit the record in the proceedings for reinstatement of the corporation, could not be prejudicial to the appellant.

The judgment is affirmed.

I concur: NOURSE, J.

66 Cal. App. 144

In re RAWSON'S ESTATE.

Appeal of SALISBURY et al. (Civ. 4682.)

(District Court of Appeal, Second District, Division 2, California. March 8, 1924.)

Wills 🔑394—Order on demurrer, denying right to contest will, held not appealable.

In view of Code Civ. Proc. § 963, order, on demurrer, denying right to contest will, is intermediate order or ruling, reviewable only on appeal from final order or judgment admitting will to probate.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

In the matter of the estate of Martha Rawson, deceased. From order sustaining demurrer to contest of will, Charles E. Salisbury and another appeal. Appeal dismissed.

Charles E. Salisbury, of Los Angeles, for appellants.

Oliver P. Ensley, of Hemet, for respondent.

CRAIG, J. The last will and testament of the above-named deceased was offered for probate, and appellants filed a contest wherein fraud, undue influence, mental incompetency, conspiracy and other grounds were alleged. The proponent demurred thereto, and after argument and the submission of briefs by the parties, the trial court sustained the demurrer without leave to amend. Notice was given that contestants appealed "from the order of the above entitled court, entered therein October 2, 1923, sustaining the demurrer, without leave to amend, filed by the proponent of the will of Martha Rawson, deceased, to contest of said will; said order being in favor of said proponent of said will and against the above-named contestants of said will, and from the whole of said order." No judgment is embraced in the record before us.

Appellants' opening brief is devoted exclusively to extensive argument and citation of authorities upon the merits of the contest, but respondent raises the point that the appeal must be dismissed, and, such being our view of the law, we are not called upon to consider the other questions involved.

Section 963 of the Code of Civil Procedure enumerates the orders from which an appeal will lie in probate matters, to wit:

> "A judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof."

Appellant contends that none of the authorities cited by respondent upon this question involve the contest of a will and quotes from Estate of Edelman, 148 Cal. 233, 82 Pac. 963, 113 Am. St. Rep. 231, as holding that—

> "There is no difference in principle between the order of the court denying a right of contest for lack of interest upon demurrer, and denying it, as in this case, by a formal dismissal of the contest for lack of interest."

However, the Supreme Court there expressly held that—

> "The only appealable orders in probate matters are those designated in subdivision 3 of section 963 of the Code of Civil Procedure. * * * The adjudication to be made is as to the validity or invalidity of the will, and the order here made dismissing a contest is reviewable upon appeal from the final order or judgment admitting the will to probate as is any other intermediate order or ruling which the court may make."

The conclusion, therefore, is irresistible that an order made upon demurrer, denying a right to contest, is an intermediate order or ruling which is reviewable only upon appeal from the final order or judgment admitting the will to probate. This is the only authority cited by appellant, and we are able to find none holding to the contrary. In De La Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717, it was said:

> "An order sustaining a demurrer is not a judgment, and does not have the effect of finally and irrevocably dismissing the demurring party from the action. 'It may form the basis for rendering a judgment, but it is not itself a judgment' (Sivers v. Sivers, 97 Cal. 518), is not appealable, and can be reviewed by an appellate court only on appeal from a final judgment subsequently given. Upon such an order being made without leave to amend, or where it is made with leave to amend and no amendment is made, the party whose demurrer has been sustained may become entitled to a judgment, which may effectually bar further proceedings against him in the matter from which he has been dismissed. In the absence of such a judgment, however, the mere order constitutes no bar, and if, at any time prior to judgment, it is made to appear to the court that a complete determination of the controversy cannot be had without the presence of such party, we can conceive of no good reason

why the court may not make such orders as will have the effect of bringing such party into the action again."

To the same effect are Cornic v. Stewart, 179 Cal. 242, 176 Pac. 164; Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680; Rickert v. Zoeger, 169 Cal. 399, 146 Pac. 894; Fortain v. Smith, 114 Cal. 494, 46 Pac. 381; Pacific Seaside Home for Children v. Newbert Protection District, 49 Cal. App. 326, 193 Pac. 169.

Appellants assert in the closing brief that a judgment was actually signed and filed, but the record does not bear out such statement, as it must, to render it available (Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117), and, even though this discrepancy might have been cured, they do not appeal from a judgment.

The appeal is dismissed.

We concur: FINLAYSON, P. J.; WORKS, J.

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66 Cal. App. 146

PEOPLE v. CARILLO. (Cr. 1040.)

(District Court of Appeal, Second District, Division 2, California. March 8, 1924.)

1. Criminal law 🔑829(1)—Unnecessary to give requested instructions covered by charge.

Requested instructions fully and correctly covered by charge given need not be given.

2. Criminal law 🔑531(3)—Confession admissible on substantial evidence of voluntariness, notwithstanding scintilla of evidence to contary.

Whether confession was free and voluntary is within the peculiar province of the trial court to decide, if there is evidence substantially supporting its ruling; and discretion to admit it is not destroyed by a mere scintilla of evidence that confession was not free and voluntary.

3. Constitutional law 🔑70(3)—Argument held to go only to wisdom of statute prescribing punishment for assault to rape.

Argument that Pen. Code, § 220, fixing punishment for assault with intent to commit rape, is unconstitutional, in view of fact that under section 264, because of discretion of jury, punishment for statutory rape (section 261, subd. 1) may be less than for such assault, *held* to go to wisdom, and not unconstitutionality, of section 220.

4. Criminal law 🔑543(2)—Foundation for admission of testimony taken at preliminary hearing held sufficient.

Evidence as to absence of witness from state *held* sufficient foundation for allowing her testimony taken at the preliminary hearing to be read to the jury.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Richard Carillo was convicted of assault with intent to commit rape and burglary, and appeals. Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. This is an appeal from a judgment after verdict of guilty rendered by a jury against the defendant upon both counts of an information charging the crimes of assault with intent to commit rape and burglary, wherein the jury found the burglary to be that of the second degree. Appellant asserts that the trial court erroneously refused to give 15 instructions requested by him. However, he has failed in his briefs to do more than quote the offered instructions and to assert that because of the omission to give them his rights were substantially prejudiced.

[1] A careful reading of the entire charge given by the trial court to the jury discloses that the principles of law involved as pertaining to the issues in this case were fully and correctly stated. This being so, it was unnecessary to repeat them in the language of the instructions requested by appellant.

[2] It is seriously urged that, "where there is one scintilla of evidence going to the fact that a confession was not free and voluntary," it is no longer discretionary with the trial judge to admit, or sustain objection to the admission of, an alleged confession. It is admitted that the effect of the testimony of one witness for the prosecution was that the confession was entirely free and voluntary. No authorities are cited by appellant to sustain his novel position. It is elementary that it is within the peculiar province of a trial court to pass upon the admissibility of evidence tending to show a confession. This is true wherever the record contains evidence which substantially supports the ruling of the trial court. People v. Grafft (Cal. App.) 214 Pac. 273; People v. Fouts (Cal. App.) 214 Pac. 657; People v. Rodriguez (Cal. App.) 214 Pac. 452; People v. Jung Sam (Cal. App.) 213 Pac. 966.

[3] Other points made by appellant are equally clearly not well taken. It is urged that section 220 of the Penal Code is unconstitutional, for the reason that section 264 of the Penal Code allows the jury by their verdict to fix the punishment of a person convicted of an offense under subdivision 1 of section 261 of the Penal Code, but that section 220 provides punishment for assault with intent to commit rape of not less than one nor more than fourteen years, and allows the jury no discretion in the matter. The point which appellant seems to attempt to make is that assault with intent to commit rape is a crime of less heinousness than rape, and yet that the punishment provided

by section 220 of the Penal Code is less severe than that for rape under subdivision 1 of section 261 of the Penal Code, hence appellant says the section under which he was convicted, to wit, section 220 of the Penal Code, is unconstitutional. The mere statement of this proposition answers itself, as the argument is clearly not directed against the constitutionality of the law, but merely to its wisdom, which, of course, is within the province of the Legislature.

[4] There is no merit in the objection that the court erred in permitting the testimony of a witness, Olive Schealey, taken at the preliminary hearing, to be read to the jury, on the ground that a sufficient foundation was not laid. The evidence showed that the officer attempted to serve a subpœna upon the witness at No. 1700 Grafton street, Los Angeles, known to be her former abode, and that a Mrs. Dunn, who lived at that address, said Mrs. Schealey had left for Texas in an automobile, starting from in front of her house; the witness interviewed another woman in the immediate neighborhood, who said she had received a postal card from Mrs. Schealey, postmarked "Laguna, Texas," stating that she was there; that he also inquired of a daughter-in-law of Mrs. Schealey, living at Glendale, who stated that she had received a letter in an envelope postmarked in Texas, on the day on which the witness was testifying. This letter was offered in evidence, and was postmarked "Monte, Texas." This foundation was ample.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

66 Cal. App. 231

COMMERCIAL & SAVINGS BANK v. EWING, City Treasurer. (Civ. 4902.)

(District Court of Appeal, First District, Division 2, California. March 19, 1924.)

Municipal corporations 🔑955(1)—Bonds payable on presentation without audit.

Municipal bonds which are legal outstanding obligations are liquidated claims which must be paid on presentation; they are contracts with the city, and, when they provide for payment upon presentation, the city may not require the holder to submit his bond to an audit or accept a warrant upon the treasury upon transfer of his bond in lieu of legal tender, and City Charter of Fresno, § 58, requiring presentation of certified vouchers, applies only to unliquidated claims.

Application for writ of mandate by the Commercial & Savings Bank against A. D. Ewing, as Treasurer of the City of Fresno, to cancel and pay a municipal bond. Writ granted.

Gallaher, Simpson & Hays, of Fresno, for petitioner.

Everts, Ewing, Wild & Everts, of Fresno, for defendant.

NOURSE, J. This is an original proceeding in mandamus to require the defendant, as treasurer of the city of Fresno, to cancel and pay on presentation to him a municipal bond issued by the city under proceedings duly had therefor for the construction of a municipal improvement described as a playground pavilion. The defendant has appeared by demurrer, and rests upon the ground that the petition fails to state a cause of action. There is no dispute as to the facts. It is conceded that the bond was duly issued by the municipality, and that it is now an outstanding obligation, and that payment is due. The point of difference between the parties is that the defendant insists that he is not authorized by the municipal charter to pay the bond upon presentation, but that it is necessary for the holder thereof to present it to the commissioner of finance for his audit, and that the commissioner must thereupon draw his warrant upon the treasurer in favor of the holder, and that such warrant alone can be paid by the treasurer. On the other hand, the petitioner insists that the provisions of the charter on which defendant relies relate only to unliquidated claims against the city, and do not relate to bonds of this character.

On behalf of the petitioner it is suggested that the bond was issued under an ordinance of the municipality enacted in 1912, which provided a sinking fund to be kept by the treasurer of the city for the payment of principal and interest upon the bonds authorized by the ordinance, and that "when the respective payments of principal and interest shall fall due the said treasurer of the city of Fresno be, and he hereby is, authorized, directed, and required to pay out of the said moneys of said sinking fund the said respective amounts thereof when demand shall be made therefor as by law required, and upon the surrender of the corresponding bonds and coupons to said treasurer." The bond in suit was sold under the terms of this ordinance and dated August 15, 1912.

The sections of the charter upon which the defendant relies were finally adopted in 1921. In general they provide that the commissioner of finance shall have the custody and control over the disbursements of city funds. The section upon which special reliance is placed is section 58, entitled "Payment of Claims." It reads in part as follows:

> "Payment by the city shall be made only upon vouchers certified by the commissioner of the appropriate department, * * * and by means of warrants on the city treasury, issued by the commissioner of finance. The commissioner of finance shall examine all pay rolls,

bills and other claims and demands against the city; and shall issue no warrant for payment unless he finds that the claim is in proper form, correctly computed and duly certified that it is justly and legally due and payable. * * * He may require any claimant to make oath to the validity of a claim. He may investigate any claim and for such purposes may examine witnesses under oath. * * *"

An examination of this section satisfies us that it relates to the payment of unliquidated claims against the city. It will be noted that it requires the voucher and certificate of the department under which the claim arises. It also authorizes the commissioner of finance to put the claimant upon his oath and to examine witnesses in aid of his investigation of the propriety of the claim.

Bonds which are legal and outstanding obligations against a city are liquidated claims which must be paid upon presentation. They are contracts with the city, and when they provide for payment upon presentation alone the city may not require the holder thereof to submit his bond to an audit before payment or to accept a warrant upon the treasury upon transfer of his bond in lieu of the legal tender which the city contracted to pay for the bond upon delivery.

In a similar case the Supreme Court of the United States held that a statute requiring the submission of claims to the county auditor for allowance and approval did not apply to municipal bonds and interest coupons thereof, saying:

> "This question was presented in the case of County of Greene v. Daniel, 102 U. S. 187, 194, in which the court observed, speaking of bonds and coupons, that 'the claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day.'" Lincoln County v. Luning, 133 U. S. 529, 532, 10 Sup. Ct. 363, 364 (33 L. Ed. 766).

To the same effect is Leach v. Commissioners of Fayetteville, 84 N. C. 829, 830, where the court say:

> "While unadjusted claims are required to be audited and ordered to be paid, absolute and unconditional obligations already ascertained and audited are in themselves and upon their face an order and authority in the financial officer, possessing the means not otherwise appropriated, to pay on presentation."

The duty of the treasurer to pay the bond from the sinking fund upon presentation to him is fixed by the ordinance under which it was issued. The charter provisions to which our attention has been directed do not pretend to supplant these provisions of the ordinance. They do not in terms refer to the payment of the principal or interest upon municipal bonds. They cover the subject of the payment of claims and demands against the city in terms which in general usage refer to unliquidated claims and demands which require the approval of an auditing body before presentation to the treasurer for payment. We are satisfied that the provisions of the charter do not affect the duty of the treasurer as outlined by the ordinance under consideration.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; LANGDON, J.

66 Cal. App. 134

PEOPLE v. STUTSMAN. (Cr. 990.)

(District Court of Appeal, Second District, Division 1, California. March 7, 1924.)

1. Criminal law 🔑372(9)—Evidence of similar transactions held admissible to show design.

In prosecution for obtaining money by false pretenses, evidence of similar transactions *held* admissible to show system.

2. Criminal law 🔑374—Refusal to permit defendant to rebut evidence as to similar transactions, held error.

Refusal to permit defendant to rebut testimony of similar transactions in obtaining money by false pretenses by proof that he had no guilty intent, but was acting in all respects honestly, *held* error.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

W. A. Stutsman was convicted of obtaining money by false pretenses, and from judgment of conviction and order denying motion for new trial, he appeals. Reversed.

Jud R. Rush and William B. Beirne, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

HOUSER, J. In each of two counts of an indictment defendant was charged with the commission of the crime of obtaining money by false pretenses. The jury returned a verdict of guilty as to one count and disagreed as to the other count. From a judgment of conviction and an order denying defendant's motion for new trial defendant appeals to this court.

The evidence was sufficient to sustain the finding by the jury of the following facts: T. B. Young and Mrs. T. B. Young were the owners of certain mining claims located on the American river in Placer county. On July 15, 1918, they executed an instrument in favor of defendant, of which the following is a copy:

> "American River, Cisco, July 15, 1918.
>
> "This is to certify that we, the undersigned owners of two certain gold placer mining claims known as the Gypsy Queen and the Hidden Treasure, situated on the north fork of the

American river, at the intersection of the Sailor Ravine, hereby agree to deliver the same by good and sufficient deed, free from mortgage and incumbrance, to W. A. Stutsman, or his assigns, for the sum of four thousand dollars, upon the following terms: Two thousand dollars on or before Sept. 15, 1918; one thousand dollars on or before Dec. 15, 1918; one thoussand dollars on or before March 15, 1918.

"It is understood that W. A. Stutsman is to arrange his commission or profit on the sale over and above the four thousand dollars herein stipulated. The price and profit to be so set and arranged by said Stutsman.

"Said deed to the Hidden Treasure to be signed by T. B. Young.

"Deed to the Gypsy Queen to be signed by Mrs. T. B. Young.

"[Signed] T. B. Young.
"Mrs. T. B. Young."

Defendant testified that about the first part of November, 1918 (which was after the first payment on the foregoing offer would have been due had the offer been accepted), he arranged with Young to do the assessment work on the claims and look after the property, and that Young told defendant that defendant could take the property and handle it and organize it on any basis he saw fit, as long as the Youngs did not have to part with the title until they received the purchase price of $4,000. It was then orally agreed between defendant and Young that a deed of the property to defendant would be executed by the Youngs and placed in escrow, with instructions that no title pass until the full amount of $4,000 was paid to the grantors. About six months later, that is, on May 24, 1919, the Youngs signed an instrument by which they agreed—

"to deliver by good and sufficient deed, relinquishing all our right, title, and interest therein to W. A. Stutsman, to own and control thereafter, upon the fulfilment of the terms as herein set forth, viz.:

"Said claims are situated at the mouth of Sailor Ravine on the north fork of the American river, six miles south and one mile east of Cisco, Placer county, Cal. Said claims are known and recorded as the Hidden Treasure and Gypsy Queen.

"The purchase price of said claims is $4,000, and is payable in cash at the time of the transfer of title.

"Said transfer is to be in the following manner: Immediately upon receipt of deed properly filled out, the undersigned owners will place the same in a designated bank at Auburn, properly signed and ready for recording; said bank is to hold and not record until the full amount of four thousand and no/100 dollars is paid into said bank and the payment of the same to the undersigned owners.

"Time is the essence of this agreement to deliver.

"[Signed] T. B. Young.
"Mrs. T. B. Young.
"Witness: James R. Smith."

In pursuance of the terms of the foregoing instrument, on June 3, 1919, a deed was executed by the Youngs, and 15 days later was by them deposited in a bank, with oral instructions to the officers of the bank to deliver the deed only upon receipt of $4,000 to the credit of the Youngs. In the count of the indictment under which defendant was convicted it was charged that in the latter part of April, 1919, defendant stated to Charles Van Wey that he was interested in the mining claims belonging to the Youngs; that he had an option to buy them; that he had paid either $4,000 or $5,000 on account of the purchase price; that the claims were valued at $10,000; that he was forming a pool to pay off the balance of the money, and was selling units of interest; and that he wanted Van Wey to invest therein. The evidence further showed that, relying upon defendant's said representations, Van Wey did pay to defendant the sum of $500 for an interest in said claims, but that he had never received from defendant any evidence of ownership thereof, nor had any part of the $500 been returned to Van Wey.

Although several alleged false representations by defendant were set out in the count of the indictment upon which the conviction was had, the prosecution relied upon and confined itself to the proof of the single misrepresentation that defendant had an option on the Young claims.

Defendant contends that prejudicial error as against him was committed by the court in admitting evidence of an alleged similar transaction which occurred between defendant and a man named Engel at a time about 6 months later than the one of which the jury found defendant guilty of obtaining money by false pretense. There was no substantial difference between the representations made by defendant to Van Wey and those which were made by him to Engel, excepting that in the negotiations with Engel defendant proposed to sell an interest in five claims, rather than two claims, and which five claims included the two Young claims, and that defendant stated that the price of the Young claims was $8,000 instead of $10,000. The first point made by defendant hereunder is that, because at the time he negotiated with Engel the deed was in escrow, the statement by defendant that he had an option to purchase did not amount to a misrepresentation.

[1] Defendant urges that the admission in evidence of similar transactions was prejudicial to him; but that contention is disposed of by a line of authorities in this state holding that in cases of this character such evidence is admissible, where the object thereof is to show system or design. People v. Whalen, 154 Cal. 472, 98 Pac. 194; People v. McGlade, 139 Cal. 66, 79 Pac. 600; People v. Arnold, 17 Cal. App. 68, 118 Pac. 729; People v. Hansen (Cal. App.) 216 Pac. 399.

From the record herein it plainly appears be considered "simply for the purpose of showing system and design." It is obvious that, while there were some variations in the procedure adopted by defendant as between the Van Wey transaction and the En- that the evidence was offered "for the purpose of showing system," and that the court instructed the jury that such evidence should gel transaction, yet they presented one general scheme to obtain money by false pretense. The evidence adduced in the Engel case was sufficient, prima facie, to support the conclusion that defendant was also guilty of an offense similar to the offenses of which he was charged in the indictment, and affects the motive or the intent which actuated defendant throughout the entire matter. The fact that other claims were added by defendant to the two Young claims in making his representations to Engel does not make any substantial difference in the plan to defraud. It is not necessary that the Engel transaction be identical with the Van Wey transaction. All that is required in that regard is that they be similar and of comparatively recent commission. In the case of People v. Hansen (Cal. App.) 216 Pac. 399, there was a difference of 8 months between the date of the commission of the offense of which defendant was found guilty and the date of the offense of which evidence was introduced as being a similar transaction; and, while the question of the length of time ensuing between the two transactions is not discussed in the opinion, it is held that no prejudicial error resulted from the admission of the evidence.

Defendant also complains that several prejudicially erroneous rulings were made by the court. The first of these has to do with the refusal of the court to permit the introduction of evidence which would have tended to prove that assessment work was performed on the Young claims at the instance of defendant for the years 1919 and 1920. It is pointed out that the bearing which such evidence would have would be to show a consideration for the "option," which, it is claimed, was created under the agreement of May 24, 1919, and which was followed by Young depositing the deed with the oral instruction to the officers of the bank to deliver same to defendant on his paying to Young the sum of $4,000; also, that it would have tended to corroborate defendant's testimony relative to the so-called "new agreement" made between defendant and Young in November, 1918, and show that defendant performed his part of the contract.

[2] As has been heretofore indicated, in cases of the nature of that of which defendant is charged, the reason for the admission of evidence as to similar transactions is to show system, or design, or guilty knowledge, or something of that character. Such a matter presents a question of fact just as much as does any other relevant circumstance in the case. It goes without saying that as to any material issue presented by the prosecution the defendant has the undoubted right to make complete rebuttal along any lines included within the rules of evidence. If it was proper for the prosecution to show that defendant had apparently committed other acts of a kind similar to the one of which he was charged in the information, defendant should have been afforded full opportunity to either deny it completely or to explain the transaction in order to show its innocent character. State v. Germain, 54 Or. 395, 103 Pac. 521. If the sale to Engel was in all respects fair and just—if it was based upon an instrument purporting to be an option for which a consideration had passed from defendant to the owners of the property—defendant was entitled to show that fact in order that his good faith might appear in the matter, to the end that no inference of guilt of defendant as to the charge against him might be indulged in by the jury on account of such alleged similar occurrence. Seldom does it happen in cases where the rule permits evidence to be introduced of similar transactions that the defendant is apprised beforehand either of the broad fact that such evidence will be offered, or of the precise nature of the testimony which will be introduced. As to that feature of the case he is therefore oft times greatly embarrassed and considerably handicapped. It is but just that in such circumstances at least his every right should be accorded him. In the instant case the question of intent was predominant and most vital to defendant's case. The facts concerning the particular charge against defendant were not of that character which would justify the conclusion that defendant's guilty intent was manifest. It was a close question for the jury to decide; and without a finding thereon against defendant no verdict of guilty could have been reached in the case. The ruling by the court of which defendant complains, and which resulted in defendant being precluded from showing primarily that there was a consideration given by him for the option to purchase the property, to the end that in selling an interest in the mining claims described therein defendant had no guilty intent, but, on the contrary, was acting in all respects honestly and within his legal and moral bounds, was an invasion upon and most prejudicial to defendant's legal rights. A consideration of other alleged errors becomes unnecessary.

It is ordered that the judgment and the order denying defendant's motion for new trial be and the same are reversed.

We concur: CONREY, P. J.; CURTIS, J.

66 Cal. App. 128

GOODWIN v. PFUNDER. (Civ. 3993.)

(District Court of Appeal, Second District, Division 1, California. March 6, 1924.)

1. Money received 🔑18(3)—Evidence held to support finding of defendant's receipt of money for benefit of plaintiff's decedent.

Evidence, in action to recover moneys paid to defendant by plaintiff's decedent, *held* to support finding in favor of plaintiff against contention that such moneys were paid in liquidation of loan by defendant.

2. Appeal and error 🔑995—Appellate courts do not weigh evidence.

Appellate courts do not weigh evidence and determine where preponderance lies.

Appeal from Superior Court, Los Angeles County; L. H. Valentine Judge.

Action by Frank J. Goodwin, administrator of the estate of William H. H. Goodwin, deceased, against Walter A. Pfunder. Judgment for plaintiff, and defendant appeals. Affirmed.

Richard Kittrelle, of Los Angeles, for appellant.

Benjamin M. Stansbury, of Los Angeles, for respondent.

CURTIS, J. This action was instituted to recover money delivered to defendant for the use and benefit of plaintiff's intestate. The delivery of said money to the defendant was denied by the answer. Judgment was rendered in favor of plaintiff, and defendant appeals.

[1] The only point made by defendant upon this appeal is the insufficiency of the evidence to justify the judgment. It was proven at the trial that the deceased, William H. H. Goodwin, on the 24th day of December, 1919, paid to defendant the sum of $1,250. The payment was made by means of a check for $1,250 sent to the defendant through the mail, which check, when admitted in evidence, bore the indorsement of the defendant, and also the stamp of the bank upon which it was drawn, showing the same to have been paid. Defendant admitted the receipt of said check, and that he had cashed the same and received the money thereon, but claimed that this money had been paid to him by Goodwin in payment of a loan in the same amount made by him to Goodwin. Upon cross-examination he was unable to show where or how he obtained the money loaned to Goodwin, except that he "had saved it up from different times from deals and things." He claimed he kept it in a safe-deposit vault prior to loaning it, although he admitted he had an account in a savings bank at the same time. He testified that he did not give Goodwin a check, but that he gave him the money itself, which he took from his safety deposit vault. The money paid him by Goodwin he deposited in the bank. He testified at the trial that he was to receive one per cent. a month interest on the loan to Goodwin, but it was shown that in the trial of another action he had testified that he was to receive eight per cent. interest per annum. He testified that he did not recall that there was any letter or writing accompanying the check which Goodwin sent to him, but at the trial of the other action referred to he testified that he had destroyed the letter sent with the check. He testified he took a note from Goodwin when he made the loan, and that this note was returned to Goodwin when the note was paid, but Goodwin's administrator testified that he was unable to find said note among the effects of the deceased when he took charge of the property of the estate of said deceased a few months thereafter. There were numerous contradictions and discrepancies in the defendant's testimony which rendered it unsatisfactory in the extreme. The evidence showed that Goodwin, during the time that he had these transactions with the defendant, was a man of considerable means and was worth in the neighborhood of $50,000, and that his property consisted of lands, notes secured by mortgage, shares of stock in the telephone company, the Pennsylvania Railroad Company, and other corporations. The testimony further showed that the defendant was a man of limited means and was then, and had been for years, working at a salary of not to exceed $125 per month, out of which he was compelled to support himself and family. A witness by the name of Vincent testified as follows:

> "I asked Mr. Pfunder [the defendant] how he came to get the car and he told me that he took it over with this money that Mr. Goodwin had loaned him, or he had loaned Mr. Goodwin."

[2] With this testimony before the trial court we are not able to say that it was not sufficient to justify the court in rendering judgment in plaintiff's favor. Defendant refers to other testimony given by the witness Vincent during the trial, to the effect that the deceased had told him that he had borrowed the money from the defendant. By reference to the reporter's transcript we find that this witness testified that the deceased "said that Mr. Pfunder managed to get the money for him." Conceding that this statement of the witness Vincent justifies the claim made for it by the defendant, this fact cannot be of any material assistance to the defendant on this appeal. We are not to weigh the evidence and determine whether the preponderance thereof is in defendant's favor or not. This was the duty of the trial court, and in the exercise of this duty it found in favor of the

plaintiff. In our opinion this finding should not be disturbed.

For the reasons above stated we think the judgment should be affirmed; and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

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66 Cal. App. 149

CUNNING v. CARR, County Auditor, et al. (SELVAGE, Intervener). (Civ. 2778.)

(District Court of Appeal, Third District, California. March 10, 1924.)

Appeal and error ⚷458(1)—Supersedeas will not issue unless necessary to preserve rights.

Supersedeas will not issue unless necessary to preserve rights of parties pending hearing, and will not be granted intervening taxpayer appealing from judgment for plaintiff in action against county officials to compel issuance of warrants for services, since defendants who did not appeal would pay at their peril and intervener would not be prejudiced.

Action by John Cunning against Thomas K. Carr, Auditor of the County of Humboldt, and another, in which T. H. Selvage intervened. There was judgment for plaintiff and intervener gave notice of appeal. On application by intervener for supersedeas to prevent action under writ of mandate, issued. Writ denied.

Selvage & Selvage, of Eureka, for intervener and appellant.

H. C. Nelson, of Eureka, for respondent.

A. W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for defendants.

PLUMMER, J. This matter is before the court upon an original application for the issuance of a writ of supersedeas herein. It appears from the intervener's petition that the plaintiff Cunning, upon his own and the assigned claims of five others, began an action in the superior court of Humboldt county against the auditor and treasurer thereof to compel the auditor to issue warrants for certain services performed by the petitioner and his assignors and also to compel the treasurer to pay the same. The petitioner herein thereupon filed his complaint in intervention. The cause went to trial, and the plaintiff had judgment. The petitioner filed a notice of appeal without giving any bond or undertaking to stay proceedings on appeal. The defendants, Carr and Hodgson, have taken no appeal. After the entry of judgment in favor of the plaintiff, a writ of mandate was issued under the hand and seal of the clerk of the superior court of Humboldt county, directing the auditor to issue warrants for the claims held by the plaintiff, and also directing their payment by the treasurer of Humboldt county. It is to supersede this writ of mandate that the petitioner now asks the order of this court.

Many authorities have been cited on the question whether the filing of the notice of appeal by the intervener stays proceedings by reason of the construction that has been given to sections 942 to 949, inclusive, of the Code of Civil Procedure. On the part of the petitioner it is insisted that the filing of his notice of appeal stayed all further proceedings, and that the issuance of the writ of mandate was without authority of law, and therefore void. On the part of the respondent it is contended that, as the judgment neither required anything of the intervener nor granted him anything, no stay was effected by his notice of appeal, and that as to the defendants, neither of them having appealed, execution could run against them immediately. As we view this case, it is not necessary for the court to determine whether the filing of the notice of appeal by the intervener did or did not effect any stay or prevent the issuance of the writ of mandate herein referred to. We have carefully examined the pleadings and find that there is nothing in the entire action which would have prevented the auditor from issuing his warrant at any time during the pendency of the trial and that there is nothing in any order made by the trial court which at any time hindered or tended to hinder the issuance of the warrants sought by the petitioner or their payment by the county treasurer.

In this particular the case is exactly similar to the circumstances presented and considered by this court in Cotton-Macauley Co. v. Deshields, 52 Cal. App. 469, 198 Pac. 1026. The court there said:

> "As we examine the pleadings and judgment in the record before us, there appears nothing to prevent the appellant Deshields issuing a warrant in favor of the plaintiff at any time, notwithstanding the appeals now pending in this court. It is simply a matter of whether the auditor does or does not wish to assume such responsibility. There being nothing to prevent the auditor at the present time from issuing such warrant, we cannot very well see how any action of this court on the motion of appellant Deshields to have his appeal dismissed will in any way imperil the rights of the intervener. If the stop notices referred to as given by the intervener are ultimately held good, the intervener has his remedy, as payment made by any officer having proper notice thereof would be at his peril."

In that case the auditor was seeking to have his appeal dismissed and the intervener contested the auditor's application for dismissal. In the case at bar the defendants have taken no appeal and are preferring to take their chances in paying the plaintiff's claims without waiting for the judgment of

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this court upon the merits of the case. If the judgment of the trial court should be reversed, the intervener has lost nothing by reason of the action of the auditor and treasurer in paying the plaintiff's demands. The illegality of the claims would be established and the defendants and their bondsmen would simply be in the position of parties paying claims out of public funds not authorized by law. A writ of supersedeas issued in this matter and directing the auditor and treasurer and the plaintiff to restore the amounts of the claims included in the judgment of the trial court would be no more effective in preserving the petitioner's rights as a taxpayer of the county of Humboldt than the judgment of this court holding such claims illegal and fixing the liability upon all the parties concerned and the bondsmen of the two defendants. The rule being that a supersedeas will not issue, unless it is necessary to preserve the rights of the parties pending hearing, this latter reason would of itself be sufficient to necessitate the denial of the petition of the intervener. The denial of the petition for a writ of supersedeas herein is made without reference to the merits of the case or to any of the questions which may be presented to this court upon the appeal now pending in said cause.

It is ordered that the petition for a writ of supersedeas herein be and the same is hereby denied.

We concur: FINCH, P. J.; HART, J.

193 Cal. 488

FAY IMPROVEMENT CO. v. RANKENBERG et al.

SAME v. HOMESTEAD REALTY CO. et al.

(S. F. 10868, 10869.)

(Supreme Court of California. April 25, 1924.)

1. Municipal corporations ⚷567(2)—Complaints to foreclose liens for street improvement work held sufficient.

Complaints in actions to foreclose liens for street improvement work under St. 1911, p. 730, *held* to allege establishment of official line and grade, and that work was done to official line and grade.

2. Appeal and error ⚷909(3)—Plans and specifications not attacked in proceeding to foreclose street improvement lien presumed regular on appeal.

On appeal from judgment for plaintiff in actions to foreclose liens for street improvement work, under St. 1911, p. 730, plans and specifications not brought to attention of appellate court by record and not attacked must be presumed regular in all respects.

In Bank.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Actions by the Fay Improvement Company against Henry P. Rankenberg and others and the Homestead Realty Company and others, respectively. Judgments for plaintiff, and defendants appeal. Affirmed.

Sawyer & Sawyer, of San Francisco, for appellants.

John R. Daniels, of San Francisco, and J. E. McCurdy, of San Mateo, for respondent.

SEAWELL, J. These actions were brought to foreclose liens for street improvement work done under the order and by the direction of the board of trustees of Daly City, county of San Mateo, as provided by the street improvement act, approved April 7, 1911. Stats. and Amendments 1911, p. 730. The same questions of law being presented by each, they have been consolidated for the purposes of appeal and presented as one cause.

Each complaint contains two causes of action, and each cause of action was demurred to on the ground that it failed to state facts sufficient to constitute a cause of action. The specific and only defect or ground of demurrer urged or presented by appellants is that the complaints fail to allege the establishment by said city of an official line and grade; further, that they fail to allege that the work was done to the official line and grade. Said demurrers were overruled. Appellants answered, and the court rendered a judgment in each case confirming the validity of the assessment liens imposed upon the property of appellants. The appeals are taken upon the judgment rolls alone. The findings of the court are amply supported by the records of the proceedings taken by the board of trustees.

In addition to alleging all necessary jurisdictional matters, the complaints contain the following allegation:

"That on the 12th day of July, 1920, the city engineer of said city of Daly City furnished to and filed with the city council of said city proper plans and specifications for constructing and completing certain public work and improvement in said city of Daly City, which said public work and improvement is hereinafter particularly set forth and described. That thereupon, to wit, on the same day last mentioned, the said city council by its resolution No. 186, duly adopted and approved said plans and specifications, and on the same day, to wit, the said 12th day of July, 1920, the said city council duly and regularly passed and adopted Resolution of Intention No. 19," in words and figures following, to wit: (The resolution in full follows.) "All of said work is to be done to the official line and grade in accordance with the said plans and specifications on file with the city clerk of said city of Daly City by the city engineer thereof on the 12th day of July, 1920, and which plans and specifications were adopted by the said board of trustees on the 12th day of July, 1920, as the official plans and specifications for said work, and reference is hereby made to said plans and specifications for further description of the said work and of the locations at which same is to be done and for further particulars."

[1] The complaints contain the further allegations that plaintiff commenced the work under its contract and caused the same to be completed as provided in said contract and specifications. The language in this respect is as follows:

"That said plaintiff fully performed on his part in every respect the said work, according

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to the specifications and terms of said contract, and with material complying with said specifications, all under the direction and to the satisfaction of the said superintendent of streets, and that the said work was duly approved and accepted by the said superintendent of streets."

The complaint contains a number of allegations of the same import as those we have above quoted, and we think it fully meets the objections now made by appellants. That appellants regarded the allegations of the complaint sufficient to put in issue the question of the "official line and grade" is made manifest by their denials and affirmative answers to the effect that no official grade had been established, and that the work had not been done to the "official line and grade."

The court, as well as the trustees of said city, upon the evidence presented in each proceeding, found against appellants on the objections above urged, as well as on all other litigated issues.

[2] The plans and specifications are not brought to our attention by the record, and, as the sufficiency of the same is not attacked, it must be presumed that they are regular in all respects and contain the matters to which reference is made by the resolution of intention as set forth in the complaint.

The judgments appealed from are affirmed.

We concur: MYERS, C. J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SHENK, J.

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66 Cal. App. 1

PEOPLE v. BAILEY et al. (Cr. 700.)

(District Court of Appeal, Third District, California. Feb. 27, 1924. Hearing Denied by Supreme Court April 24, 1924.)

1. Insurrection and sedition 🔑2—Evidence as to character of I. W. W. held to sustain conviction of members for criminal syndicalism.

In prosecution of members of the I. W. W. for criminal syndicalism, in violation of St. 1919, p. 281, § 2, subd. 4, evidence as to character of organization *held* to sustain conviction.

2. Criminal law 🔑452(1)—Conclusions as to meaning of terms used and expressions found in books held admissible in prosecution for criminal syndicalism.

In prosecution of members of the I. W. W. for criminal syndicalism under St. 1919, p. 281, testimony of witnesses who derived their information while members of the organization and at meetings thereof as to meaning of certain terms used by members of organization, and as to whether passages from books expounding the doctrines of the organization indicated that it adhered to its former ideas, *held* admissible, though somewhat in the nature of conclusions.

3. Criminal law 🔑419, 420(1)—Testimony that members of I. W. W. had told witness that they had committed arson held not admissible.

In prosecution of members of the I. W. W. for criminal syndicalism, testimony that witness had talked to other members of the organization, who had told him that they had recently committed the crime of arson, *held* inadmissible.

4. Criminal law 🔑1169(2)—Erroneous admission of evidence held harmless, in view of other evidence.

In prosecution of members of I. W. W. for criminal syndicalism, testimony that witness had been told by other members that they had recently committed arson *held* harmless, in view of the large quantity of incriminating testimony presented against the defendants.

5. Insurrection and sedition 🔑2—I. W. W. literature published before enactment of Syndicalism Act held admissible in prosecution thereunder.

In prosecution of members of the I. W. W. for criminal syndicalism under Criminal Syndicalism Act, § 2, subd. 4, I. W. W. literature published prior to the passage of such act was admissible; the subsequent reformation of the organization being a matter of defense.

6. Criminal law 🔑400(1)—Parol evidence not admissible to prove contents of writings.

In prosecution of members of the I. W. W. for criminal syndicalism, parol evidence was not admissible to prove the contents of certain writings by which it was sought to prove that the organization had for some years renounced and condemned the policy which it at one time had advocated.

7. Insurrection and sedition 🔑2—Admission of list of I. W. W. members who had been arrested and charged with criminal syndicalism held error.

In prosecution of I. W. W. members for criminal syndicalism, in which an article contained in a magazine published under the authority of the organization, stating that the organization had adopted peaceful means for carrying out its objects, was introduced in evidence by the defendants, the admission in rebuttal of a list of members who had been arrested and charged with a violation of the Criminal Syndicalism Act published in the same issue of such magazine, was erroneous.

8. Criminal law 🔑1169(2)—Erroneous admission of evidence held harmless, in view of other evidence proving defendant's guilt.

In prosecution of I. W. W. members for criminal syndicalism, the erroneous admission in evidence of a list of members of the organization who had been arrested and charged with criminal syndicalism *held* harmless, in view of other testimony by which defendants were overwhelmingly proven guilty.

9. Criminal law 🔑655(5)—Alleged misconduct of court held not ground for reversal.

In prosecution for criminal syndicalism, remarks of court to defendant's attorney at different times *held* not ground for reversal, since jurors could not have been misled thereby.

10. Criminal law ⚷823(4)—Refusal of requested instruction defining "knowingly" held not error, in view of other instructions.

In prosecution of I. W. W. members for criminal syndicalism, refusal to instruct as to meaning of word "knowingly" *held* not ground for reversal, in view of other instructions on the subject of guilty knowledge.

11. Insurrection and sedition ⚷2—Instruction defining criminal syndicalism held not error.

In prosecution for criminal syndicalism under Criminal Syndicalism Act, § 2, subd. 4, instructions defining the crime, though not as specific as they should be, *held* not erroneous.

12. Insurrection and sedition ⚷2—One who became member of conspiracy to commit "criminal syndicalism" was guilty of such crime.

A person who became a member of and engaged in a conspiracy to engage in advocating, teaching, or aiding and abetting criminal syndicalism, as defined by Criminal Syndicalism Act, § 1, was guilty of "criminal syndicalism."

13. Criminal law ⚷655(1), 706—Defendants charged with criminal syndicalism entitled to same fairness as persons charged with other offense, and prosecuting attorney and judge should use care in reception of evidence.

In a prosecution for criminal syndicalism the judge and the district attorney should exercise the most circumspect care in the presentation of evidence; the defendants in such a prosecution being entitled to the same fair and impartial trial as persons charged with any other crime.

14. Criminal law ⚷1186(4)—Statute requiring errors to be prejudicial does not change the rules of evidence.

Const. art. 6, § 4½, requiring an error to be prejudicial to constitute ground for reversal, does not change the rules of evidence.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Frank Bailey, William Joozdeff, P. Mellman, J. Orlando, John Wiza, F. Franklin, James Martin, and R. A. Gibson were convicted of criminal syndicalism, and from judgments of conviction and orders denying a new trial, they appeal. Affirmed.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were jointly tried under an indictment found and presented to the superior court of Sacramento county by the grand jury of said county, charging them with the crime of "criminal syndicalism." The charge was based on subdivision 4 of section 2 of the "Criminal Syndicalism Act." Stats. 1919, p. 281. See, also, People v. Roe, 58 Cal. App. 690, 692, 209 Pac. 381; People v. Wagner et al. (Cr. 711) 184 Pac. 876, an opinion in which was filed by this court on February 21, 1924. The jury found each of the defendants guilty as charged, and they have brought the case here by appeals from the judgments and the orders denying them a new trial.

The verdicts are assailed on the grounds that there is no evidence which affords them sufficient support; that errors of a highly prejudicial character were committed by the trial court in rulings admitting and excluding certain evidence; that the court, during the progress of the trial, was guilty of misconduct which seriously militated against the rights of the accused in the trial of the charge against them, and that certain instructions proposed by the defendants were erroneously and to the positive prejudice of the rights of the accused disallowed.

The record here, in so far as its evidentiary features are concerned, is quite familiar to this court. Books, pamphlets, leaflets, magazines and other periodicals containing and setting forth in elaborate detail the principles and policies of the Industrial Workers of the World, and also containing dissertations and speeches by individuals upon the principles and ultimate aims thereof (all in the extreme commendatory and laudatory of the organization and its objects), were introduced in evidence, and are in the record as it is presented to this court. This documentary evidence is in all substantial respects the same evidence of that character which has been introduced in every case involving the prosecution of the same crime against others which, in the last three years, has been appealed to and reviewed by the Supreme and the appellate courts of this state, as we learn from the opinions in those cases. See People v. Steelik, 187 Cal. 361, 203 Pac. 78; People v. Taylor, 187 Cal. 378, 203 Pac. 85; People v. Roe, 58 Cal. App. 690, 209 Pac. 381; People v. La Rue et al. (Cal. App.) 216 Pac. 627; People v. Flanagan et al. (Cal. App.) 223 Pac. 1014. In the opinions in the cases just named, the principles and purposes of the organization, as disclosed by its literature introduced in evidence in said cases and in this, are sufficiently set out to make it clear that the ultimate end of said organization is to completely destroy the existing systems of governments of the United States and the states, and substitute therefor a sort of cooperative government, or what the members of the organization denominate "a system of industrial democracy," the effect of the establishment of which would be to overthrow capitalism, and, to use plain terms, to destroy existing vested rights. To accomplish this radical result the organization proposes to take control of all machinery of industry, and all persons who work are to partake equally in the fruits of all industrial activities. The organization, so it is declared in its platform of principles, as the same is paraphrased by some of its members in maga-

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zines published by its author, "is not only industrial in form, but revolutionary in character," and is "based on the principle that 'the working class and the employing class have nothing in common,' and that 'labor is entitled to all it produces.'" According to the same interpreters of its creed, the capitalists are thieves and parasites, and their "sacred" property is plunder and "the state, church, press, and universities are tools of the exploiters," and that upon these institutions the members of said organization "look with contempt." There are in the numerous magazines, books, and literature in other forms, all published and circulated by and under the authority of said organization, many details of how its great ultimate object can be accomplished. It is unnecessary to give these space herein. It is enough to say, generally, that the methods openly advocated by the organization for overthrowing the capitalistic class, are, among others, to cause strikes, shirk the work to which the members may be assigned by employers, and to do any other act which may discommode the employers or cause their enterprises to become unprofitable; that if any attempt be made by the capitalists to close down their industries or cease operating them because of the labor conditions thus brought about, then the members themselves shall refuse to cease working, and, if necessary, take control of the industrial plants in which they may be employed and operate them.

The witnesses Townsend, Coutts, and Arada (the two first named ex-members of the said organization), each detailing the circumstances of crimes and other atrocities committed by members of the organization to further the ends thereof, again appear in the instant case as witnesses for the prosecution. Their stories of the crimes committed (arson in particular) at various points in the San Joaquin valley and other points in this and other states of the Union in the years 1916, 1917, 1918, 1920, and some other crimes as late as the year 1922, by the members of the organization, and resulting in the destruction of many thousands of dollars worth of property, as given in this case, are familiar chapters in a number of the judicial opinions of the higher courts of this state. The purpose sought to be attained by the commission of those crimes was, according to these witnesses, in accord with the then established policy of the organization to create throughout the state a reign of terror, in the hope that thus the people—the producers, capitalists, and employers generally—would, if not actually yielding to or acquiescing in the ultimate demands or objects of that organization, be so instilled with fear and alarm, and, indeed, utter helplesness, against an enemy carrying on its criminal warfare with a cunning subtlety that challenged detection, that would induce them to offer a sort of "armistice" or a plan of compromise which would operate only as a wedge for driving deep into our soil the radical and revolutionary principles of government for which that organization avowedly stands. It is unnecessary to repeat herein in detail the stories told by the witnesses referred to. It is conceded by counsel for the defendants that all the testimony in this case is substantially a repetition of the testimony in the cases above named.

[1] There can exist no ground for doubting that the testimony thus referred to is amply sufficient to support the verdicts. The defendants, proceeding upon the claim that since the commission of the offenses or the crimes concerning which Townsend and Coutts testified the organization had entirely changed its policy for carrying out its ultimate objects, introduced a number of witnesses, either members of the organization or former members thereof, who testified that the executive board of the Industrial Workers of the World had held a session at which were adopted resolutions denouncing and proclaiming against the resort by the members of the organization to the commission of acts of violence of any character in furtherance of the purposes thereof. Documentary evidence was also introduced to the same effect. Some of the witnesses for the defense testified that all literature containing either express or implied advocacy of acts of sabotage or other criminal violence as the means for accomplishing the purposes of the organization had been destroyed several years ago, or subsequently to the passage of the Criminal Syndicalism Act. They explained, however, that the destruction of said literature was because the Industrial Workers of the World did not desire to get into trouble with the courts. They also testified that they had never heard any member or members of the organization advocate acts of sabotage or other crimes for the purpose of carrying out the objects of the organization. Much of this testimony is at positive variance from the testimony of Townsend and Coutts, who stated that, while the literature advocating criminal violence by the members of the organization might have been destroyed at the time mentioned by the witnesses for the defense, such act was merely a subterfuge, and that it was understood among the members that the same destructive policy should be pursued as it had always been by said organization. It was for the jury to determine whether the testimony of the witnesses referred to or the documentary evidence introduced involved a statement or representation of the truth.

In the case of the People v. Roe, 58 Cal. App. 690, 209 Pac. 381, we declared that there is nothing, so far as we may judge from what on their face they purport to be, in the principles advocated by the Industrial Workers of the World which they are not at liberty to advocate. We still adhere to that declaration. In other words, we are not inclined to hold that, upon the face of its platform of principles, in advocating the practical application thereof, the Industrial Workers of the World are not within the rights guaranteed to all citizens by the federal and state Constitutions. It is obvious, though, that the scheme proposed to be established by the organization for the government of society is wholly fanciful and impractical. It is, indeed, a paradoxical notion of government. It would seem to involve a recidivation to that primitive society in which might stood for right. The jury would be entitled to weigh these considerations, in connection with the testimony showing that violent methods had been resorted to by the organization, in determining whether the said organization had reformed or still believed in, advocated, taught, and sanctioned such methods for establishing its propaganda.

The rulings as to the evidence and of which the defendants complain are very much of the same character as those considered in People v. Wagner et al. (Cr. 711), supra. A general reference to and consideration of these assignments will therefore be sufficient.

[2] The specific claim as to certain testimony given by the witnesses Townsend and Coutts is that they, in explaining the operations of the organization, were permitted to express their opinions and conclusions. For instance, Townsend was examined in detail, in connection with the alleged acts of violence advocated by the organization, with regard to the meaning of certain words or terms or phrases employed by the members of said organization in expressing the various criminal acts which were perpetrated or to be perpetrated by them in effecting its purpose to create a general state of terrorism among the people, particularly employers. Among numerous other questions on these lines, he was asked if he knew what the members understood from the term "sab cat," to which he replied that it had reference to those members who were engaged in commiting acts of sabotage. He further testified that, when property had been destroyed by members either by acts of sabotage or arson, the expression understood among the members was that the "cat had been turned loose." He was also asked what was understood by the members by the terms "scissorsbills" and "highjacking," and other terms wholly unintelligible to one not a member of the organization and who has not read its literature or heard those terms explained. "Scissorsbills," as a part of the nomenclature of the organization, he explained, referred to members of labor unions, with whom the Industrial Workers of the World were as much at war as they were with the capitalistic class, because the labor unions necessarily recognize the rights of employers, and that "high-jacking" referred to the robbery of "scissorsbills" or other persons not connected with the organization, a principle, so Townsend declared, which the organization fully indorsed as one of the means for disrupting labor organizations and creating terror among the people generally. These and other statements too numerous to mention specifically herein, relative to the methods adopted, practiced, and advocated by the organization as in aid of the attainment of its paramount objects, constituted largely the testimony of the witnesses Townsend and Coutts, which, as is the claim, involved the expression of the opinions and conclusions of those witnesses.

Townsend and Coutts testified that all the information they had obtained as to the methods of the organization for forcing its propaganda upon the people and all that they knew as to the meaning of the various cryptic terms employed by the members in indicating acts of violence which had been and which were proposed to be committed was acquired while they were members of the organization, and at meetings when the matters referred to were discussed and explained. We do not think that this testimony is subject to the objections urged against it. It is true that now and then the witnesses expressed their conclusions, but, considering their testimony as a whole, it cannot justly be said that the matters to which they testified did not constitute facts competent to be established in the case and pertinent to the issue. Naturally, in a case dependent for its establishment, as this is, upon the proof of certain political doctrines or principles, it would not be surprising if a witness giving testimony regarding the scope and the designed effect of those principles would occasionally make a statement involving more or less of an opinion or a conclusion, but such an opinion or conclusion under such circumstances would and should be regarded as a statement of facts where made by one who has indorsed, habitually practiced and followed said principles. Of course, a general commentary or dissertation upon the principles or doctrines, unless a defendant on trial was himself the author thereof, or unless shown to have been published or adopted by the organization itself, would not be admissible. It may further be explained that the same objection is urged here against the testimony of the witness Townsend with regard to the principles advocated by the organization as they were set forth in a book purporting to have been published under the authority of the organization. The witness was shown the book and asked by the district attorney whether or not he could find therein any language indicating that "the I. W. W. holds the same sort of ideas that it formerly had." Several such questions based upon the book were propounded by the district attorney, objected to by the defendants, and the objections overruled. As we understand the record, the witness, in response to those questions, merely read certain passages from the book to which his attention was called by the district attorney setting forth the principles of the organization, and answered the questions in the affirmative. We can perceive no reason for holding that the testimony thus elicited was not competent. No question was raised as to the meaning of the passages read by the witness to the jury, and it was proper for the latter to state whether or not the organization still adhered to the doctrines promulgated in said book to which his attention was directed by the district attorney.

Speaking generally of the character of the documentary evidence introduced in the case, it is to be remarked that, in a case of the character of the one before us, it would be difficult to present the theory of the people without securing from those who had been members of the organization, and who had made a study of the principles thereof, as Townsend and Coutts declared that they had, a statement as to what they understood to be the meaning and purpose of those principles. Certainly such testimony by witnesses who admitted that they had been members of the organization and had participated in acts involving the practical application of the principles of the organization would be competent and proper.

[3, 4] It is further contended that the testimony of Townsend to the effect that he had met and talked with other members of the organization when he was a member thereof, and that they had told him that they had but recently committed the crime of arson by setting fire to a number of buildings in the San Joaquin valley, was hearsay, and, therefore, incompetent. The Attorney General argues that this testimony was admissible upon the theory that the Industrial Workers of the World constituted a confederation or combination whose purpose was to accomplish its objects by unlawful or criminal means, and that it is a continuing conspiracy, and will remain so until its ultimate objects are accomplished; that therefore any acts or declarations of any members of the organization regarding the criminal activities thereof, whensoever made, are admissible under the rule. But the point has been decided the other way by the cases. See People v. La Rue (Cal. App.) 216 Pac. 627; People v. Flanagan (Cal. App.) 223 Pac. 627, and the cases therein cited. It must therefore be held that the admission of that testimony was error, but, in view of the large quantity of incriminatory testimony presented against the defendants herein, we must conclude that, notwithstanding said error, a miscarriage of justice will not result therefrom.

[5] It is contended that much of the literature introduced by the people and allowed by the court, advocating, at least by implication, acts of violence by its members, was irrelevant to the case because of having been published a long time anterior to the passage of the Syndicalism Act. Some of this literature was of "ancient vintage"—that is to say, published prior to the passage of said act. But it was published under the authority of the I. W. W. and, as stated, some of it advocated, though in an indirect way, the resort to unlawful activities to carry out its great central idea. This evidence was not irrelevant or incompetent. Whether the organization had subsequently to the publication of said literature receded from the policies therein advocated and is now opposed to the employment of unlawful means for the achievement of its ends and aims was a matter of defense; and, even upon the introduction of evidence by the defense designed and tending to show that the organization no longer advocated the methods set out in the said literature as a part of its program to change our systems of government, it was for the jury to determine from all the evidence whether it had reformed its methods to accomplish its point, and, in thus considering the evidence, the jury, for the purpose of measuring its weight or probative value, were at liberty to, and, we may assume, did, take into account the fact that said literature had been published many years before the Syndicalism Act was passed. It is further to be assumed from the verdict that that fact did not in the minds of the jury detract any from the evidentiary significance of said literature.

There are several other assignments involving the same proposition as the one just considered. In reply to all such objections, we can say that no sound reason occurs to us why all the literature published by said organization, and which is shown to contain authoritative statements and interpretations of its purposes, principles, policies, activities, and methods of accomplishing results, is not competent evidence in a prosecution under the Criminal Syndicalism Act, regardless of the time at which such literature was so published and issued. None of the literature of the organization received in evidence in this case showed or tended to show any other crime than that charged in the indictments, to wit, that the defendants became and were members of the organization with knowledge of its unlawful character. It follows, therefore, that the cases cited by counsel for the defendants, notably, People v. Glass, 158 Cal. 650, 112 Pac. 281, are not in point.

[6] The complaint that the court erroneously excluded certain evidence offered by the defense is without substantial merit. There are many of these assignments, and we will not attempt to give them specific notice herein. It will be sufficient to say, generally, that much of the evidence offered by the defense and excluded by the court was incompetent in that it involved an attempt to prove the contents of certain writings by parol. The court permitted the defendants to introduce a large amount of evidence tending to

show that the organization for some years last past had renounced and condemned the policy which once it had advocated of pressing its principles to the accomplishment of its purposes by unlawful methods. Indeed, the court seemed to give the defense considerable latitude in the matter of the introduction of evidence tending to show that the organization had not for many years advocated or believed in the practice of criminal acts as in furtherance of its objects.

[7, 8] The defense introduced in evidence an article contained in a magazine published in the year 1920 under the authority of the I. W. W., stating that said organization had adopted peaceable means for carrying out its objects, and that it was unalterably opposed to the use of violence or criminal acts for its purposes. In rebuttal, to offset the effect of said article the district attorney was permitted to introduce in evidence a list (published in the same issue of said magazine) of the members of the I W W who had been arrested and charged with a violation of the Criminal Syndicalism Act, some being convicted, others acquitted, and others as to whom indictments were dismissed, all these proceedings being inaugurated subsequent to the time at which, according to said magazine article, the organization declared that acts of criminal syndicalism would no longer be practiced or sanctioned as a part of its program. The ruling allowing that testimony was clearly erroneous. A man cannot be convicted of crime by proof of the fact that he had previously been convicted of or charged with a similar or some other crime. The fact that these men were arrested, prosecuted, and convicted or acquitted would not be competent proof that the organization continued to preach and practice acts of sabotage. But we cannot believe that the testimony operated prejudicially against the defendants. We doubt not that there was not a member of the jury trying the defendants here but that knew that since the date of the publication of the magazine referred to (in the year 1920) there had been many prosecutions and convictions under the Syndicalism Act in the state of California. At all events, the testimony of guilt in this case is so overwhelming that we cannot well say that a miscarriage of justice will result from the upholding of the verdicts herein, notwithstanding the error adverted to.

[9] Certain misconduct on the part of the trial court is assigned. There is so large a number of specifications under this head that it would be impossible to notice all of them. The alleged misconduct occurred at different times during the trial, and involved remarks of the court when ruling on objections to certain evidence. On one occasion, when counsel for the defendants was examining his own witness and endeavoring to keep him within the scope of the questions asked, the court, in effect, stated that greater progress would be made in the trial if the attorney for the defendant would take the witness stand and let the defendant take the chair of the attorney. On another occasion the court, in the course of a discussion with the attorney for the defendant relative to the admissibility of certain testimony, addressing the said attorney, said, "If you want to show the transactions of your organization, why it is your duty to present the best evidence of it." It is further complained that the court, in ruling upon an objection to the cross-examination of one of the witnesses for the defense (a member of the organization) as to a certain provision of the constitution of the I. W. W., said:

> "That portion of the constitution was read in evidence by Mr. Cowan (assistant district attorney) this morning which provides that the official literature shall bear or carry the seal of the organization."

It is also claimed that the court prejudiced the rights of the defendants by unjustifiably rebuking one of the attorneys for the defense. The incident arose as follows: One of the witnesses for the defense was testifying as to the form of an application for membership of the organization, and upon being shown by the district attorney a blank form purporting to be such an application identified the same as the ordinary form of application. He was then asked some other questions concerning the application, when the attorney for the defendants objected to further examination with reference thereto on the ground that the witness had failed to identify it as the official form of application. The witness interrupted, and said, "Well, your Honor, I did not fail to identify it. I absolutely do identify it"; to which counsel for the defendants remarked, "I suppose the witness wants to correct his answer"; and the witness replied, "No corrections." After further discussion, the attorney for the defendants stated: "I note an exception to the remark of the court as intimating that I have deliberately misstated a statement of the witness"; to which the court replied, "You are mistaken. The court did not intimate anything. The court means just what it said, and does not mean anything else but what it did say, and does not intimate anything else."

The above constitute the principal grounds upon which it is urged that the court was guilty of misconduct which seriously prejudiced the rights of the accused The court should have omitted some of the remarks referred to; but we see nothing in any of them which would justify this court in holding that a jury of intelligent men and women would be influenced thereby in determining so serious a question as that of the guilt or innocence of persons charged with a public offense.

[10] The next and the last consideration will be as to the complaint that the court

erred in giving and refusing to give certain instructions. The defense proposed an instruction upon the question of scienter which was considered in the case of People v. Wagner et al. (Cr. 711), supra, and therein it was held that said instruction was not wholly a correct statement of the law, and that the court, having elsewhere in its charge, as it did in this case, given two instructions which, rationally construed, as presumptively they were so construed and understood by the jury, was not required to accept the instruction proposed by the defendant and give it to the jury after so modifying it as to make it conform to a correct statement of the law. We held in the Wagner Case, following the case of People v. Flanagan, supra, that scienter or guilty knowledge was an essential element of the offense charged in the indictment there, and we reaffirm our adherence to the conclusion so reached. The court here, as in the Wagner Case, read the section of the Criminal Syndicalism Act upon which the indictment here is predicated, and also gave another instruction in which it was plainly stated that persons charged under that section of the act must be shown to have knowingly joined or become members of the organization, and by this it was intended to be said, as the instruction certainly must be construed to mean, that "knowingly" meant guilty knowledge or knowledge of the unlawful character of the organization when they became and remained members thereof. The court also gave an instruction proposed by the defendants, which was to the effect that evidence as to certain acts done and declarations made by certain members of the Industrial Workers of the World should be considered solely for the purpose of enabling the jury to determine whether the said organization was organized "to teach, practice, advocate, or aid and abet criminal syndicalism, as that term has elsewhere been defined to you in these instructions." This instruction was clearly founded upon the theory that the gist of the offense was in the means by which the said organization proposed to carry out its objects, and it seems to us would necessarily imply that persons, to be guilty of the offense charged, must have had knowledge, when becoming members or remaining such, of the criminal methods advocated by the organization. The court, however, did reject the following instruction proposed by the defense: "The word 'knowingly,' as used in this indictment, means knowing the Industrial Workers of the World was organized for the purposes charged in the indictment." This instruction could and should have been phrased in such language as to have made the proposition therein declared more complete or as the statute itself defines the crime of criminal syndicalism; but it would not have been improper to give it in its present form. We do not think, however, in view of the entire record and the abundance of proof of guilt, that a miscarriage of justice has resulted or will result from the verdicts by reason of the refusal of the court to accept and give said instruction. In fact, we cannot persuade ourselves that the jury were not sufficiently enlightened upon the subject of knowledge by the instructions given. It will be borne in mind that the court in this case did not, as in the case of People v. Flanagan, orally interpret to the jury, contrary to what we conceive to be the proper meaning and intent of subdivision 4 of section 2 of the Criminal Syndicalism Act, the written instructions given upon the subject of scienter or guilty knowledge.

It is further contended that the court erred in giving the following instruction, the claim being that it does not contain a correct statement of the law of the case:

> "You are instructed that if you believe from the evidence beyond a reasonable doubt that the I. W. W. organization and its members was, at the time charged in the indictment, engaged in a conspiracy which had for its object the commission of the acts denounced by the criminal syndicalism statute of this state, and which I have read to you, and if you further believe from the evidence beyond a reasonable doubt that such conspiracy, if conspiracy there be, on the part of the I. W. W. organization and its members, was still continuing, at the time charged in the indictment, not having yet accomplished its purpose, and if you further find that the defendants, or either of them, knowingly became members of the said I. W. W. organization, and continued such membership at the time charged in the indictment, then I instruct you that by so knowingly becoming members of such organization they thereby adopted and became coconspirators, and it is your duty to return a verdict of guilty as charged."

[11, 12] The above instruction is not as specific as it should be, but we are unable to see that it is in any respect erroneous. It in a very general way states the law correctly. Certainly if any person became a member of and engaged in a conspiracy which had for its object the commission of the acts denounced by the criminal syndicalism statute of this state—that is, to engage in advocating, teaching, or aiding and abetting criminal syndicalism as the same is defined by section 1 of said act—he would be guilty of the crime charged in the indictment. The court in this case gave several instructions correctly explaining the essentials of the crime of conspiracy.

We have now considered, in a very general way, it is true, the more important points urged for a reversal. It cannot be denied that in a number of instances the court committed error in the reception and exclusion of evidence; but, viewing the record as a whole, and accepting the evidence, as we must, at its face value, we are unable to persuade ourselves that from any errors committed in the trial of the case a miscarriage of justice has been or will be the consequence of the verdicts returned.

[13, 14] We may with propriety take occasion to remark that in the trial of cases of this character the judge presiding and the district attorney prosecuting should exercise the most circumspect care in the matter of the presentation of evidence to support the charge preferred against the accused. The defendants in a criminal syndicalism prosecution are entitled to the same fair and impartial trial as are persons charged with any other offense known to the law. Nothing should be brought into the record, either by way of side remarks or upon any unsupported pretext whatsoever, which is not relevant and competent and calculated to aid in a just determination of the ultimate question of the guilt or innocence of the accused. It should also at all times be borne in mind that section 4½ of article 6 of the Constitution was never intended as a shield for the torturing of the rules of evidence. These rules are the same to-day as they have always been, and they alone should be the guide in the trial of all cases, whether criminal or civil. These remarks are addressed to all judges and district attorneys trying cases of a similar character.

For the reason herein given, the judgment and the order as to each of the defendants are affirmed.

We concur: FINCH, P. J; PLUMMER, J.

66 Cal. App. 235

PEOPLE v. TOU JUE. (Cr. 1146.)

(District Court of Appeal, First District, Division 2, California. March 19, 1924.)

1. **Criminal law 🔑1159(4)—Credibility of witnesses not reviewable.**

Unless the testimony is insufficient to support the verdict, or is wholly improbable, the decision of trial court, and jury, on the credibility of a witness, will not be disturbed.

2. **Criminal law 🔑1153(4)—Witnesses 🔑330(1)—Extent of cross-examination, to determine credibility, discretionary, and reviewable only for abuse of discretion.**

The extent of cross-examination of a witness to determine his credibility is within the court's discretion, and reviewable only for abuse thereof.

3. **Criminal law 🔑1169(1) — Admission of weapon carried concealed by defendant, in narcotic prosecution, not prejudicial.**

In a prosecution for selling narcotics, admission of a weapon, carried concealed by defendant when arrested, though irrelevant, *held* not prejudicial.

4. **Criminal law 🔑1172(2)—Instruction as to credibility of testimony held not prejudicial.**

An instruction, that "a witness that is false in one material part of his testimony may be mistrusted in other parts," though followed by particular emphasis on fact that falsity in "material" evidence alone must be considered, *held* not prejudicial, notwithstanding Code Civ. Proc. § 2061, subd. 3.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Tou Jue was convicted of violating the act relating to the sale and use of poisonous drugs, and he appeals. Affirmed.

J. B. Peckham, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was convicted of a violation of the act relating to the sale and use of poisonous drugs. Two inspectors employed by the state board of pharmacy laid a trap for defendant, and on the day in question posted themselves directly across the street from defendant's place of business. From this point they observed the witness Bowman, who was acting under their instructions, enter defendant's restaurant and engage him in conversation. Thereafter Bowman left the restaurant and was followed a short time after by the defendant. The two met on the street and shook hands. At this point the two inspectors approached and arrested the defendant and Bowman, and an immediate search disclosed that the defendant had in his possession three silver coins which had previously been marked by the inspectors and delivered to Bowman for the purpose, and that Bowman had in his possession a small package containing morphine, which he testified he had obtained from the defendant in exchange for these coins. Testimony was offered that at the time of the arrest a revolver was found in the pocket of defendant, and this was offered in evidence during the course of the trial.

The appeal is based upon the claim that the whole case was framed upon the appellant, and that the witness Bowman and one of the inspectors employed by the state board of pharmacy were men of questionable character and bad reputation, and that for this reason their testimony should have been wholly disregarded. It was further argued in this connection that the trial court unreasonably curtailed the cross-examination of these witnesses, which was directed to the purpose of disclosing their reputations. Some criticism is also made of the instructions which the trial court gave to the jury.

[1] In cases of this nature the appellate courts must necessarily rely upon the trial court to see that substantial justice is given to the party on trial. It is impossible for this court to analyze the testimony of the witnesses as written in the record and from that analysis to determine whether such witnesses are entitled to be believed. In the

trial of the action all these witnesses must appear before the trial court and the jury, and it is the function of the jury, in the first instance, and of the trial court, after verdict, to pass on the credibility of the witnesses who have appeared before them. Unless the testimony which appears in the record is insufficient to support the verdict or is wholly improbable, we are not in a position to disturb the verdict.

[2] Complaint is made that the trial court unnecessarily limited the cross-examination of the witness McEnerney, who had been called by the prosecution. The criticism is directed to that part of the cross-examination relating to the credibility of this witness. It has been frequently held that the extent to which such cross-examination may be pursued is within the discretion of the trial court, and we do not believe that in this instance this discretion was abused.

[3] One of the witnesses testified that when the appellant was arrested he was carrying a concealed weapon, and this weapon was then offered in evidence. The arrest was made upon a charge of selling narcotics, and we do not see the relevancy of the offer of the weapon; but we cannot say that its admission was error prejudicial to the cause of the appellant.

[4] Particular criticism is made of the instruction advising the jury that "a witness that is false in one material part of his testimony may be mistrusted in other parts." It is said that in adding the word "material" to the instruction the court went beyond the provisions of section 2061, subd. 3, of the Code of Civil Procedure. Stress is laid upon the fact that the trial court followed this instruction with particular emphasis of the fact that falsity in material evidence alone must be considered. The portion of the instruction quoted has heretofore been approved by the Supreme Court. People v. Plyler, 121 Cal. 160, 53 Pac. 553. We have carefully examined the instructions which were given, and, taking them in their entirety, we do not find any prejudicial error.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

66 Cal. App. 115

PEOPLE v. TORTERICE. (Cr. 1056.)

(District Court of Appeal, Second District, Division 1, California. March 6, 1924. Rehearing Denied April 1, 1924. Hearing Denied by Supreme Court May 5, 1924.)

1. Perjury 🔑7—False oath for marriage license an offense.

In view of Pen. Code, § 118, defining perjury, not limiting oath to court proceeding and Civ. Code, § 69, stating requisites for issuance of license to marry female under age of 18 years, information alleging that defendant, to obtain license, made affidavit that female was then of age of 19 years, well knowing that statement of age was false, stated public offense.

2. Perjury 🔑22—Information held to allege that officer before whom oath administered had jurisdiction to issue marriage license.

Certificate at end of affidavit, set forth in information showing that affidavit to procure license to marry was subscribed and sworn to before deputy county clerk, *held* sufficient to show that officer had jurisdiction to issue marriage license.

3. Perjury 🔑33(8)—Evidence showed perjury in procuring marriage license.

Evidence *held* to leave no reasonable doubt that female was under age of 18 years, which fact was known to defendant, and that she had not been previously married, and supported conviction for perjury in oath before deputy county clerk to obtain license to marry.

4. Perjury 🔑10—Irregularity in taking oath not defense.

In prosecution for perjury under Pen. Code, § 129, it is by section 121 no defense that oath was administered in irregular manner, if accused caused officer to certify that it had been taken or administered.

5. Criminal law 🔑829(12)—Refusal of instruction on proof of corroborating circumstances held without prejudicial error.

Where age of female, alleged in defendant's affidavit to obtain marriage license to be 19 years, was proved to be less than 18 years, and, although record contained testimony of only one witness that he subscribed to affidavit, affidavit and fact that license was issued at same time were corroborative circumstances, and birth certificate under St. 1919, p. 448, § 21, was prima facie evidence, defendant was not prejudiced by refusal to instruct that before accepting corroborating circumstances jury must test sufficiency of circumstances alone without aid of other testimony, where court instructed on rule of Code Civ. Proc. § 1968, providing that perjury must be proved by two witnesses or one witness and corroborating circumstances.

6. Criminal law 🔑553—Jury not bound to decide in conformity to mere numbers of witnesses.

Jury is not bound to decide in conformity with declarations of number of witnesses which do not produce convictions in their minds against less number or against presumption or other evidence satisfying their minds.

7. Perjury 🔑37(3)—Instruction held applicable to testimony.

In prosecution for perjury in procuring license to marry female under legal age, instruction that if jury found that clerk required defendant to make affidavit and subscribe to it and at same time required him to take oath prescribed and that oath was administered and that marriage license was issued thereon, etc., *held* not inapplicable though the evidence showed the oath was administered with reference to application blank rather than in connection with signing the affidavit.

8. Perjury 🔑10—Contention that oath was to application blank and not to affidavit held without merit.

In prosecution for perjury, contention that if defendant only swore to the truth of facts contained in application blank for marriage license it would not constitute crime was without merit.

9. Criminal law 🔑834(1)—Refusal of instruction with concrete examples of criminal intent not error.

In perjury prosecution where instruction defined criminal intent necessary and was complete without concrete examples, there was no error in refusing illustrative additions thereto.

10. Criminal law 🔑788—Refusal of instruction on unexplained failure to call material witness held not error.

In prosecution for perjury in procuring license to marry female not of legal age where defendant stated that female's mother had said that daughter was going to be 19, there was no error in refusing instruction as to inference from unexplained failure to call material witness, as witness was available as well to defendant as to state.

11. Criminal law 🔑814(5)—Refusal of instruction defining elements of perjury held without error.

Where information not only charged that defendant made and subscribed to affidavit to procure marriage license, but also that he did falsely depose and swear, etc., there was no error in refusing instruction which defined elements of perjury and kind of evidence necessary, under Code Civ. Proc. § 1968, to prove it, which limited charges of perjury on affidavit.

12. Criminal law 🔑402(1)—Foundation properly laid for introduction of affidavit to procure marriage license.

Where deputy clerk stated that facts as stated in affidavit to procure marriage license were transferred from statement of facts in application blank and that defendant made oath to their truth, in view of Pen. Code, § 118, foundation was sufficiently laid for introduction of affidavit.

13. Criminal law 🔑429(1)—Birth certificate of female properly admissible in prosecution for perjury in procuring marriage license.

In prosecution for perjury in procuring license to marry female not of lawful age, in view of St. 1919, p. 448, § 21, making birth certificates prima facie evidence of facts therein stated, exhibit purporting to be birth certificate of female *held* properly admitted.

14. Criminal law 🔑696(5)—Denying motion to strike after evidence received held not abuse of discretion.

Where there was no timely objection to admission of application blank to procure license to marry female not of lawful age because no foundation was laid as to oral testimony as to its contents, there was no error in overruling motion to strike after testimony had been given.

15. Criminal law 🔑1128(1)—Assignment of error not sustained by record not considered.

Assignment of error not sustained by record cannot be considered.

16. Criminal law 🔑1129(1)—Misconduct in offer of incompetent witness not considered where not assigned as error.

Misconduct in an offer by the state as a witness of a girl who admitted she had been married to defendant cannot be considered when not assigned as error.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Victor Torterice was convicted of perjury, and he appeals. Affirmed.

J. Morgan Marmaduke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. This is an appeal by the defendant from the judgment and from an order denying his motion for a new trial in an action wherein he was convicted of the crime of perjury.

The alleged act of perjury related to an oath, taken by the defendant before a deputy county clerk of Orange county, for the purpose of obtaining a license to marry one Jennie Patt. In the information it is alleged that for the stated purpose the defendant made and subscribed his name to an affidavit which stated, among other things, that Jennie Patt was then of the age of 19 years; that said affidavit was delivered to said officer by the defendant as true; that the defendant then and there well knew that the statement that said Jennie Patt was of the age of 19 years was false, and that in fact her age was 17 years; that the defendant did then and there willfully, unlawfully, knowingly, falsely, and feloniously depose and swear that said Jennie Patt was of the age of 19 years, well knowing at the time that she was not of the age of 19 years, but in truth and in fact was of the age of 17 years; that the marriage license applied for was then and there issued by the deputy clerk, by whom the defendant was duly sworn to testify and certify truly concerning the matters stated in said affidavit.

[1] Appellant contends, first, that the information does not state a public offense, and does not allege commission of the crime of perjury. Counsel for appellant contends that the making of a false affidavit, as alleged in the information, is not a public offense, except when intended to be used in a court proceeding. The sole authority cited by him in support of this proposition does not sustain his contention. Section 118 of the Penal Code, defining perjury, is not in

terms limited to the taking of an oath in a court proceeding. We are not aware of any decision which limits the section in that manner. Section 69 of the Civil Code states the facts which must appear in order to authorize the issuance of a license to marry a female who is under the age of 18 years and who has not previously been married.

> "For the purpose of ascertaining all the facts mentioned or required in this section, the clerk, at the time the license is applied for, may, if he deems it necessary in order to satisfy himself as to matters in this section enumerated, examine the male applicant for a license on oath, which examination shall be reduced to writing by the clerk, and subscribed by him."

It thus appears that the oath was administered in a case provided by law, and related to a material matter concerning which, according to the information, the defendant knew that his statement was false.

[2] It is further contended by appellant that the information is lacking in a vital element necessary to properly charge the offense of perjury, in that there is no allegation that the person or officer before whom the oath was taken or affidavit made was a person then having jurisdiction of the proceeding in which the oath was administered or affidavit made and filed. The information shows that the deputy clerk before whom the oath was taken was acting in behalf of the clerk in the matter of the issuance of said marriage license. The certificate at the end of the affidavit immediately following the signature of the defendant sets forth that the affidavit was subscribed and sworn to before the county clerk, acting by said deputy. These facts were sufficient to show that the officer then and there had jurisdiction of the proceeding, to wit, the issuance of the marriage license.

[3] It is next contended by appellant that the verdict is contrary to the evidence, in that perjury is not proven thereby. We have read the evidence on which counsel relies in support of this contention. Among other things, the deputy clerk testified that the applicant was sworn to the truth of the information set forth in the application blank; that the facts were then written out by the clerk (by transfer from the application) as an affidavit. "Then I had him swear to this affidavit and then filled out the balance of it myself." There was no explanation showing what the witness intended by the phrase "then filled out the balance of it myself." But the "balance of it," so far as appears, consisted of nothing more than the jurat or officer's certificate to the oath. It is true that, according to the testimony of the officer, the information to which the oath referred, as administered by him at that time, was the information contained in the application blank; that the formal affidavit itself had not yet been written, signed, or certified. It is upon this claimed irregularity in the transaction that appellant bases a claim that the evidence does not prove that he made oath to the affidavit, and that the court erred in admitting the affidavit in evidence. But we think that since the oath was directed to the truth of the identical facts (the statements in the affidavit being contained in the application), and the application and the affidavit, together with the issuance of the license, were all parts of one transaction, this irregularity affords appellant no avenue of escape.

[4] It is provided in section 121 of the Penal Code that it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, "* * * if such accused caused or procured such officer to certify that the oath had been taken or administered." And section 129 of the Penal Code reads as follows:

> "Every person who, being required by law to make any return, statement, or report, under oath, willfully makes and delivers any such return, statement, or report, purporting to be under oath, knowing the same to be false in any particular, is guilty of perjury, whether such oath was in fact taken or not."

The evidence leaves no reasonable doubt that Jennie Patt was under the age of 18 years, and that this fact was well known to the defendant, who was her cousin. Only 3 months before making this affidavit he had been present at the family celebration of her seventeenth birthday. It may be true, as counsel contends, that there is no direct statement that Jennie Patt had not previously been married. It does appear, however, from the evidence of her father and other witnesses that she still bore the family name, and that down to the time of the transactions here in question she had lived with her parents as a member of their family. The entire tenor of the testimony not only assumes, but tends to prove, that this young girl had not previously been married.

Appellant claims that the court made certain errors in the instructions given to the jury, and in refusing to give certain instructions requested by the defendant. As the instructions are not numbered, we are obliged to identify them in a less convenient manner. (a) Refusing the instruction found in clerk's transcript, line 14, of page 30, to line 6, of page 32. (b) Instruction given; clerk's transcript, page 17, line 18, to page 18, line 9. (c) Instruction given; clerk's transcript, page 21, lines 5 to 8. (d) Instruction given; clerk's transcript, page 18, lines 21 to 24. (e) Instruction given; clerk's transcript, page 20, line 16, to page 21, line 3. (f) Instruction given; clerk's transcript, page 22, line 10, to page 24, line 9. (g) Instruction refused; clerk's transcript, page 27, line 20, to page 28, line 8. (h) Instruction refused; clerk's transcript, page 38, lines 9 to 15.

(j) Instruction refused; clerk's transcript, page 32, line 8, to page 34, line 13.

[5] Concerning the refused instruction "a": This was in substance an instruction containing and commenting upon section 1968 of the Code of Civil Procedure, which provides that perjury must be proved by the testimony of two witnesses or one witness and corroborating circumstances. The proposed instruction, after quoting that section, states that—

> "Corroborating circumstances in this case would be such credible testimony, as standing alone and without the aid of any other testimony given during the trial would tend to prove the fact in question, to wit: that Jennie Patt was on the 11th day of June, 1923, under the age of 18 years and that defendant made and subscribed to the affidavit as set forth in the information, and in determining whether there is credible testimony of such corroborating circumstances in this case, you must test the sufficiency of such testimony by considering it alone and apart and without the aid of any other testimony which you have heard in this case and after considering such testimony alone and as if you had heard no other testimony in the case, you believe it tends to prove that the girl Jennie Patt was on the 11th day of June, 1923, under the age of 18 years and defendant made and subscribed to the affidavit set forth in the information, it is competent evidence for you to consider along with the testimony of the other witness to the same fact, if you believe there is such other credible testimony given by a witness, and unless you so find, in addition to the other necessary facts to be proven as set out in another part of this instruction, you should acquit the defendant."

The court did give an instruction (c) stating the rule as found in said section 1968, Code of Civil Procedure. The gist of appellant's complaint is that the court refused this instruction (a) which undertook to explain and apply to the case the meaning of the phrase "corroborating circumstances."

Assuming that there is no valid objection to the statement of the meaning and effect of the phrase "corroborating circumstances," as set forth in the requested instruction, yet we think that the refusal was not prejudicial error sufficient to warrant a reversal of the judgment in this case. The age of Jennie Patt was, by the testimony of at least two witnesses, proven to be less than 18 years. And, although the record contains the testimony of only one witness directly to the fact that the defendant made and subscribed to the affidavit, the affidavit itself, with the signature of the defendant appended thereto, and an official certificate in due form showing that it had been subscribed and sworn to by the defendant, together with the fact that the marriage license was issued to the defendant at the same time, are corroborating circumstances in relation to the testimony that the defendant made and subscribed to the affidavit. A properly certified record of any birth or death or marriage, registered as provided by law, is "prima facie evidence in all courts and places of the facts therein stated." Section 21 of the act concerning vital statistics, as amended; Stats. 1919, p. 448. These circumstances corroborating the testimony are so plain and easy to understand, and were so thoroughly established, without contradiction, that we cannot see how the defendant was prejudiced by failure of the court to tell the jury that before accepting such corroborating circumstances, together with the testimony of the witnesses tending to prove these particular issues of the facts, the jury must test the sufficiency of the testimony of such corroborating circumstances alone and apart and without the aid of any other testimony which they have heard in the case.

The instruction "b" pointed out the distinctions existing between direct and circumstantial evidence. The instruction "c" gave the rule stated in section 1968, Code of Civil Procedure, which we have set forth, in substance, in our discussion of the refused instruction "a." There was no error in giving these instructions.

[6] The court did not err in giving that part of the instruction "d" reading:

> "* * * The jury are not bound to decide in conformity with the declarations of any number of witnesses which do not produce convictions in their minds against a less number, or against a presumption or other evidence satisfying their minds."

[7] The court did not err in giving the instruction (e), wherein the jury were instructed that if they should find "that the clerk at said time required of said Victor Torterice the making of an affidavit and the subscribing to the same, and that the same was done, and that at the same time the clerk required the said Victor Torterice to take the oath prescribed by law, and that said oath was administered to him, and that a marriage license was issued thereupon, that it would be immaterial as to whether a marriage ceremony was performed or not and the act of said clerk in requiring the oath to be administered would be conclusive as to its materiality." The argument is that this instruction could not be applicable under the testimony because the only testimony to the transaction in question showed without conflict with the oath was administered with reference to the application blank and not in connection with the writing out and signing of the affidavit. This argument is answered by the fact that the oath was administered, and the affidavit executed, as parts of one and the same transaction, and all for one and the same purpose. And, therefore, under the sections of the Penal Code and Civil Code above cited, the instruction was correct.

[8] The court did not err in giving the instruction "f," which instruction sets out the information. The point urged here is that

the information, if found to be true, would not constitute a crime, and that, even if it did state the commission of a crime, the instruction is erroneous in view of the testimony which disproved that the defendant was sworn to answer truly any questions propounded to him relating to the age of the girl, but that the defendant only swore to the truth of the facts contained in the application blank. There is no merit in this assignment of error.

[9] The court did not err in refusing to give defendant's instruction "g." The court gave the first portion of this instruction, which defined the criminal intent necessary, but refused the illustrative additions thereto requested by the defendant. The instruction was complete without the concrete examples.

[10] It is contended that the court erred in refusing to give the following instruction (h) requested by the defendant:

> "You are instructed that the unexplained failure to call and examine as a witness a person who has peculiar knowledge of material facts at issue warrants the inference that his testimony would have been unfavorable to the party to whom the witness was available and who would naturally be expected to produce him under the circumstances."

Appellant bases his claim of error on this point on the fact that defendant testified to a conversation with the mother and father of Jennie Patt wherein Mrs. Patt stated that Jennie was going to be 19 and Mr. Patt said 17 years old; that Mrs. Patt said her daughter would be 19 years old on the 23d day of February; that at the birthday party Mrs. Patt again stated that the girl's age was 19 years. Mrs. Patt was not called as a witness at the trial of this case. So far as appears, she easily might have been called to rebut this testimony of the defendant if it had not been true. But it is equally true that Mrs. Patt might have been called by the defendant to support his testimony concerning statements made by her if his testimony had been true. In view of the fact that the direct testimony of the witnesses, together with the registered certificate of birth, strongly establishes the fact that on the 23d day of February, 1923, the age of Jennie Patt was only 17 years, it becomes improbable that the mother would have stated at that time that the girl's age was 19 years. Under these circumstances, even assuming that the instruction itself states a correct rule of law, we hold that no prejudicial error was involved in the refusal to give the requested instruction.

[11] 9. The court did not err in refusing to give defendant's instruction (j), which defines the elements of the crime of perjury and the kind of evidence necessary, under section 1968, Code of Civil Procedure, to prove perjury. This instruction, as requested by defendant, limited the case of the prosecution to the charge that the defendant did under oath make and subscribe to the affidavit set forth in the information. It will be noted, however, that the information not only charged that the defendant made and subscribed his name to the affidavit, but also directly charged that at said time and place the defendant did falsely depose and swear, etc.

[12] Appellant contends that the court erred in overruling the objection of the defendant to the introduction in evidence of the so-called affidavit, as set forth in the information, and to the order of the court overruling the objection of the defendant to the admission of an exhibit purporting to be a birth certificate of one Jovana Patti. With reference to the affidavit the point is that the affidavit was secondary evidence, if it could have been evidence at all, and that no foundation had been laid for its admission; that in fact the witness Morrison, deputy clerk, testified that the so-called affidavit was written up and signed after the defendant had been sworn to the truth of the statements contained in the "application blank," which was first written; and that the application blank was not introduced in evidence. We find, however, that Morrison testified that the facts, as stated in the affidavit signed by the defendant, were transferred from the statement of facts set out in the application blank, and that the defendant made oath to the truth of those facts. In view of the provisions of the section of the Penal Code, to which we have referred, we think that a sufficient foundation was laid for the introduction in evidence of said affidavit.

[13] Concerning the birth certificate, appellant suggests that it was introduced in the hope that it would be a corroborating circumstance to support the direct testimony of Frank Patt that the girl was, on the 11th day of June, 1923, of the age of 17 years and not of the age of 19 years; that no other direct testimony than that of Frank Patt was given as to the age of the girl; that the birth certificate was inadmissible, particularly because no foundation was laid for its introduction. We have cited, supra, the statute by which such certificates are made admissible evidence. Frank Patt testified that the first name of his daughter, Jennie Patt, in Italian is spelled Jovana, and that the family name in Italian is Patti; that the name of Mrs. Patt in Italian is Vinguenza, and that her maiden name was Torterice. The record of the birth certificate, as introduced in evidence, shows the birth, on February 23, 1906, of a female child, Jovana Patti; that the father was Frank Patti, and that the mother's maiden name was Virgenia Tartarige. There is no reasonable doubt that this was the certificate of birth, filed on the date of her birth, of the said Jennie Patt. We find, also, that the sister of Jennie Patt

testified that Jennie's age was "17 last February."

[14] Appellant claims that the court erred in overruling his objection to the testimony of witness Morrison as to what the so-called application blank contained, it not being in evidence and no foundation being laid as to oral testimony as to its contents. The "objection" was not a timely objection, but was a motion to strike out, after the testimony had been given. There was no abuse of discretion in denying this motion.

[15] On direct examination of Louise Proftia, sister of Jennie Patt, as a witness for the people, in response to the question:

> "What conversation did you hear between Victor Torterice, the defendant, and your father?"

She replied:

> "My father told him to get out of the house because he had a wife in Chicago; he shouldn't write to Jennie."

Then this occurred:

> "Q. What did he say, if anything? A. He didn't say anything; he said he didn't write that letter."

Defendant's counsel then said:

> "I ask that that answer be stricken out till I have the time to object, rather that part of it referring to the statements which have nothing to do—doesn't charge this defendant with any knowledge of the age of the girl—and ask that the jury be advised to disregard it."

This motion was denied. The terms of the motion are so indefinite and so placed in the record that we cannot say that they applied to anything except the last answer. The claim that the court erred to the prejudice of the defendant in refusing to strike out the statement indicating that the defendant had a wife in Chicago is not sustained by this record.

[16] Jennie Patt was introduced as a witness for the people. She stated that her age was 17 Counsel for defendant objected to the introduction of any testimony of the witness on the ground that she is the wife of the defendant. The court permitted defendant's counsel to ask preliminary questions on that point. He thereupon asked the witness: "Are you the wife of the defendant?" She replied, "No; because he has another wife in Chicago." On motion of counsel for defendant this answer was stricken out. The witness having then admitted that she did marry the defendant, she was not permitted to testify any farther. The court afterwards gave the instructions requested by the defendant to the effect that offers of evidence not allowed by the court are not to be considered as any evidence of the existence of the facts thus offered to be proven, and that the jury must not consider anything except the instructions of the court and the evidence produced at the trial. In connection with the offer of this evidence it is to be noticed that there is no assignment of misconduct in the offering of the testimony of this witness, so that that point cannot be considered at this time.

It is evident, from the record, that the defendant had a fair trial and was justly convicted.

The judgment and order are affirmed.

We concur: HOUSER, J.; CURTIS, J.

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66 Cal. App. 130

ALLEN v. CROSS. (Civ. 4185.)

(District Court of Appeal, Second District, Division 1, California. March 7, 1924. Hearing Denied by Supreme Court May 5, 1924.)

Specific performance ⚷29(1)—Parol contract to buy home in consideration for services held enforceable.

Parol contract to buy for another person home better than one referred to by name, in consideration for services to be rendered, *held* not too indefinite for enforcement, in view of evidence as to place referred to, and part performance by entering into a contract for purchase of home worth more than that referred to, in view of Civ. Code, § 3390, subd. 6, and section 3538.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Louise C. Allen against B. C. Cross, executor of the last will and testament of B. F. Childs, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

F. L. Richardson, of San Diego, for appellant.

Henry C. Ryan and F. F. Grant, both of San Diego, for respondent.

HOUSER, J. Plaintiff brought an action for damages against defendant as executor of the last will of B. F. Childs, deceased, based upon the failure of said Childs to comply with the terms of an alleged oral contract by which it was agreed that if plaintiff would give up her home in the state of Kansas and come to California with the said Childs and there continue to serve him as she had done in the state of Kansas in the capacity of housekeeper, cook, companion, and nurse so long as he lived, he would buy for plaintiff a home better than "Maple Crest" (which was the name of the home of said Childs in the state of Kansas), and that he would also see that plaintiff would be comfortable the rest of her life, and would afford her an opportunity to educate her young daughter.

Judgment was rendered for plaintiff, and defendant appeals.

The points presented by appellant are: That the alleged contract was too indefinite and uncertain to admit of enforcement; that the findings of the court, the conclusions of law, and the judgment therein are not supported by the evidence.

The findings of the court were to the effect that the alleged contract was actually made by the parties; that pursuant thereto plaintiff performed her part of the agreement; that in accordance with said agreement and as a part thereof said Childs purchased a home for plaintiff in the city of San Diego, Cal., at an agreed price of $10,000 and caused the same to be conveyed to plaintiff; that said Childs paid in cash on said purchase the sum of $3,000, leaving a balance of $7,000 to be paid on or before five years, with 7 per cent. interest, in accordance with the terms of a promissory note secured by a mortgage on the premises executed by plaintiff at the request of said Childs; that Childs thereafter died without having paid said $7,000, the balance of the purchase money; that the plaintiff was obliged to and did pay interest on said indebtedness amounting to the sum of $490; and that she duly presented her claim for the sum of $7,490 against the estate of said Childs, which claim was by the defendant herein, as said executor, rejected. As conclusions of law, the court found that plaintiff was entitled to recover the sum of $7,490 from defendant, and judgment was ordered accordingly.

While the evidence in the case is not of that character which might be called conclusive, it is substantial in quality and fully authorizes the conclusions reached thereon by the trial court.

A general rule, supported by many authorities not only in this state, but as well in other jurisdictions, is that contracts of the nature of that upon which action is brought herein are valid and enforceable, provided only that the precise act which is to be done be clearly ascertainable. Civ. Code, § 3390, subd. 6. The contract here in question, as determined by the findings, is perfectly clear as to the nature and the extent of the services to be performed by plaintiff. It is only as to what was promised to be done by the other contracting party to the agreement that any doubt is expressed and as to which any question is raised regarding its certainty or definiteness. So far as this case is concerned, the only language of the contract which requires consideration is that part therein whereby plaintiff was promised a home in California "better than Maple Crest." One of the maxims of jurisprudence, as laid down in section 3538 of the Civil Code, is that "that is certain which can be made certain." While the language of the contract itself, to one unacquainted with the circumstances surrounding the making thereof, is perhaps not understandable, in the light of the evidence adduced on the trial of the case it appears that "Maple Crest" was the name given to the former home of Mr. Childs in the state of Kansas, and that it had a value of $6,000. As thus interpreted, the contract would then read that, in consideration of certain specified services to be performed by plaintiff, Childs obligated himself to give to plaintiff a home in California of greater value than $6,000. As heretofore set forth, the court found that carrying out the said agreement Childs did purchase a home for plaintiff "at an agreed price of $10,000 and caused the same to be conveyed to plaintiff." The court further found, and the evidence sustains the finding that all the money paid on account of the purchase price was furnished by Childs, and that, while the balance in terms was to be paid by plaintiff, in truth and in fact it was the indebtedness of Childs, and that he promised to pay the same. It thus appears that that which was uncertain in the contract in its inception was made clear and intelligible by the acts of the parties thereto. By their conduct they placed an interpretation on the contract which all might read and readily comprehend. They declared by their acts, if not by their words, that the intention of the parties when they agreed upon a home "better than Maple Crest" was that it should cost the sum of $10,000. In a note occurring in Ann. Cas. 1912A, at page 750, the rule of law is laid down to the effect that on a sale of real property where the description of the land in the contract is defective the defect will be considered cured where the vendee has been put in possession of the land, and many authorities are cited in support thereof. The same principle should apply to the facts here. Although the exact consideration to be paid for the services of plaintiff is wanting in the language of the contract, the defect was cured by the parties thereafter, expressed by their conduct.

The judgment of the lower court was right and just, and it should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

(66 Cal. App. 200)

PEOPLE v. SCOTT. (Cr. 1062.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1924.)

1. Larceny 🔑64(7)—Evidence held to sustain conviction.

Evidence that stolen property was found in defendant's possession shortly after it had been stolen, and defendant's flight after his arrest, *held* sufficient to sustain a conviction for grand larceny.

2. Criminal law 🔑753(2)—Court's advice to jury to acquit defendant of burglary charges held not to invade province of jury.

Court's statement to jury before argument that he would advise them to acquit defendant on burglary charges, leaving a charge of grand larceny, did not invade jury's province; court merely performing its duty as prescribed by Pen. Code, § 1118.

3. Criminal law 🔑1168(6)—Error in authorizing acquittal of burglary charges held to favor defendant.

If the court erred in advising jury to acquit defendant of burglary charges, leaving a charge of larceny, as to which evidence justified submission to jury, defendant could not complain.

4. Indictment and information 🔑132(2) — State not required to elect between burglary and larceny charges.

The state was not required, in a prosecution for burglary and larceny, to elect between the different charges, in view of Pen. Code, § 954.

5. Criminal law 🔑1168(1)—Dismissal of burglary charges after conviction for larceny held not erroneous.

Court's dismissal of burglary charges after receiving verdict finding defendant guilty of larceny without any finding as to burglary charges, did not constitute prejudicial error, same result being obtained as though jury had followed court's advice and acquitted defendant on such charges.

6. Criminal law 🔑730(10)—Remarks of prosecuting attorney on defendant's failure to testify held not misconduct requiring reversal.

Remarks of prosecuting attorney on defendant's failure to testify, in violation of Pen. Code, § 1323, was not misconduct sufficient to require reversal, where court promptly sustained defendant's objection to improper remarks, instructed jury to disregard them, and admonished attorney not to repeat offense, and evidence clearly showed that defendant was guilty of crime charged.

7. Criminal law 🔑1171(1)—Remarks of prosecuting attorney, referring to charge on which judge instructed jury to acquit defendant, held not misconduct requiring reversal.

Remarks of prosecuting attorney, referring to a charge on which court advised jury to acquit defendant, was not misconduct sufficient to require a reversal.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Albert Scott was convicted of grand larceny, and he appeals. Affirmed.

Clarence B. Conlin, of El Centro, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CURTIS, J. The information in this action contained three counts: One charging the defendant with the crime of burglary in entering, with intent to commit larceny, the house of F. E. Ginder; the second, with the crime of grand larceny in taking, stealing, and carrying away certain personal property of the said F. E. Ginder; and the third, with the crime of burglary in entering, with intent to commit larceny, the house of Ellis Gray. The court advised the jury to acquit the defendant upon the burglary charges. The jury returned a verdict, however, simply upon the charge of grand larceny, finding the defendant guilty thereof, and failed to render any verdict whatever on either of the charges of burglary. A new trial was granted defendant upon the charges of burglary, and they were thereupon dismissed by the court. Defendant has appealed from the judgment finding him guilty of grand larceny and from the order denying his motion for a new trial on said charge. His first assignment of error is that the evidence is insufficient to support the judgment.

The testimony in the case shows that one of the complaining witnesses, Ellis Gray, about the middle of February, 1923, missed certain articles of personal property from his house, and on the 13th day of March, 1923, the other of the complaining witnesses, F. E. Ginder, also missed from his house certain personal property which he had seen in his house on the day before. The property belonging to Ellis Gray, and which he had missed from his house, was afterwards found in the possession of a second-hand dealer, to whom it had been sold by the defendant about the 1st of March, 1923. The property of Ginder was found in the defendant's room on the 15th day of March, 1923, at the time of the latter's arrest, at which time he told the arresting officers that he had bought the property about ten days prior thereto from a man by the name of Tex. The defendant at this time was placed under arrest, but on the way to the police station he escaped from the officers, and was not rearrested until the following July. The defendant did not testify in the case, nor did he introduce any evidence at the trial.

[1] It is defendant's contention that this evidence shows only that the stolen property was found in his possession, and he cites the well-established rule that mere possession of stolen property, however recent, is not sufficient to warrant a conviction of larceny. De-

fendant apparently overlooks the fact, established at the trial, that after his arrest he escaped from the officers. Flight of a defendant, under the circumstances proven in this case, is always a circumstance to be taken into consideration by the jury, with the other facts proven in the case, in determining the guilt or innocence of a defendant. We think that there can be no question that evidence that the stolen property was found in the possession of the defendant shortly after the same had been stolen, coupled with evidence of the flight of the defendant after his arrest, was sufficient to justify the jury in finding a verdict of guilty. People v. St. Clair, 5 Cal. Unrep. 294, 44 Pac. 234; People v. Cox, 29 Cal. App. 419, 155 Pac. 1010; People v. Gill, 45 Cal. 285; People v. Vidal, 121 Cal. 221, 53 Pac. 558; People v. Cole, 141 Cal. 88, 74 Pac. 547. Furthermore, the defendant gave a false account of the manner in which he had acquired possession of said property. This was also a circumstance which could be taken into consideration by the jury in determining his guilt, and, taken in connection with proof of his possession of the stolen property, was sufficient to justify a verdict of guilty. People v. Cole, supra.

[2] The defendant takes exception to certain language used by the court just prior to the argument of the case before the jury as follows:

> "I want to say to you that the court has considered the evidence in this case, and, in view of the information and commitment and evidence in the case, has decided to advise the jury to render a verdict of not guilty upon count No. 1 and upon count No. 3 of the information (being the counts charging burglary). * * * You will be advised to consider only the question of whether the defendant is guilty or not guilty of the crime of larceny as charged in count 2 of the complaint. I make that statement at this time in order that you may understand why counsel do not argue that phase of the case."

Defendant contends that the court by the above statement invaded the rights of the jury by intimating to them that, while, in the opinion of the court, the evidence was not sufficient to justify the submission to them of the charges of burglary, yet it was sufficient to warrant the consideration by the jury of the charge of grand larceny. The only statement made by the court regarding the evidence it will be observed, was made in connection with his statement to the jury that he would advise them to render a verdict of acquittal upon the two burglary charges. This was followed by a further statement of the court that under the advice of the court they would only consider the question of defendant's guilt upon the charge of grand larceny. The law makes it the duty of the court to advise the jury to acquit the defendant, if, at any time after the evidence on either side is closed, it deems the evidence insufficient to warrant a conviction. Pen. Code, § 1118. In its statement to the jury, which is objected to by the defendant, the court merely performed its duty as prescribed by this section of the Penal Code. By its reference to the evidence in this statement the court did not invade the rights of the jury, nor would the jury, in our opinion, be likely to draw any inference therefrom unfavorable to the defendant.

[3] Defendant further complains that the court, by advising the jury to acquit the defendant of the burglary charges, must have believed that the defendant did not take the goods from the house of Ginder, the complaining witness, and that, unless he did take the goods from Ginder's house, he would not be guilty of larceny. We are not advised of the reasons upon which the court based its instruction to advise the jury to acquit the defendant upon the burglary charges. Neither are those reasons essential to the decision of this appeal. The court might have erred in so advising the jury, but, if so, its action was favorable to the defendant, and he cannot complain. There was no error on the part of the court upon the evidence before it in submitting to the jury the charge of grand larceny, and that is the only question that concerns us at this time.

[4, 5] The contention of defendant that the court erred in refusing to direct the prosecution to elect between the different charges set forth in the information is without merit. Pen. Code, § 954. Nor was it error on the part of the court, of which the defendant can complain, to receive the verdict finding the defendant guilty of larceny, and thereafter dismiss the burglary charges. The same result was obtained, so far as the burglary charges were concerned, as if the jury had followed the advice of the court and acquitted the defendant on these charges.

[6] The only remaining question to be considered on this appeal is the objection made by the defendant to the remarks of the deputy district attorney in his argument to the jury. As we have before noted, the defendant did not take the stand at the trial. In his argument before the jury the deputy district attorney conducting the prosecution made the following statement: "I am not allowed to comment on the fact that this defendant did not take the stand, and I do not so comment—." Upon the objection of the defendant the court instructed the jury to disregard this remark of the prosecuting officer. Whereupon the latter, continuing his argument to the jury, stated, "I am merely stating a fact, and it is a fact—." The defendant again objected to the remarks of the attorney, and the court sustained the objection, and admonished him not to refer to the subject again. Defendant now assigns this conduct of the deputy district attorney as error prejudicial to his rights. There can be no question that these remarks of the prose-

cuting officer were in direct violation of the express mandate of section 1323 of the Penal Code. No prosecutor in his zeal to secure a conviction should allow himself to so far forget his duty, both to the defendant as well as to the public, as to transgress the plain provisions of this statute upon this subject. While the courts of this state have uniformly held such improper conduct on the part of the prosecuting officer to be error, they have not in all cases held it to be such error as to entitle defendant to a reversal of the judgment. A recent case decided by the Supreme Court lays down the rule as follows:

> "It has been the disposition of this court where timely objection was not made or where the court has by appropriate instructions to the jury withdrawn such improper comment from their consideration to deny a reversal, if the evidence in the case was such as to clearly support a conviction." People v. Mayen, 188 Cal. 237, 259, 205 Pac. 435, 444 (24 L. R. A. 1383).

In the present case the court promptly sustained the defendant's objection to the improper remarks, instructed the jury to disregard them, and admonished the attorney not to repeat the offense. The defendant therefore was not prejudiced by such remarks, if the evidence in the case showed clearly that he was guilty of the crime charged. We have already held that the evidence was sufficient to sustain the judgment, but it does not necessarily follow therefrom that the evidence was so conclusive against the defendant that his rights may not have been prejudiced by the improper conduct of the prosecuting officer. The evidence against the defendant, as before referred to, showed that the stolen property was found in his possession some two or three days after it had been stolen from the owner, at which time he stated to the officers that he had bought it ten days before from a man by the name of Tex; after his arrest, and while the officers were conducting him to an automobile, he escaped from them; they fired three shots at him in an endeavor to stop his flight; the shots missed him, although fired from a relatively short distance from him, and he made his escape, and was not recaptured until some months thereafter. It seems incredible to us that an innocent man would have risked his life in an endeavor to escape from officers attempting to arrest him. Evidently the defendant, after being caught with the stolen property in his possession, and being unable to deceive the officers by his statement that he had purchased it, rather than submit to arrest, trial, and punishment, determined to escape, even at the risk of being shot down by the officers. We believe that any reasonable jury, in viewing the evidence in this case, would have found the defendant guilty of the charge upon which he was tried. We feel that, had the prosecuting officer refrained from the improper comment complained of, the jury would have returned a verdict of guilty against the defendant. Quoting further from the case of People v. Mayen, supra, page 259 (205 Pac. 444) our views are aptly expressed in the following language:

> "The conduct of the district attorney was clearly error, and would demand a reversal of the verdict, * * * if it appeared that any miscarriage of justice had resulted. Under the testimony presented to the jury we fail to see how it could have avoided a verdict of conviction. The evidence against the defendant was conclusive and * * * uncontradicted. * * * While in no manner justifying the improper comments of the district attorney, we think it is a case for the application of section 4½ of article 6 of the constitution."

[7] The deputy district attorney, in his opening argument to the jury, also made the following statement:

> "There is evidence here also of the kind of a man this defendant is; there is evidence here that he goes to a pawnshop; that he there sells other goods which are stolen; that he there signs another name not his own."

An objection was made by the defendant to this statement, but it was overruled by the court. The prosecuting officer in this statement evidently referred to the goods missed by Ellis Gray from his house, and which the defendant sold to a second-hand dealer a few days thereafter. The court had already advised the jury to acquit the defendant on this charge. The jury, however, were not bound by this advice. In view of the court's instruction, the better practice, we apprehend, would have been for counsel to have refrained from discussing any of the facts involved in this charge, but we are not advised of any authority that prohibits him from so doing.

The judgment and order denying motion for new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

(66 Cal. App. 196)

LINCOLN v. HOGGARD et al. (Civ. 3983.)

(District Court of Appeal, Second District, Division 1, California. March 13, 1924.)

1. Landlord and tenant 🔑326(1)—Provision for dividing produce held applicable to crop growing at execution of lease.

Provision of lease, without exception, that parties shall share equally in everything produced or raised on the premises, *held* to apply to crop growing when lease was executed.

2. Trial 🔑404(1)—Finding of what was agreed held to impliedly exclude other alleged inconsistent agreement.

Finding as to what was agreed between the parties, when lease was canceled, by implication, *held* to exclude an alleged agreement inconsistent therewith and with the provisions of the lease relative to cancellation.

3. Appeal and error 🔑1071(6)—Failure to make finding, which it is apparent would have been adverse to party complaining harmless.

Omission to make finding, which, it is apparent from findings made, would have been adverse to party complaining, is harmless.

4. Trial 🔑397(2)—Omission of finding held not to make decision against law or to amount to mistrial.

Findings made being ample to dispose of the material issues, and to uphold the judgment, omission of other findings, which, if made, would not invalidate the judgment, does not make the decision against law or amount to a mistrial.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by E. M. Lincoln against Jennie M. Hoggard and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Milton K. Young, Lyndol L. Young, William K. Young, and Forrest F. Murray, all of Los Angeles, for appellants.

Frank C. Prescott and Frank G. Falloon, both of Los Angeles, for respondent.

HOUSER, J. Plaintiff brought an action against defendant for breach of a contract, arising out of an alleged failure to keep a certain covenant in a lease between them, as follows:

> "If the lessor wishes to cancel the lease and gain possession of the property, the lessee agrees to accept $3 per acre for such land as he has plowed and seeded or $2.50 per acre for land that is plowed but not seeded. At any time up to and within 60 days of the time of harvest. Within 60 days of time of harvest the lessee will be allowed to harvest his crop. After harvesting of the crop and up into the time of the spring or fall plowing the lessee will surrender lease and give possession upon payment to him of $500 in cash, plus the price per acre of any land plowed as per above schedule."

The lease also contained, among other provisions, the following:

> "It is agreed between the parties hereto that the lessor shall share 50 per cent. in everything produced or raised on said leased property, and lessee shall share 50 per cent. in everything produced or raised on said leased property during the continuance of said lease."

The property described in the lease was sold shortly after plaintiff went into possession thereof; and thereupon, according to the findings of the court, "plaintiff and said defendant agreed to divide certain crops on said premises according to the terms of said contract, and plaintiff agreed to surrender possession of said premises and to cancel said contract according to its terms."

The crops were divided in accordance with the said agreement of the parties, but defendant failed to pay to plaintiff the sum of $500, which plaintiff claimed to be due to him under the terms of the lease. From a judgment in favor of plaintiff for the sum of $500 defendant appeals to this court.

[1] It is contended that, because the crop was growing on the land at the time the lease was executed, plaintiff was not entitled to 50 per cent. thereof; but the plain language of the lease to which we have adverted will bear no such interpretation. The findings of the court, which are supported by the evidence, are that the parties "agreed to cancel said written contract according to its terms, and agreed to allow the lessee (plaintiff herein) to harvest his crops; that said crops were thereafter harvested; that, after the harvesting of the crops, and before the time of the spring or fall plowing, the lessee (plaintiff herein) surrendered his lease and gave up possession of the demised premises in accordance with the terms of said lease."

Appellant also urges the point that the court failed to find upon an issue raised by the answer to the effect that the one-half of the crop was given and transferred by defendants unto plaintiff as full consideration and compensation for the surrender of said premises. But the lease itself provides for just such a division as was made between the parties; and the court found on substantial, although conflicting, evidence that the parties to the lease agreed to cancel the lease "according to its terms, and agreed to allow the lessee (plaintiff herein) to harvest his crops; that said crops were thereafter harvested"; and that they agreed to divide the crops "according to the terms of said contract"; that "plaintiff agreed to surrender possession of said premises and to cancel said contract according to its terms."

[2, 3] The finding of the court as to what was the agreement between the parties at the time the lease was canceled is a complete statement as to what took place; every other thing is presumed to be excluded. The im-

plication is that the allegation contained in the answer to the effect that the division of the crops was in full consideration and compensation for a surrender of said premises is untrue. From the finding as made by the court it is apparent that, if there had been a direct and specific finding upon the question of whether or not the division of the crops was in full consideration and compensation for a surrender of the premises, it would have been against defendant's contention; and the rule is as laid down in the case of Winslow v. Gohransen, 88 Cal. 452, 26 Pac. 504, that, if the omitted finding must have been adverse to the appellant, its omission will not constitute an error sufficient to authorize a reversal of the judgment. To the same effect see Southern Pacific R. R. Co. v. Whitaker, 109 Cal. 274, 41 Pac. 1083; Reed v. Johnson, 127 Cal. 541, 59 Pac. 986, and cases there cited; Gerth v. Gerth, 7 Cal. App. 737, 95 Pac. 904, and cases cited; Furlong v. White, 51 Cal. App. 272, 196 Pac. 903; U. S. Trading Corporation v. Newmark Grain Co., 56 Cal. App. 191, 205 Pac. 29.

[4] The findings, which were ample to dispose of the material issues in the case, are sufficient to uphold the judgment; and the failure to make other findings upon other issues which, if made, would not invalidate the judgment does not make the decision against law, nor amount to a mistrial. Sharp v. Pitman, 166 Cal. 505, 137 Pac. 234.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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66 Cal. App. 243

HELLMUTH et al. v. BANK & TRUST CO. OF CENTRAL CALIFORNIA.
(Civ. 2673.)

(District Court of Appeal, Third District, California. March 19, 1924.)

1. Banks and banking ⚷154(8)—Finding as to amount of deposit held supported by evidence.

In action for deposit, evidence *held* sufficient to sustain finding that plaintiff, claiming to have deposited $935 on certain date, deposited only $35.

2. Appeal and error ⚷1011(1)—Rule as to noninterference with findings on substantially conflicting evidence applies to expert or opinion testimony.

Rule that reviewing courts will not interfere with trial court's findings of fact, where there is substantial conflict in evidence, is binding as to expert or opinion testimony, probative value of which is for trial judge.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by Mary M. Hellmuth and husband against the Bank & Trust Company of Central California. Judgment for defendant, and plaintiffs appeal. Affirmed.

Frank L. Simons and Edward Schary, both of Fresno, for appellants.

Harris & Hayhurst, of Fresno, and Alfred C. Skaife, of San Francisco, for respondent.

HART, J. The plaintiffs are husband and wife. In the month of December, 1915, the plaintiff Mary M. Hellmuth opened a savings deposit account with the savings department of the defendant, and continuously thereafter, and until the 23d day of April, 1920, the time of the filing of the complaint herein, carried and maintained said savings account therein. The defendant, upon the opening of the account, issued and delivered to said plaintiff a savings bank book, in which the amounts of such deposits as were made by her in said account from time to time from December, 1915, to January 2, 1920, were duly noted. On the last-named date the said plaintiff appeared at the bank and deposited in her savings account a sum of money. The controversy between the parties is as to the amount of the deposit made on said 2d day of January.

The complaint alleges that on the 2d day of January, 1920, the plaintiff Mary M. Hellmuth had to her credit in the savings department of defendant the sum of $2,000.01; that she thereafter made demand in writing on the defendant to pay said sum to her, and that her account in said bank be closed; that the defendant then refused and still refuses and ever since said demand was made has refused to pay her said sum of money and to accept her order for the withdrawal thereof and to close her account in said bank.

The answer admits all of the allegations of the complaint, except the allegation as to the amount of money which the said plaintiff had on deposit in the defendant bank at the time this action was instituted, and as to this it is alleged that said plaintiff, on the said 2d day of January, 1920, had on deposit with defendant the sum of $1,100.01 only, and that defendant was indebted to her on said date by reason of said deposit or savings account in no greater sum than that last named; that of the said sum of $1,100.01 so on deposit with defendant, the sum of $35, and no greater sum, was deposited by Mrs. Hellmuth on the 2d day of January, 1920; that after said last-mentioned deposit of $35 was made, as alleged, some person other than defendant or any of its agents or employees, and without the knowledge or consent of the defendant "did willfully and fraudulently, and with the intention of defrauding and cheating this defendant, enter in said savings bank book in front of and near said record entry therein of said deposit of $35 above mentioned so made by the said employee of said bank who received said deposit of $35 a figure 9 in front of and near the said entry of $35 so as to make said deposit and the record thereof in said savings bank book appear to be $935 instead of $35," etc.

The findings are in accord with the claims of the answer, and judgment passed for defendant accordingly. The appeal is by the plaintiffs from said judgment.

The single question to be determined here is whether the finding that the plaintiff did not deposit the sum of $935 in the savings department of the defendant on the 2d day of January, 1920, but on said date deposited the sum of $35 only, derives sufficient support from the evidence.

At the time the deposit in dispute was made Mrs. Hellmuth had to her credit in the savings department of the defendant the sum of $1,065.01. If, therefore, she deposited on the 2d day of January, 1920, the sum of $935, then, manifestly, she had to her credit on said day, after said deposit, the sum of $2,000.01. If, on the other hand, her deposit on said day amounted to the sum of $35 only, then, quite clearly, she had to her credit in the bank, after said deposit, the sum of $1,100.01 only. The receiving teller of defendant, one Roy D. Crippen, who received the deposit from Mrs. Hellmuth on the 2d day of January, 1920, testified that he had no distinct independent recollection of the circumstance of the deposit made by Mrs. Hellmuth on the day mentioned. He explained, though, that the 2d day of January having immediately succeeded a holiday, on which no business was transacted by the defendant, an unusually large number of persons were in the bank that day and transacted business with the savings department, and that that fact accounted for his inability to recall the particular transaction in question. He further explained that the customary method in vogue in said bank in the matter of handling savings deposits made therein was as follows: That the customer would present his passbook at one of two wickets maintained on the bank counter, together with the amount he desired to deposit; that the receiving teller would thereupon count the money, and, while the money still remained on the counter, would enter the amount thereof in the passbook, and then add said amount to the balance or total of the deposits which had therefore been entered therein, thereby showing the total of the deposits made up to and including that date. After this part of the transaction was completed, the teller would then, among other things, note the amount deposited and the total amount of the account on a deposit tag, place the tag on a spindle which was used for that purpose by all the receiving tellers in the savings department, deposit the money received in a drawer, used in common by all the tellers for that purpose, and later in the day, generally when the day's business was near its close, the deposit and the total of the account would be transferred to the ledger cards. Crippen testified that that course or custom in receiving savings deposits was invariably followed by him.

W. W. Parsons was, on the 2d day of January, 1920, and had been for some years prior thereto, the manager of the defendant's savings department, and as such exercised superior authority in said department over Crippen and other clerks and employees in that department. At some hour of the afternoon of said January 2d Crippen, assisted by Parsons, commenced posting the "individual ledger"—that is, they were jointly engaged in transferring to the ledger the deposits made by the different depositors on that day. Parsons, as he testified, "happened to post that particular deposit (Hellmuth deposit) to the individual ledger," following, of course, the deposit slip or tag on which said deposit was noted by Crippen when receiving the money. It was then that the discrepancy in the Hellmuth account was discovered by Parsons, who thereupon, addressing Crippen, said, "Roy, I guess you made a bull in this account. You have added the '35' to the '65' and carried your '1' over to your thousandths." Crippen replied, "By Jove, I guess I did." The account, as transferred to the ledger, was corrected or inserted in said book upon the basis of a deposit of $35 on the said 2d day of January. Assuming that the same error had been made in the passbook, Parsons and Crippen decided to call the attention of Mrs. Hellmuth thereto, but concluded that the matter might well be allowed to remain in abeyance until that lady next called at the bank. A few days thereafter—the exact date was not shown—Mrs. Hellmuth appeared in the savings department of the defendant, and Crippen told her of the error that had been made in her account. She insisted that she had deposited the sum of $935 on the 2d day of January, 1920, and handed her passbook to Crippen to show that she had. Crippen, upon examining the book, found to his great amazement, so he testified, that the book contained an entry of the sum of $935 as the deposit made on said date. As he supposed he had done, he had noted in the passbook as the balance of the account after the deposit in dispute was entered the sum of $2,000.01, which sum, as we have seen, would represent the correct balance, if the deposit in question had actually amounted to the sum of $935. Crippen, while admitting that the figures $2,000.01 as representing the balance in the passbook had been written therein by him, positively asserted that it was erroneously done, and, furthermore, that the figure "9" before and next to the figures "35" in the passbook was not written by him, but has been placed there by some other person; that said numeral "9" was not in his handwriting. Parsons, before whom Mrs. Hellmuth was taken by Crippen, undertook to convince said plaintiff that there had been a mistake on the part of Crippen in noting the balance in her passbook on the 2d day of January after she had made a deposit on that day, but she insisted that no mistake had then been made. She declared that she deposited the sum of $935 on said day, and that Crippen received that sum from her, and he himself inserted that amount in the passbook. At the trial Crippen repeatedly and positively testified that he did not write the numeral "9" which appeared before the figures "35" in the passbook, making the deposit on January 2, 1920, appear to have been the sum of $935. He stated that the only way in which he could account for the notation of a balance of $2,000.01 on that day, after the deposit in question was made, both on the deposit slip and in the passbook, was that he erroneously carried the sum of $1,100.01, which represented the actual balance "to the thousandths column, making $2,000.01 instead of $1,100.01." He should have placed the true balance, so he testified, in the "hundredths column" in the passbook and on the deposit tag. Thus he was led, so he stated, to erroneously make the figure "2" instead of a figure "1" as the initial numeral of the figures representing the balance.

Parsons testified that he was familiar with the writing of Crippen and the characteristic manner in which he formed his figures or numerals; that he would state without qualification that Crippen made the figures "3" and "5" constituting parts of the number "935" in the passbook, but that he was of the opinion that Crippen did not write the figure "9" in said number. Parsons further testified that there was, at the close of the day's business on the 2d day of January, 1920, no overplus of cash in his department of the bank, except in the sum of five dollars and some cents, but, he stated, that sum was accounted for before the day's business of the bank was closed, and, as we understand his testimony, it had no relation to the account of the plaintiffs.

It appears that, after the alleged discrepancy in Mrs. Hellmuth's account was discovered, the defendant turned the matter over to its attorneys for investigation. The theory of the bank was then, as it is now, that the passbook of Mrs. Hellmuth having been erroneously made to indicate a balance to her credit of $2,000.01, some party, other than any of the bank officials or employees, subsequent to the deposit of $35 on January 2, 1920, had observed the mistake, and thereupon placed the figure "9" before the figures "35" so as to make the total of the deposits correspond with the total balance as indicated by the passbook. Acting upon this belief, the attorneys for the defendant called on the plaintiffs, and obtained two canceled bank checks, admittedly in the handwriting of the plaintiff, William Hellmuth, and in each of which there were numbers containing the numeral "9." Hellmuth, at the request of said attorneys, also wrote on a blank piece of paper several different numbers, each of which was partly made up of the figure "9." These several writings were used as exemplars at the trial. Prior to the trial, however, the passbook, the exemplars, and specimens of figures made by Crippen were submitted to E. O. Heinrichs, a handwriting expert, then residing at Berkeley. The opinion testimony of Heinrichs cannot be followed in detail in this opinion. It will suffice, for the purpose of this decision, to state generally herein the substance of his testimony. First it may be stated that he testified that he had had many years of experience in the business of examining and passing on questions of the authorship of disputed handwritings; that he is a graduate of the College of Chemistry of the University of California, and that at the time of this trial was, and for some years prior thereto had been, a member of the summer faculty of the university, "giving the course there in criminal investigation, including the subject of disputed handwritings." He had had "a professional experience, examining disputed handwritings, and appearing in courts, covering the last ten years, nearly eleven years, and studying and practicing on the subject, including a professional experience of about 26 years." He had given testimony, as a handwriting expert, in a large number of the state courts, as well as in some of the United States and the military courts. He testified that the several exemplars and the passbook of Mrs. Hellmuth had been submitted to him without information as to the identity of the parties that wrote the same; that he made a thorough examination by the usual scientific methods of the several exemplars referred to and a like comparison of them, one with the other, particularly directing his investigation to the figure "9" as shown by the exemplars and in the passbook in question, and that it was his positive opinion, based upon his examination of said several writings, that the figure "9," as shown in the passbook, and which constituted a part of the number "935" contained in said book as purporting to show the deposit made by Mrs. Hellmuth on January 2, 1920, was not made by Crippen or Parsons, but that it was made by the party who made the figure "9" in the canceled checks of William Hellmuth and on the blank piece of paper on which said Hellmuth had written several numbers containing the numeral "9." In other words assuming, as the evidence warranted, that William Hellmuth made the figures contained in the canceled checks signed by him, and also certain figures on the blank piece of paper adverted to, Heinrichs' opinion was that Hellmuth wrote the figure "9" before the figures "35" in the passbook.

[1] The above is a sufficient statement of the testimony introduced by defendant to

show that there is ample support for the findings that neither Crippen nor any other person connected with the bank wrote the numeral "9" before the number "35" in the passbook; and that said figure "9" was written by some other person, not connected with the bank, with the fraudulent purpose of making it appear that Mrs. Hellmuth deposited $935 on the day mentioned, when in truth and in fact she deposited the sum of $35 only.

The plaintiffs, as might naturally be supposed or expected, introduced testimony tending to show that Mrs. Hellmuth deposited in the defendant bank on the 2d day of January, 1920, the sum of $935. It is not necessary to detail this testimony herein. One of the witnesses for the plaintiffs, however, was an expert on handwriting, and expressed the opinion that the figures "935" and "2,000.01" in the passbook of Mrs. Hellmuth "were made at the same time, by the same pen, same ink, and the same person." This witness had previously had some 23 years of experience in passing upon disputed handwritings, and was besides being a handwriting expert, a chemist by profession.

[2] Thus it is to be observed that there is a sharp conflict between the testimony given in behalf of the defendant and that presented by the plaintiff. The rule that reviewing courts will not interfere with the findings of fact of the trial court, where, as here, there is a substantial conflict in the evidence, is so thoroughly established and so well understood that the citation of authorities in confirmation of this statement would be wholly superfluous, and this rule is no less binding on reviewing courts as to expert or opinion testimony than it is as to testimony of a positive or direct kind. There is nothing inherently improbable in the testimony of Heinrichs, the expert witness of the defendant, nor is there any such infirmity in the like testimony of the plaintiffs. The probative value of this testimony, as is true of any other character of testimony, was a question for solution by the trial judge. In this connection it may be observed that the testimony of William Hellmuth in a certain particular seems to be of such a character that it is probable that the trial court, in forming its conclusion as to the facts, did not feel compelled to rely solely on the testimony presented by the defendant. It appears that, in a certain respect, said Hellmuth's testimony was such as justly to excite some degree of doubt as to its verity. He testified that the $935 which it is claimed his wife deposited on the 2d day of January, 1920, was of the sum of $950 which he gave her a day or two prior to the date of said deposit. Asked where or how he secured that sum, he explained that he had accumulated it from time to time, and that as he did so deposited it in a safe deposit box he had rented in the Farmers' National Bank of Fresno, until it reached the sum mentioned. He testified that at some time between the 15th and 20th days of December, 1919, for the purpose of giving it to his wife, to be deposited by her in the defendant bank, in the first part of January, 1920, he removed the money from his safe deposit box and carried it on his person, inclosed in a pocket book, continuously from said time until the day he gave it to his wife—a period of two weeks. He admitted what was obviously true that any sum of money would be safer against loss when kept in a safe deposit box in a bank than it would be when carried on the person of an individual. He could not, at least he did not, give a rational reason for doing such an improvident act. It is manifestly true that a person of average intelligence (and we judge from his answers to questions propounded to him that William Hellmuth was the possessor of that degree of intelligence and sense) would not, in the absence of a special or an urgent reason for so doing, remove so large a sum of money from a place of perfect safety against its loss and carry it about on his person for approximately two weeks and thus subject it to the chance of being lost, mislaid, or taken from him. Doubtless, the trial court took this view of that portion of Hellmuth's testimony and regarded it, as well it could, as materially derogating from the evidentiary value of his entire testimony. At all events, as before declared, we cannot perceive any legal justification from the record before us for disturbing the findings of the trial court, although we feel no embarrassment in saying that, if, upon the evidence as it is disclosed by this record, the trial court had given plaintiff the decision, we would, in such case, be no less bound to sanction and uphold the findings than we are as they stand here.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

66 Cal. App. 238

BOLLES v. BOONE. (Civ. 4734.)

(District Court of Appeal, First District, Division 2, California. March 19, 1924. Hearing Denied by Supreme Court May 15, 1924.)

1. Municipal corporations 🔑706(7)—Contributory negligence of pedestrian injured by automobile held for jury.

Woman who, after seeing street car leave preceding stop and looking for on-coming automobiles between her and it, crossed line of traffic and stood two or three feet from rails with umbrella over head, *held* not contributorily negligent as matter of law precluding recovery for injuries from automobile.

2. Negligence 🔑82—Contributory negligence must be a proximate cause of injury.

To support a plea of contributory negligence, plaintiff's negligence must be established, and also that it was a proximate cause of injuries sued for.

3. Municipal corporations 🔑706(7) — Pedestrian's negligence as proximate cause of injury held for jury.

Evidence *held* not to establish as a matter of law that negligence of pedestrian standing in street with umbrella over head while waiting for street car was proximate cause of injury by automobile.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Myrtle Bolles against W. R. Boone. Judgment for plaintiff, and defendant appeals. Affirmed.

Donahue, Hynes & Hamlin, of Oakland, for appellant.

H. S. Craig, of Oakland, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of the plaintiff in the sum of $6,000 for personal inpuries sustained by her when struck by an automobile driven by the defendant on one of the public streets of the city of Oakland. The facts of the case are that one rainy night in February, 1922, at about 7:45 p. m., plaintiff, a foot passenger, endeavored to board a Telegraph avenue street car at a regular stopping place on Telegraph avenue near Thirty-Eighth street. She stood upon the curb and looked to her left, watching for the approach of a car. As a car approached she went through the traffic to the street car track, but the car failed to stop, and she returned to the curb. She remained at the curb watching for the approach of another car from her left. When she saw a car leave the last stopping place, one block away, she again went through the traffic and took a position about 2 or 3 feet from the outer car rail, where she awaited the approach of the car. While standing there, she had an umbrella over her head to protect herself from the rain, and after taking that position she did not look to her left to observe the approach of other vehicles. Before she left the curb she noted that no other vehicles preceded the street car as it came upon the track. While standing there she was struck by the defendant's automobile, which was traveling astraddle of the outer rail of the car line at a rate of speed of about 30 miles an hour. The force of the impact was so great that she was thrown or carried a distance of 30 feet and suffered injuries which were within the award of damages made by the jury. At the time of the collision the defendant was proceeding in an admittedly careless and negligent manner and in violation of the motor vehicle statute, without any warning of his approach, and with his vision obscured by the rain upon his windshield so that he did not observe the presence of the plaintiff until after she had been struck. The evidence of this negligence on the part of the defendant is so plain and unmistakable that the only ground urged upon this appeal is that, conceding this, the plaintiff was guilty of contributory negligence. The only question, therefore, before us is whether the respondent was guilty of contributory negligence as a matter of law requiring us to set aside the verdict of the jury on that issue.

The case is closely allied in facts to that of Haines v. Fewkes (Cal. Sup.) 213 Pac. 490, the only difference being that in that case the pedestrian had crossed the street car tracks and had taken a position which she assumed to be a place of safety to await the passage of an automobile approaching from the south, when she was suddenly struck by another automobile coming from the same direction; while in this case the respondent carefully looked in the direction of approaching traffic before she left her place of safety on the curb and took a position which she assumed to be a place of safety for the purpose of boarding the street car, when she was struck by an automobile which has swerved in front of the street car and approached her unawares. In the Haines Case the Supreme Court held that it was not contributory negligence as a matter of law.

A similar case is Mann v. Scott, 180 Cal. 550, 554, 182 Pac. 281, 283, where the court said:

> "And it may be that if the jurors in this case rejected, as improbable, respondent's testimony that she looked and saw no approaching automobile, they, nevertheless, concluded—as well they might—that if she did see the automobile before leaving the sidewalk, she reasoned that its driver would comply with the city ordinance, referred to in the court's instructions, requiring an automobile traveling behind a street car to stop ten feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile,

respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury."

[1] Here the undisputed facts are that the respondent, before she left her place of safety on the curb, looked in the direction of approaching traffic and saw that the street car had left its last stopping place one block to her left and that no automobile was traveling ahead of it. She had the right to assume, therefore, that any vehicle coming from that direction would observe the statutory regulation as to rate of speed and that, if any such vehicle attempted to pass the street car at the intersection where she stood for the purpose of boarding the car, such vehicle would observe the provisions of the statute requiring it to pass at least six feet from the right running board or steps of the street car. Whether it was her right to assume that no vehicle would suddenly pass the street car within the block and proceed upon its right of way at a rate of speed greatly in excess of the statutory rate, especially upon a dark rainy night, was a question which was properly left to the jury.

The case before us differs in this respect from Klusman v. Pac. Elec. Ry. Co. (Cal. Sup.) 213 Pac. 38, and Atkins v. Bouchet (Cal. App.) 223 Pac. 87, where the pedestrian walked blindly into a place of danger without using any means of care for his own safety.

In support of the appeal the appellant insists that—

> "The conclusion is irresistible that respondent, had she looked, could have seen and avoided the danger, and it is the sole purpose of this brief to show that it was her duty as a matter of law to look."

[2] More than this is necessary to support a plea of contributory negligence. Mr. Justice Myers, in Gett v. Pac. Gas & Elec. Co. (Cal. Sup.) 221 Pac. 376, 380, in discussing the plea of contributory negligence, said:

> "In this defense the burden is upon the defendant to prove two things: (1) That the plaintiff was negligent; (2) that such negligence was a proximate cause of the injuries complained of. If he fails to prove either of these things, this entire defense falls."

So with the case before us it is purely a matter of conjecture whether the respondent could have avoided injury if she had looked to her left after she had taken her position near the street car rail. She was attempting to board the street car at a regular stopping place at which a "stop" sign was exhibited. The automobile traffic on that side of the street was very heavy, especially at that time of night. This was brought out by appellant's cross-examination of the witness Claypool, who was attempting to board the same car with the respondent. This witness testified:

> "Q. On this night you walked out into the street, or rather to the car tracks on the street, when this first car came along? A. As I recall it, I did not get out as far as the car track because of the automobiles that were passing. They were racing past and the motorman did not see us as he passed. Q. There were lots of automobiles going on Telegraph avenue that night? A. I would not say 'lots.' Q. A great many? A. From time to time. Q. When this first car came along, this car that did not stop, there were so many automobiles coming along Telegraph avenue, going in a southerly direction, that you could not get out to flag the car; that is true? A. Yes, as I recall it. * * * Q. And all that time you were standing there were automobiles proceeding along the westerly side of Telegraph avenue, going south? A. I don't recall any particular number of cars. Q. I appreciate that, but the fact which I am simply trying to find out from you, young man, is if there were not automobiles continually going in a southerly direction on the westerly side of Telegraph avenue as you stood there? A. There probably were."

[3] It is true that this witness, a young man of about 20 years, who stood 10 feet away from the respondent, saw the approach of defendant's automobile in time to jump to a place of safety. But it is purely a matter of conjecture whether this respondent could have saved herself from injury if she had looked. On this phase of the case appellant offered no proof, his whole plea of contributory negligence depending upon the evidence that the respondent held an umbrella over her head and that she did not look to her left as she stood at a point three feet from the car rail awaiting the approach of the street car—a position which she assumed to be a place of safety. It cannot be said with certainty, therefore, that if she had looked to her left or had not held the umbrella over her head she would have escaped the injury. If the conditions were such that she could have escaped had she so looked or had she not held the umbrella over her head, those were matters which it was incumbent upon the appellant to prove. Upon the record before us, therefore, we are unable to say that the respondent was guilty of negligence as a matter of law. See, also, Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 Pac. 125, and Burgesser v. Bullock's (Cal. Sup.) 214 Pac. 649.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

66 Cal. App. 173

PEOPLE v. SALAZ. (Cr. 1046.)

(District Court of Appeal, Second District, Division 2, California. March 12, 1924.)

1. Homicide 🔑244(1)—Evidence held to sustain manslaughter conviction as against claim of self-defense.

Evidence *held* to support conviction of manslaughter as against claim of self-defense.

2. Criminal law 🔑308—No presumption of unlawful homicide on admissions by defendant.

Where only evidence that killing was done by defendant was his admissions which carried circumstances of necessary self-defense, no presumption of guilt weighed against presumption of innocence at close of people's case, under Pen. Code, § 1105.

3. Criminal law 🔑554 — Uncontradicted evidence of defendant does not control jury if circumstances in case incompatible.

Defendant's account of killing, though uncontradicted by direct evidence, does not control jury if there is any well-established circumstance which may reasonably be regarded as incompatible with defendant's theory of killing.

4. Criminal law 🔑475—Direction of gunshot wound in body not matter of expert opinion.

Question whether direction of gunshot wound in body indicates relative positions of person firing shot and deceased is not matter of expert opinion or opinion evidence.

5. Criminal law 🔑1169(9) — Admission of opinion of physician as to relative position of deceased and person firing shot held prejudicial.

Admission of opinion of physician as to relative positions of defendant and deceased, as indicated by direction of gunshot wound, *held* reversible error.

6. Criminal law 🔑1186(4) — Application of constitutional provision as to evidence erroneously admitted.

Whenever court is unable to determine whether defendant would have been convicted had erroneously admitted evidence been withheld from jury, Const. art. 6, § 4½, cannot be applied to uphold a conviction.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Cruz Salaz was convicted of manslaughter, and appeals. Reversed.

Wm. T. Aggeler, Public Defender, and Charles E. R. Fulcher, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

FINLAYSON, P. J. Upon an information charging him with the murder of Ignacio Gonzales, defendant was convicted of manslaughter, and now appeals from the judgment and from an order denying him a new trial.

Defendant, who in the trial court admitted the killing, but claimed that it was done in necessary self-defense, claims here that the evidence is insufficient to justify the verdict. The salient facts in the case are these: Decedent lived with his wife and family in a house located about a block and a half from the scene of the tragedy, which occurred near the intersection of Gabriel and Effie streets, in the city of Los Angeles. Some time prior to the homicide the deceased had had illicit relations with Manuela Gonzales, a married woman who had separated from her husband and who seems to have been the cause of the jealousy which led to the deadly encounter. Though the woman and decedent bore the same surname, they were not related either by consanguinity or affinity. An illegitimate child was the result of their meretricious relations. Manuela Gonzales lived with her father at 1758 Gabriel street, about a half block north of Effie street. Defendant worked at El Segundo, in Los Angeles county. He had a brother whose residence was about two or three blocks from the home of Manuela Gonzales.

On the afternoon of July 7, 1923, defendant left El Segundo for Los Angeles, arriving in the latter city in the evening at about 40 minutes past 6 o'clock. He went to a grocery store kept by one Jose Martinez, situated one block east of the spot where the killing took place. After purchasing some bread he left the store, accompanied by the decedent. Following the exchange of a few words, the nature of which will presently be stated, the two men separated, defendant proceeding to the home of Manuela Gonzales, to whom he was engaged to be married. He remained there about 30 minutes, talking to Manuela and her father. About a month previously defendant had purchased the pistol with which the shooting was done. It had been left by him at the house of Manuela Gonzales for the purpose, so he claimed, of affording protection to the house against burglars or other possible intruders. On the evening in question, before leaving Manuela's house, defendant procured the pistol from the woman, and some time between 8 and 9 o'clock he left the house with the intention, so he says, of calling upon his brother, who, as we have stated, lived near by. Proceeding southerly on the easterly side of Gabriel street, defendant, on arriving at or near the northeast corner of Effie and Gabriel streets, saw the deceased, who, according to defendant, was standing on the opposite corner. The night was dark; there were no street lights, and, with the exception of the two participants, there were no eyewitnesses to the shooting. Defendant fired five shots, three of which took effect.

Two of the bullets entered the front of the body and one entered near the anterior aspect of the left shoulder. Dr. A. F. Wagner, the county autopsy surgeon, who examined the body two days after the homicide, called as a witness for the prosecution, testified that he found three bullet wounds in the body of the decedent. These he described as follows: One bullet entered an inch above the left nipple and about three-quarters of an inch from its outer side. It passed backward and slightly inward and downward through the second rib, the inner margin of the left lung, the upper posterior of the left ventricle of the heart and through the fourth rib near its attachment to the spine, finally lodging just beneath the skin in the midline of the back, about three inches lower than the level of its entrance. Another bullet entered the outer surface of the left shoulder near the anterior aspect. It passed inward and downward in front of the bone, out in the armpit, and, entering the chest in the inner side of the armpit, it proceeded downward and through the soft tissues of the left thoracic wall, grazing the adjacent margin of the lung. It perforated the diaphragm, penetrated the inner margin of the spine and the left end of the stomach, tore a large hole in this part of the stomach, and, passing through the abdominal wall in the back near the spine, lodged just beneath the skin in the back, at a point two inches to the left of the midline and about three inches below where the first-mentioned bullet was found. Another entered just to the right of the navel, passed towards the right through the abdominal muscles and slightly downward, struck the crest of the ilium or hip bone, where it lodged, lying just beneath the skin at about the anterior superior spine of the hip bone. The witness further testified that the general course of all the bullets was downward; that the course of one was approximately from left to right, and that the courses of the other two were also from left to right, but not in the same degree; that death was caused by the gunshot wounds in the heart and abdomen, and that a bullet through the heart usually produces instant death.

Immediately after the shooting defendant proceeded one block easterly to the grocery store of Jose Martinez, arriving there about 5 minutes after the occurrence. Laying his pistol on the counter, he told the proprietor that he had shot a man, exhibited to the grocer a swelling on his left wrist, such as might be caused by a blow from a club or stick, and asked Martinez to call the police. The latter complied with the request. The call was received at the police station about 9 o'clock. Defendant remained in the store until the arrival of the police, 15 minutes later, when he told the officers that he had shot Gonzales after the latter had attacked him with a club.

There are no curbs or sidewalks on either Gabriel or Effie street. When the officers examined the surroundings where the killing occurred they found the body lying about 10 or 15 feet north of the northerly line of Effie street. Its distance from the east line of Gabriel street was variously estimated by the several witnesses. The body was found lying on its right side, with the right hand extended above the head. A club or stick about 2 feet long, 3½ inches in circumference and of hard wood was found lying parallel with the body, about 2 or 3 feet from the right hand and in line with the body. One of the officers testified that the stick, which he described as resembling a piece of hoe handle, looked as if it had dropped out of the decedent's hand as he fell. On arriving at the police station the officers found on defendants' left wrist a bruise about 2 inches long, an inch wide and swollen to about half an inch.

All of the witnesses but one testified that the spot where the body lay was east of the center line of Gabriel street. One of the officers testified that it lay west of the center line of that street—that it lay about 20 feet from a fence on the west side of the street. Another officer testified that the body was found lying on the east side of the street, between the center line of Gabriel street and the east curb line. Still another officer testified that it lay about one foot west of where the easterly curb would have been had there been a curb or sidewalk. The grocer, Jose Martinez, testifying as a witness for the people, said that the body was lying on the east side of Gabriel street—the side of the street on which the house of Manuela Gonzales was—and about 8 feet from a fence on the east side of the street. Whether the body when found was lying on the east or west side of Gabriel street is a material factor in the case, as later will appear.

The evidence for the prosecution consisted of the testimony of the county autopsy surgeon, who described the nature of the wounds found on the body and gave his opinion as to the relative positions of the parties when the shots were fired; the testimony of decedent's wife to the effect that her husband left their home at about 7 o'clock in the evening, that she did not see him carrying any stick or club when he left, and that about an hour later she heard the fatal shots; the testimony of the grocer and the officers as to the statements made to them by the defendant, the condition of the body when found and how it lay; the testimony of an interpreter who interpreted for the officers the statements which were made to them in Spanish by the defendant; the testimony of Manuela Gonzales as to what transpired that evening when defendant called upon her just prior to the shooting; a written statement, in Spanish, which the defendant wrote and gave to the officers, and an English translation thereof. This statement, or rather the translation, is set forth infra. It tends to show that the killing was done in self-defense. Except as to the precise spot where the shooting occurred—and it unquestionably occurred where the body was found, for without doubt the decedent fell as the five shots were fired—defendant's testimony is not materially contradicted by the testimony of any of the witnesses for the people.

Defendant was a witness on his own behalf. The case presented by his testimony is substantially as follows: After purchasing bread of Jose Martinez he left the grocery store with the intention of calling upon Manuela Gonzales. Decedent, who happened to be in the store at the time, left when defendant did. As the two walked from the building decedent asked defendant where he was going. Defendant replied that he was going to the house of Manuela Gonzales. Whereupon decedent told defendand that if he went to the woman's home he (decedent) would "beat him up." Defendant told decedent that he could not do that, and that he (defendant) was going over to Manuela's house. Nothing further was said, and the two men parted, decedent taking a direction which led towards his own home and defendant proceeding to the house of Manuela Gonzales, where he remained for about half an hour. Before taking leave of Manuela he asked the woman for the pistol which he previously had left with her. He told Manuela that decedent had threatened to "beat him up," and that he wanted the pistol in order to defend himself in the event that he should be attacked. She gave him the weapon, and shortly thereafter he left, telling Manuela that he was going to his brother's house. He proceeded southerly on Gabriel street towards Effie street, walking on the easterly side of Gabriel street—on the part where the easterly sidewalk would have been had there been any sidewalk. As he approached the northeast corner of the crossing formed by the intersection of Gabriel and Effie streets he saw Ignacio Gonzales standing on the northwest corner. From this point defendant's testimony, reduced to narrative form, is substantially as follows:

> Gonzales asked me to go with him on to the park. I told him I would not go—that I was going to my brother's house. Then he came after me right away. I was backing up, and he came after me, trying to strike me. He struck me, struck at me two or three times. He struck at me twice, at my hat, along each side of my head, and then, acting in my own defense, I pulled the gun from my pocket. He continued to strike at me. He struck me on the wrist, just about the wrist of my left hand. When he struck me I was backing up. When I shot we were almost together—right close together. The encounter occurred on the east side of Gabriel street near the crossing. When he first spoke to me, I was on one corner and he was on the other. When I told him I would not go to the park with him, he came over to the corner where I was. He came at me right away. When he came after me and began to strike me, I began to back and back. I fired all five shots in succession as fast as I could shoot. He was striking at me, and I was shooting. His body fell where I shot him. He did not fall until the last shot. I do not know which shots hit him. When he fell, his body was about four or five steps inward from the corner on the east side of the street. I was backing up toward Manuela's home. When I began backing, I was about 2 feet from where the curb of the sidewalk should be on the east side of the street. I was jumping backward. I did not say anything when he struck me. He came right after me. It was very dark. I could not see what he had in his hand. I thought it was a large piece of iron or a stick or a knife. I didn't know what it was, and I had to defend myself with what I had. I was afraid he would kill me or do me great bodily injury. It appeared to me that he was about to kill me. When I shot him, I was in front of him. I pointed the gun at him because he was right in front of me. I shot neither to his right nor to his left. I just shot. After I shot Gonzales, I walked to Mr. Martinez' grocery store and told him to notify the police.

The English translation of the written statement which defendant gave to the police officers, and which the prosecution put in evidence as a part of its case, is as follows:

> "Well, I arrived from the camp and went straight into the store; I bought the bread, I met the man and greeted him and told him I was going to the house of Manuela, and I went straight to the house, arrived there and greeted her and all her family and remained there in conversation for about one-half hour. I then asked her for the gun and then she said that if she gave it to me her father would scold her. Well! but if this man wants to strike me what have I got to face him? Well, I think he is going to beat me and I cannot face him with my finger nails merely. I left the house, and the first thing I found was him at the corner, and he invited me to fight and I told him that I did not want to and then he came after me, endeavoring to strike me and I began to back up and when I saw he was going to strike me on the head, then I pulled the gun and began shooting, and I discharged all of the five shots and I then went to the store to tell that I did not want to be a criminal."

Dr. Wagner, over defendant's strenuous objections, was permitted to testify that in his opinion, based entirely upon the result of his examination of the body and the course taken by the bullets, the man who did the shooting was in front and towards the left of the decedent. Asked by the district attorney if, from his examination of the body and the course of the bullets, he could tell in what position the decedent was when he was shot, the witness replied:

> "In a general way I could. I can positively state that the man [who did the shooting] was in front and towards the left. He was not immediately in front, but what we might call diag-

onal towards the left and in front of the deceased."

[1] Appellant, as his first point, urges with much earnestness that, upon all the evidence, but one conclusion can be drawn, and that is that it was only in the necessary defense of his own person that he killed Gonzales.

[2] The jury could not have found, from the evidence for the people, that the killing was done by appellant except upon the latter's admissions, which carried, in close and immediate connection with proof of the killing, circumstances of necessary self-defense. Since, therefore, the proof on the part of the prosecution tends to show that the act of appellant was justifiable, there was, at the close of the people's case, no presumption against the accused that he had committed an unlawful homicide. No presumption of guilt weighed against the presumption of innocence. "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Pen. Code, § 1105.

[3] But it does not necessarily follow that appellant's account of the killing, though uncontradicted by direct evidence, should control the jury. If there be any well-established circumstance in the case which may reasonably be regarded as incompatible with the theory of the defense that the killing was justifiable, then the jury, from a consideration of all the evidence, was warranted in finding that the act amounted to an unlawful homicide. The question therefore is: Does the record furnish evidence of any circumstance which cannot reasonably be reconciled with the theory that appellant acted in self-defense? Though a majority of the people's witnesses agree that the spot where the body was found is east of the center line of Gabriel street, and though one of the officers even testified that the body was found quite near where the easterly curb line would be, the jury nevertheless would be justified in accepting as true the evidence of the officer who testified that it was found west of the center line of the street. And if, as the witness last referred to testified, the body was found west of the center line of Gabriel street and about 20 feet from a fence on the westerly side of the street, then that is approximately where the shooting occurred, for the five shots were fired in a volley or in rapid succession, as though by the convulsive hand of an hysterical person wrought to a pitch of excitement, and one bullet passed through the upper posterior of the left ventricle of the heart. Indeed, appellant himself admitted at the trial that the deceased fell as the last shot was fired. If, then, the shooting did occur west of the center line of the street, it may be argued that there thus is afforded some ground for the inference that appellant, seeing Ignacio Gonzales on the opposite corner, and inflamed with a rage born of jealousy, advanced and sought a quarrel, with the design of forcing a deadly issue so as to create a real or apparent necessity for the killing. But we doubt if such an inference can be said to rest upon any very substantial foundation. The finding of the body on the west side of the street, if indeed that is where it was found, does not seem to amount to anything more than a circumstance which raises only a suspicion of guilt. As an incriminating circumstance it seems to be equally compatible with innocence. Appellant testified that while he was shooting he was "jumping backward." It is not an unreasonable inference that on this dark night appellant, in the excitement of the moment and while "jumping backward," lost all sense of direction, and that though he supposed he was backing up on the east side of the street he was in fact jumping backward in a diagonal direction, and took more jumps backward than he thought he did. This hypothesis—an hypothesis which, when we pause to consider the nervous excitement engendered by the heat of a deadly encounter, is not an unreasonable one—would account for the fact, if it be a fact, that the body fell, with the last shot, on the west side of the street instead of on the east side, as appellant supposed, or, rather, as he testified. It has been said by our Supreme Court that, where "every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court." People v. Staples, 149 Cal. 425, 86 Pac. 894. At any rate, if it cannot be said, as a matter of law, that the evidence in this case is insufficient to support the verdict, the question is a close one—so close that it may readily be seen how appellant must have been greatly prejudiced by the action of the court in permitting the county autopsy surgeon to give his opinion as to the position in which appellant stood when he fired the fatal shots. And this leads us to a consideration of what we deem to be a fatal error in the case and the ground upon which we are satisfied the judgment should be reversed.

[4, 5] That grievous error was committed when Dr. Wagner was permitted to testify that he could "positively state" that the man who did the shooting was in front "and towards the left," that "he was not immediately in front, but what we might call diagonal towards the left and in front of deceased," is clearly demonstrable. The question whether the direction of a gunshot wound in the body of a deceased indicates the relative positions of the person firing the shot and the person receiving it is not a matter of ex-

pert or opinion evidence, and it has been held by our Supreme Court that it is error to allow a physician to testify to his opinion upon that question. People v. Milner, 122 Cal. 171, 54 Pac. 833; People v. Westlake, 62 Cal. 303; People v. Smith, 93 Cal. 445, 29 Pac. 64. There are other factors besides the course of the bullets in the body which must be looked to in order to determine the relative positions of appellant and decedent when the shots were fired. Indeed, the slightest consideration of the facts of this case will suffice to show that the question of the relative positions of appellant and Gonzales during the shooting was not one which an expert or any other person could determine merely from the course of the bullets, but was essentially a question for the jury, and for the jury only, to be determined by it from a careful consideration and weighing of all the evidence. For example, if decedent, at the instant when the shot was fired which entered near the anterior aspect of his left shoulder, was striking at appellant with the piece of wood which was found at the scene of the tragedy, then it is not improbable that the former, in order to deliver an effective blow, raised his right arm, advanced his left foot and partially turned upon his waist line in such a manner as to swing the right side of the upper portion of his body backward, thus presenting his left shoulder toward appellant just as the shot was fired. If this supposition be true, and it is not inherently improbable, then the fact that the bullet entered near the anterior aspect of the left shoulder would not conflict with appellant's statement that he was directly in front of the deceased and was backing away as he fired the shots. Or it may be that the first shot which struck the deceased was the one which entered just to the right of the navel. We can readily perceive how the impact of a bullet so received might force the right side of the person thus shot to turn with a backward movement and in such a manner as to bring his left shoulder in line with a pistol held directly forward by a person standing immediately in front of him. These illustrations will suffice to show that neither a physician nor any other person could tell the relative positions of the parties merely from the course of the bullets. And yet Dr. Wagner presumed to say, and over defendant's objection was permitted to testify, that he could positively state that the man who did the shooting was not immediately in front of the decedent, but was "what we might call diagonal towards the left." The fact that to this description the witness added the words "and in front of the deceased" did not cure the error. It still remains that the doctor claimed that, as an expert, he could positively state that the person who fired the shots was not immediately in front of the deceased.

That the appellant's position during the shooting in its relation to that of the decedent is an element of prime importance in the case admits of no doubt. For if, as appellant testified, he was directly in front of the deceased as he fired the shots, then the position of the parties harmonizes with appellant's testimony that he was "backing up" or "jumping backward" when he fired the fatal shots. On the other hand, if he stood somewhat to the left of the deceased when the shots were fired that fact might lend color to the theory that appellant was advancing upon Ignacio Gonzales from a point of vantage of his own choosing and that he was the aggressor—that instead of receiving the attack from the deceased on or near the northeast corner of the crossing, he himself, when he espied Gonzales on the opposite side of Gabriel street, sought out the quarrel and closed in on his victim.

[6] While it is true that section 4½ of article 6 of the Constitution confers upon this court the power to weigh, to a limited extent, the entire evidence upon which a conviction was had, still "we are not substituted for the jury. We are not to determine, as an original inquiry, the question of defendant's guilt or innocence." We are to "decide whether, in our judgment, any error committed *has led* to the verdict which was reached." People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042. (Italics ours.) And whenever we are unable to determine whether the defendant would have been convicted had erroneously admitted testimony been withheld from the jury's consideration, this section of the Constitution cannot be applied to uphold the judgment. People v. MacPhee, 26 Cal. App. 218, 146 Pac. 522. See, also, People v. Columbus, 49 Cal. App. 763, 194 Pac. 288; Freeman v. Adams (Cal. App.) 218 Pac. 600, and People v. Roe, 189 Cal. 548, 209 Pac. 560. After a most careful consideration of the entire cause, including the evidence, we are unable to determine whether the jury would or would not have convicted appellant had Dr. Wagner's opinion as to the position of the parties been withheld from them. This being so, we do not think that the judgment can be upheld by reason of this provision of the Constitution.

The judgment and the order denying a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

66 Cal. App. 216

BARCLAY McCOWAN CO. v. STEELE et al.

(Civ. 3922.)

(District Court of Appeal, Second District, Division 2, California. March 15, 1924.)

1. Contracts 🔑175(3)—Evidence held sufficient to warrant finding plowing was to be three or four inches and not six.

In action for damages for breach of contract to plow land, evidence *held* to sustain finding that defendants agreed only to plow three or four inches deep and not six inches.

2. Appeal and error 🔑1010(1)—Determination of facts prima facie for trial court.

Determination of issues of fact is prima facie for trial court, and findings will not be overthrown unless totally unsupported by substantial evidence.

3. Appeal and error 🔑1056(4)—Exclusion of evidence as to damages held harmless in view of verdict.

Sustaining of objections to questions to show amount of damage was harmless, where jury found that plaintiff had no right to recover.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the Barclay McCowan Company against W. C. Steele and others, copartners doing business under the firm name and style of Steele & Thompson. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. T. Helms, of Los Angeles, for appellant.

Kaye & Siemon, of Bakersfield, for respondents.

FINLAYSON, P. J. This is an action to recover damages for the alleged breach of an oral agreement by defendants to plow plaintiff's land. Plaintiff's demand is based upon the claim that defendants undertook to plow the land to a depth of six inches. Defendants contend that the agreement was to plow to a depth of approximately three to four inches. Whether the agreement was what plaintiff claims it was, or whether defendants' version of it is the correct one is the crucial point in the case. The findings of fact were favorable to defendants; judgment was entered accordingly; plaintiff moved for a new trial, which was denied; and from the judgment for defendants plaintiff now appeals.

The trial court found that defendants did not agree to plow to a depth of six inches, but did agree to plow the land "to a depth sufficient for ordinary dry wheat farming, namely, approximately three or four inches in depth." Appellant's first point is that the evidence is insufficient to support this finding. While a contrary finding, if it had been made, would have been sustained by this court, it cannot be held that there was not sufficient evidence to sustain the finding as made. The agreement was arrived at in the course of a conversation between the defendant Steele and Barclay McCowan, the president of the plaintiff corporation. McCowan, in whose office the conversation took place, testified:

> "I told Mr. Steele I wanted section 25, 30—29 plowed for summer fallow, * * * and that I would pay him $2 an acre for plowing that land six inches deep. He said he would do it. He would plow the land six inches deep for $2 an acre, to be paid for when the job was finished."

One Daniel Bidwell, who says he overheard the conversation, corroborated McCowan's version of it. Steele's account of the transaction is as follows:

> "I walked into Mr. McCowan's office. * * * I wasn't in there but a few minutes with him, and I says, 'Well, Mr. McCowan, I came up here to see about that plowing that we was talking about some time ago.' He said, 'All right,' and he asked me what I would plow it for. I told him that I would plow it, give him good ordinary wheat plowing, for $2. That is just the words that was said. * * * Mr. McCowan says, 'Well,' he says, 'it ought to be plowed six inches,' and I never said a word more about it. Just before I got ready to go away, I says, 'Well, I'll give you a good ordinary wheat plowing for $2.' Mr. McCowan says, 'Very well.' I says, 'I'll do the best I can for you.' That is just the words, the whole thing."

[1, 2] From the foregoing it will be seen that there was a conflict in the testimony as to what was said by the parties when entering into their oral agreement, and that the evidence supports the finding that the agreement was to plow to a depth of approximately three or four inches, unless, as appellant claims, Steele's testimony, when correctly interpreted, is in harmony with that given by McCowan and Bidwell. We are unable to give our assent to appellant's interpretation of Steele's testimony. There is evidence to warrant the conclusion that by the words "good ordinary wheat plowing," as used by the witness Steele, the parties understood that the plowing was to be to a depth of approximately three to four inches. This explains why McCowan, when Steele said he would "give him good ordinary wheat plowing for $2," replied that it "ought" to be plowed six inches. That is, if we interpret Steele's testimony most favorably to respondents and in the light afforded by all the evidence, as we are required to do, it shows that Steele was willing to plow to a depth of three to four inches for $2 an acre; that he so informed McCowan; that the latter thought that a depth of three to four inches was not sufficient—that he thought the ground ought to be plowed to a depth of six

inches—and that finally, when Steele repeated his offer to do "good ordinary wheat plowing for $2," i. e., to plow to a depth of approximately three to four inches, McCowan replied, "Very well." The rule that the determination of issues of fact is primarily for the trial court, and that the findings of that court are to be overthrown on appeal only when they totally lack the support of substantial evidence, has been announced so often that it has become trite. In Fowden v. Pacific Coast S. S. Co., 149 Cal. 162, 86 Pac. 182, it is said:

> "It is the firmly settled law of the state that this court will not disturb the ruling of the court below on a motion for a new trial upon the ground of insufficiency of evidence, if there be a substantial conflict in the evidence, even though this court may, upon the record, consider the verdict greatly against the weight of the evidence."

In cases of mere conflict of evidence the conclusion of the trial jury and judge, says the court in Still v. San Francisco, etc., Ry. Co., 154 Cal. 564, 98 Pac. 674, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177, "are conclusive on the question as to which side produced the 'preponderance of evidence.'"

[3] In view of our conclusion that the evidence is sufficient to sustain the finding that the agreement was what respondents claim it to be, it will not be necessary to consider appellant's contention that the court erred in sustaining objections to certain questions. The sole purpose of the questions to which the objections were made was to show the amount of appellant's damage. But since respondents did not breach the agreement which the court found was the only one which was entered into, there can be no recovery. From this it necessarily follows that appellant could not possibly be prejudiced by the rulings of which it now complains. The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

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66 Cal. App. 157

GOLDSMITH v. BOARD OF EDUCATION OF SACRAMENTO CITY HIGH SCHOOL DIST. et al. (Civ. 2642.)

(District Court of Appeal, Third District, California. March 12, 1924.)

1. Schools and school districts 🔑141(2) — Statute allowing board to "dismiss" held to authorize suspension of school teacher.

Under Pol. Code, § 1609(j), as amended by St. 1921, p. 1666, empowering school boards to dismiss teachers for unprofessional conduct, a judgment of suspension against a teacher for unprofessional conduct was not void, in view of Civ. Code, § 3536; the word "dismiss" vesting a discretion in the board to determine whether an accused teacher should be permanently or temporarily dismissed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dismiss.]

2. Statutes 🔑184 — Ambiguous statute construed with manifest purpose.

Where a statute is reasonably susceptible of either of two constructions, that construction which will render it reasonable and harmonious with its manifest purpose will be adopted.

3. Schools and school districts 🔑141(2) — Statute allowing school boards to dismiss teachers for unprofessional conduct held not void.

Pol. Code, § 1609(j), as amended by St. 1921, p. 1666, empowering school boards to dismiss teachers for unprofessional conduct, is not void because of allowing too much discretion to boards in dismissing teachers.

4. Schools and school districts 🔑141(4)—Advocacy of political candidacy held "unprofessional conduct" warranting teacher's suspension.

Teacher's advocacy before public school pupils of election of particular candidate for public office *held* "unprofessional conduct" warranting suspension of teacher under Pol. Code, § 1609(j), as amended by St. 1921, p. 1666.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Unprofessional Conduct.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by A. L. Goldsmith against the Board of Education of Sacramento City High School District and others, as members of the Board of Education. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 218 Pac. 296.

Elliott & Atkinson, of Sacramento, for appellant.

C. F. Metteer, of Sacramento, for respondents.

HART, J. On and prior to the 11th day of September, 1922, the appellant was a teacher in the Sacramento high school. On said date the city superintendent of schools of the city of Sacramento presented to and filed with the city board of education of said city, then consisting of the persons named in the title hereof as defendants and respondents herein, written charges against the appellant as follows:

"That on the 1st day of September, 1922, at the high school, before his class, in session and under discipline, he stated and remarked among some other notices as follows: 'Many of you know Mr. Golway, what a fine man he is, and that his hopes are to be elected soon. I think he would be more helpful to our department than a lady, and we need more men in our schools. Sometimes your parents do not know one candidate from another; so they might be glad to be informed. Of course, if any of you have relatives or friends trying for the same office, be sure and vote for them.' I charge that said conduct on the part of said A. L. Goldsmith is and was unprofessional, in that it is contrary to the law of the state of California."

It should be explained that Golway, mentioned in the charges, was a candidate before the voters for election as superintendent of schools of Sacramento county at the time the alleged objectionable remarks were made by appellant.

On the 22d day of September, 1922, said day having previously been fixed for that purpose by said board, and the appellant duly notified thereof, the charges were called for hearing and the same were publicly heard and testimony taken thereon, both the city superintendent of schools and the appellant being represented at said hearing by counsel. On the conclusion of the taking of testimony, and after the issue was argued by counsel for the respective parties, the board ordered and took a recess for 10 minutes for the purpose of going into executive session and therein considering the evidence and a verdict. Within a brief time thereafter, and on the same evening, the board returned a written finding adjudging that the charges preferred against the appellant were sustained by the evidence, and were true. As a conclusion of law from said finding, it was found that the appellant was guilty of "unprofessional conduct as charged in the complaint." The judgment following the finding and conclusion of law was that the said A. L. Goldsmith "be and he is hereby suspended without pay for a period of ten weeks, beginning on the 22d day of September, 1922, and ending on the 30th day of November, 1922," and that the president of the board of education publicly reprimand said Goldsmith. Upon announcing the finding and conclusion of law and judgment the president of the board reprimanded the appellant.

On the 5th day of October 1922, the appellant filed this action in the superior court in and for the county of Sacramento, in which he sought and prayed for a writ of mandate to compel the defendants to reinstate him to the use and enjoyment of the right to perform services and duties of teacher in said Sacramento high school, "and for such other and further order as is proper in the premises," etc. The complaint in said action alleged that plaintiff, after having been regularly employed as a teacher in said high school for a long number of years, was by said board of education, on said 22d day of September, 1922, wrongfully and without right suspended from said position, and denied his right to perform and discharge the duties thereof. The return to the writ contained a recital of all the proceedings culminating in the order and judgment of the board of education suspending and depriving the appellant of the right to exercise the duties of teacher of said school.

Upon hearing the matter, the court below rendered judgment denying the writ of mandate and discharging the order to show cause. From this judgment the plaintiff appeals. This cause was appealed to the Supreme Court, the transcript having been filed in said court in February, 1923, but later that court transferred the same to this court for hearing and decision. Subsequently the defendants noticed a motion in this court for a dismissal of the appeal on the ground that the same involved a moot question for the reason that the period of suspension of the appellant, at the time of taking the appeal, had expired, and for the further reason that, after said period of suspension had terminated, and at the time the appeal was taken, he had resigned his position as teacher in said high school. The motion was denied by this court for reasons stated in the opinion filed on denying the motion. 218 Pac. 296.

The question first raised by the appellant is as to whether the charges preferred against him, and of which he was found guilty by the said board of education, are authorized by any law of this state as the grounds for the suspension of a teacher in the public schools. His contention is that there is no warrant in any law of the state relating to the public schools for the filing of such charges against such a teacher. So far as we are advised by the discussion in the briefs, if the proceedings taken against the appellant are to be sustained, it must be upon the authority of either section 1609(j) as amended by St. 1921, p. 1666, or section 1672 of the Political Code. The first-mentioned section contains an enumeration of the powers of boards of school trustees, and subdivision (j) thereof reads as follows:

> "To dismiss permanent teachers, principals, or supervisors of special subjects, except as hereinafter provided, only for one or more of the following causes, after a fair and impartial public hearing. Causes for dismissal are immoral or unprofessional conduct, incompetence, evident unfitness for teaching, persistent violation of or refusal to obey the school laws of California, or reasonable rules prescribed for the government of public schools."

Section 1672 provides:

> "No publication of a sectarian, partisan, or denominational character must be used or distributed in any school, or be made a part of any school library; nor must any sectarian or denominational doctrine be taught therein. Any school district, town, or city, the officers of which knowingly allow any schools to be taught in violation of these provisions, forfeits all right to any state or county apportionment of school moneys; and, upon satisfactory evidence of such violation, the superintendent of public instruction and school superintendent must

withhold both state and county apportionments."

The learned judge by whom this action was tried filed a written opinion setting forth his reasons for the conclusion at which he arrived, and which conclusion is embraced in the decision of the court. In said opinion it is declared that the charges against the appellant, as framed and filed, do not come within the provisions of the section last hereinabove quoted. In other words, the judge declared in his opinion that, since the appellant was not specifically charged with issuing or distributing a publication of a partisan character in the school, or teaching therein any sectarian or denominational doctrine, the conduct of the appellant, as indicated by the charges filed against him, does not come within the ban of said section. It was his opinion, however, that the charges were authorized by section 1609, subdivision (j), of the Political Code.

We agree with the judge of the court below that the charges as they are alleged do not, strictly speaking, fall within the condemnation of section 1672 of the Political Code, but that if they are sustainable at all under any law of the state it is upon the authority of subdivision (j) of section 1609. We are not prepared to hold, however, that, if any teacher in the public schools should teach or advocate, ore tenus, any doctrine of a sectarian, partisan, or denominational character his conduct in that regard would not come within the purview of section 1672. And this view is based upon the principle that the law will not suffer that which is directly prohibited to be done indirectly or by indirection. Nor are we prepared to declare that the oral advocacy by a teacher in a public school before a body of students of the election of a single or a particular candidate for a public office is any the less an act of partisanship, within the meaning of section 1672, than would be like advocacy of the election of all nominees of a particular political party. If such conduct does not come within the spirit, even if not the letter, of section 1672, then the very practice which said section specifically condemns may be indulged in by a teacher with impunity But, in view of the character of the charges filed against the appellant, this question does not require further discussion herein.

[1, 2] As stated, we agree with the trial judge that the charges against the appellant are clearly embraced within the contemplation of subdivision (j) of section 1609 as expressed in the general language "unprofessional conduct." But it will be noted that said subdivision does not in terms provide that a judgment of suspension may be imposed by the school board in the case of the commission by a school teacher of acts constituting "unprofessional conduct." The provision is that for such acts and for all other acts mentioned in the section a teacher may be dismissed. This peculiar phraseology of said subdivision gives handle to the appellant to urge the point (for the first time in this court) that the judgment of suspension is void because it is not within the express words or the intention of the section as evidenced by its language. It may be conceded that, as generally used in connection with legal proceedings in the courts of justice the word "dismiss" means putting an end to a proceeding, as, for instance, to dismiss a particular action or a motion, etc. It does not always or necessarily mean, though, the final ending or termination of the litigation of the subject-matter of the action or of the motion dismissed. We are of the opinion, however, that the word "dismiss" as used in the section in question could not have been intended by the Legislature so to restrict the power of the board as to require it in all cases of guilt under said section to impose as a punishment the permanent dismissal of the offending teacher. It is certainly true that the Legislature intended that for any of the offenses enumerated or contemplated by said section there should be some sort of punishment. We will not assume that the Legislature, in enacting said section, acted upon the sanguinary theory upon which Draco ordained in his code of criminal laws that all offenses, whether petty or aggravated, should be punished with death, because, as he seemed to conceive, the least deserved it while there was no greater human punishment which could be inflicted for the more heinous. To hold that the meaning of the word "dismiss" as used in said section was intended to limit the power of the board to the imposition of no other punishment than that of permanent dismissal in any and all cases arising thereunder, regardless of whether the particular offense charged is of sufficient gravity to warrant such a penalty, would give to the section a construction which, in its application to conceivable cases, would be so unreasonable as that the courts might be justified in declaring it to be void. It is a cardinal rule of statutory construction that, where the language of a statute is, upon its face, reasonably susceptible of either of two constructions, one which, in its application, will render it reasonable, fair, and just, and harmonious with its manifest purpose and another which, in its application, would be productive of absurd consequences, the former construction will be adopted. Giving the word "dismiss" an interpretation in accord with the common understanding of its meaning will impart to the section the force of a sensible enactment, and at the same time exonerate the Legislature from the charge, otherwise justifiable, of a preposterous intention in passing the section. Colloquially, or as used in common vernacular, the word "dismiss" is often used interchangeably with the word

"suspend," and it is clear that the interpretation of that word as so used is the only one that may be given it to relieve the section from the imputation of being absurd or of authorizing, when applied in certain cases, unjust and, in truth, nonsensical consequences. Indeed, we think that if necessary to effectuate what appears to be the clear intent of the Legislature as to said section, the established legal maxim, "The greater contains the less" (section 3536, Civ. Code), should be applied in this instance, and that therefore the word "suspend" should be held to have been intended by the Legislature to be included within the word "dismiss" as used in said section. So interpreting, then, the word "dismiss," and as it is believed the Legislature intended it should be understood as so used, the section vests in the board the discretion of determining, in any given or particular case, whether the accused teacher should be permanently or only temporarily dismissed.

But there is still another view which may well be taken of the question of the right of the board of trustees of a school district to impose penalties upon teachers for the violation of their duties as such. The board, under the law, has supervisory power over the common schools and also the duty of employing teachers. The right of a person to teach in the public schools arises out of contract. Let us suppose that notwithstanding the existence of such power in the board of trustees over the schools and teachers, there was no statutory provision expressly empowering such board to dismiss or suspend a teacher for unprofessional or other conduct inconsistent with the exactions of his position. Would it be contended for a moment that the board for such conduct would not be empowered to rescind and terminate the contract and so put an end to the teacher's employment as such? No negative reply to this question would, we apprehend, be vouchsafed. If, under such circumstances, the board may terminate the contract then for conduct of the teacher while exercising the duties of his position which is inconsistent therewith but which justly would not call for absolute severance of the teacher from the school, such board would be authorized to exercise the right to discipline such teacher or impose a penalty for his violation of his contract which would be less drastic than permanent dismissal.

[3] The remaining points in the case were satsfactorily discussed and disposed of by the trial judge in a very able opinion in which he stated the reasons impelling him to the conclusion crystallized in the findings and the judgment of the court. We therefore approve and adopt the following portions of said opinion as the opinion of this court:

"The accusation stands as a specific allegation that certain things were said by the plaintiff in the presence of his assembled students and while he was acting in the course of his employment as a teacher. The charge then sets forth that the language used under the conditions alleged constituted 'unprofessional conduct.' In defense the plaintiff does not deny that the language used was improper nor claim that it did not establish a condition of such gravity as would have warranted punishment if there was any valid law under which the charge could have been brought. But it is claimed that the term 'unprofessional conduct' is so general, so undefined, so vague, that there is no way by which what is meant by it can be determined, that any act might be claimed to constitute it, and that to make it a ground upon which a teacher might be removed would be to make his employment dependent upon the whim and caprice of changing official authority. As a consequence it is claimed that the cause 'unprofessional conduct' as a ground of removal is meaningless and illegal and that no charge can be said to legally come within it, and that the charges here attempted, having no foundation, are void. If this be true it leaves California with a very large number of teachers to whom she has given permanent employment with no power reserved in her boards of education or other governing authority to prohibit the grossest misuse of their privileges. If 'unprofessional conduct' as a ground of dismissal is void because it leaves too much to the judgment or discretion of the board of education in determining what constitutes it, then 'immoral' conduct, 'incompetence,' and 'evident unfitness for teaching' must likewise be held void for the same reason, and practically all of the vitally necessary power of the boards will be stripped from them. A decision which involved such radical consequences should be reluctantly arrived at and reached only for reasons which are unanswerable. The meaning of the term 'unprofessional conduct' as a ground for suspension from certain kinds of professional employment, or for revoking a license for such practice, has been on many occasions before the courts of many states, and has been variously supported and condemned. Counsel are familiar with cases stating these different views, and it would be of little value for me here to recollect and analyze them. They have been admirably assembled in the recent case of State v. Robinson, 253 Mo. 271, 161 S. W. 1169. There the court, after collecting and grouping these decisions, says: 'There is such a great divergency in judicial thought on this subject that, after reading it all, we find ourselves groping in a wilderness of confusing precedents.' The court then continues: 'In considering precedents it is usually safest to keep an eye on the rules of common sense.' 253 Mo. 290, 161 S. W. 1174. This wise rule I will attempt to apply in the discussion which follows.

"A review of the cases collected will disclose that all of them that do not relate to criminal statutes have to do with the revocation of the licenses of physicians and dental practitioners. Two California cases are cited with those claimed to hold the invalidity of laws providing penalties for 'unprofessional conduct.' Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257, had to do with a criminal charge growing out of an attempted revocation of a medical license upon a charge of 'unprofessional conduct.' Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, was a case in which a physician resisted the cancellation of his license to practice upon a charge of 'unprofessional conduct.' The revocation was sought under a specification of 'unprofessional conduct' which in reality was an extension of the ordinary meaning of that term. The specification constituted in fact the statement of a new group of revocation. The decision did not condemn the general ground, but the loose language of the specification under which the charges were brought. The objections to this specification were so obvious that its illegality could not well be denied. It will thus be seen that our California courts have never held that, where the term 'unprofessional conduct' was stated by the Legislature as a ground for the revocation of the license of one practicing a profession under authority of law, it was void for uncertainty. In Ex parte McNulty the judgment on this point was distinctly reserved by one of the concurring Justices, he holding the provision invalid only as a basis of criminal punishment.

"It seems probable, however, that, should the sufficiency of the term 'unprofessional conduct' as a ground for the revocation of the license of a physician or dentist be raised in our California courts, they would align themselves with the courts of the states which have held it insufficient, and therefore invalid. I say this, although our court in a recent decision involving a somewhat indefinite criminal statute say: 'In this connection it may be stated that there has been a tendency to a much more liberal construction of such statutes in the more recent decisions.' Ex parte Daniels, 183 Cal. 646, 192 Pac. 442, 21 A. L. R. 1172. But would our courts hold invalid such a law in a case involving the employment of a teacher in the public schools? They have never done so, nor, so far as I have been able to discover, has any other state in the Union.

"In this state the court sustained a charge alleging 'evident unfitness to teach,' 'insubordination,' and 'unprofessional conduct' against a teacher. McKenzie v. Board of Education, 1 Cal. App. 406, 82 Pac. 392. And in Kentucky one of the first states to take a positive position that such a charge as 'unprofessional conduct' was too vague to justify a proceeding against a physician, the court asserted the authority of the school board to remove a teacher for 'incompetence, improper conduct or inattention.' Thompson v. Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548. In these cases the point made here was not raised, and they are significant only in that it was not raised. As has been stated, if plaintiff is correct here in claiming that the school board has no power to proceed against a teacher for any breach of what the statute designates as 'unprofessional conduct' because the term is too general, and leaves too much to the discretion and judgment of the board, then other statutory grounds of removal are equally invalid, and the school boards of this state are almost totally without authority over the teachers they employ. This is not only so of California, but is equally true of every other state in the Union so far as a thorough search has enabled me to discover. The statutes of the several states provide for removal of teachers or the revocation of their certificates generally for such causes as 'general neglect of the business of the school,' 'general neglect,' 'lack of patriotism or refinement,' that the teacher lacked the qualities of success, that the teacher has 'become unworthy,' for 'other demoralizing vice,' 'neglect of duty,' 'willful neglect of duty,' or 'when he has become unworthy to remain a teacher.'

"Further specification is unnecessary; all of the states seem to provide grounds of removal or dismissal in the broadest terms, leaving to the board or superintendent to determine what acts come within these general provisions.

"Whatever may be said about physicians, dentists, and other similar statutes in the case of teachers this seems to be the only course that could be pursued. It is not, as was denied in State v. Robinson, 253 Mo. 271, 161 S. W. 1174, with reference to physicians, that teachers are more willing to commit offense than men of other callings, and that in consequence it would be impossible to be specific in their enumeration. It is that the calling is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment. The intimate personal life and habits of a physician or dentist do not necessarily affect his usefulness; he deals with adult persons or children under his protection. But the teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all of these things be provided for and offenses against them be particularly specified in a single statute? The delicacy of the questions involved in a teacher's employment is illustrated by a Missouri case where it is said: 'There may be causes for the removal of a teacher affecting the discipline of the school over which he presides, entirely outside of any question of his learning, ability, power of enforcing discipline, or moral qualities, and outside of his own acts.' McLellan v. Board, etc., 15 Mo. App. 365. And the court there permitted the removal of a teacher upon the ground that his wife had charged him with flagrant infidelity, and the fact that the charges had become notorious. How could such a condition as this be anticipated or provided for? The inexpediency, not to say impossibility, of attempting to so specify them is illustrated by the law relating to the power of a teacher to suspend or expel a pupil from his school. In discussing this question a learned author reviews the general obligations of the student and then states: 'These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been reenacted by the district board in the form of written rules and regulations. Indeed, it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly.' Voorhees, The Law of Public Schools, § 71, p. 175. This language applies with peculiar appropriateness to a teacher as well as to his pupils. His duties to them and to the public are coextensive with their obligations to the school. To enumerate them in one case would be as 'impossible' as in the other. To restate them would be equally unnecessary, as the professional proprieties of a teacher's employment has likewise become the 'common law of the school.' The board of education is responsible for the proper conduct of our schools. They administer them through the teachers they employ. To enable them to discharge this obligation they must have such power over their teacher as is necessary to promote the efficiency of the schools and to prevent or to punish offenses against it. In occupations involving a high degree of personal, as distinguished from mechanical or technical service, specification of acts of unfitness are wholly impossible and have never been attempted. They 'have never dared to do so,' as was stated by counsel for plaintiff in quoting a prominent educator of the state.

"In the case of attorneys they may be disbarred for 'any act involving moral turpitude.' Section 287, Code Civ. Proc. In the army a commission can be revoked for 'conduct unbecoming an officer and a gentleman.' Articles of War, subd. 95. In the church, where the highest degree of personal propriety is demanded, governing bodies are almost unrestricted in their discretionary power to deal with offenses against a discipline that is itself unwritten.

"I have considered the right to dismiss a teacher as interchangeable with the power to revoke his certificate. But the cases are different. This case is not one where a board or commission has sought to revoke the license of a physician, dentist, optician, or pharmacist. No effort is being made here to revoke the certificate of the plaintiff or to prohibit him from continuing the employment of teaching a public school. For this reason the cases such as Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, and Matthews v. Murphy (Ky.) 63 S. W. 785, 54 L. R. A. 415, relied upon by plaintiff, have no application. Section 1609 of the Political Code, under which the defendants acted in this case, has no relation to the revocation of a teacher's certificate; it provides only for his dismissal, or suspension, from some one particular employment, leaving his right to seek similar employment elsewhere unimpaired. With all of the protection which the law surrounds the right of a physician or dentist to prosecute his profession and to earn his living by it, nowhere is the right of those who employ them to dismiss them anywhere restricted. Any one who employs any one else in such callings can dismiss them or employ others in their stead at will, for any reason or for no reason. Ordinarily it would be so with boards employing teachers. The Legislature could provide that they might be dismissed 'at the pleasure of the board.' Voorhees, The Law of Public Schools, § 69, p. 160. But with us our Legislature has wisely seen fit to deny to the employing board the power of unrestricted control. In the cases of dentists and physicians they may now be employed by the governing bodies of our prisons, reformatories, and hospitals, and unless they are protected by some civil service regulation they may be discharged at will, notwithstanding the doctrine of the cases invoked by counsel for plaintiff. The cases would be parallel if the employment of such physicians and dentists were protected by civil service restrictions, as our teachers are by the limitations of section 1609 of the Political Code. It cannot be questioned but that the civil service protection would be only such as the Legislature specified. It could provide for the dismissal of these physicians and dentists upon 'charges filed,' without specification, 'for good cause shown,' for 'inefficiency,' for 'inattention to duties,' or countless other general grounds.

"Cannot the Legislature likewise provide for the dismissal of a teacher from a particular employment for such actions as in the sound discretion of the board of education amount to 'unprofessional conduct'? It would seem clear that it could. In both cases the dismissal has been only from a particular employment, leaving the person dismissed free to prosecute his professional employment elsewhere. There is an undeniable difference between the qualification of a man for the general practice of a profession and his fitness for some particular employment. Transient and local causes may render him undesirable in the latter case, although his general fitness might be conceded. There is a vast difference between the right of a board to take away a man's right to practice a profession by revoking his license and subjecting him to dismissal from a single employment after he has become subject to a substantial objection of his employer. This difference the Legislature has recognized in section 1609 by permitting an employing board to dismiss a teacher without giving it the power to revoke his certificate or prevent or interfere with his employment elsewhere. Whatever may be said as to the too general language of the grounds of revocation of certificate as contained in section 1519a as amended and section 1771 of the Political Code, the sufficiency of section 1609 seems beyond question.

"I have been discussing this question upon the assumption that the position of a teacher was of the same general character as that of a physician or dentist or optician, differing only in the delicacy of the trust, in its more personal nature, and in the countless number of particulars in which its duties and proprieties might be offended against. But the cases are wholly different, and this difference accounts for the general terms used in stating the grounds upon which a teacher may be removed, and why these statutes have been so universally administered without challenge.

"The right to work in the treatment of diseases, the care of teeth, the manufacture of optical instruments, and similar tasks is a natural and inherent one. Subject to a limited police power in the state, the right to labor at these occupations can no more be taken away from a man than can his right to work at hoeing corn or laying brick. But because of the nature of these callings, in the exercise of such police power, and for the protection of the public health and safety, the Legislature may prescribe the qualifications of those who are to be permitted to practice them, 'and may commit to a board created by it the authority to ascertain whether an applicant for permission to practice possesses the necessary qualifications; and also the power, after notice and opportunity to be heard, to revoke the license of any who become disqualified either morally or intellectually.' Aiton v. Board of Medical Examiners, 13 Ariz. 354, 114 Pac. 962, L. R. A. 1915A, 691; State v. Robinson, 253 Mo. 271, 161 S. W. 1169; Green v. Blanchard, 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84; 8 Cyc. 876, 877. And the charges made as a basis of removal must involve acts bringing the case within the purview of such police power. Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750. The practitioner's natural right to labor can only be taken away or circumscribed when the public health and saftey demand it, and only for reasons involving these considerations. But with a school teacher the case is entirely different. No one has a natural or inherent right to teach a public school. * * * And the Legislatures of our state and the other states in the Union have seen fit for reasons of public policy to make the right to teach in any particular school subject to a broad discretion in the school authorities to dismiss for causes which come within very general designations. I believe these statutes are valid; I believe that the term 'unprofessional conduct' is sufficiently specific as a basis of action leading to the dismissal of a teacher. * * * If the board of education should take advantage of these general provisions, if it attempts frivolous charges, or acts arbitrarily or capriciously upon substantial ones, the courts will protect the teacher whose rights have been invaded. But in this case the board of education seems to have acted in good faith and within the limits of the authority given them by law. Within these bounds their power is supreme, and their order in this case is therefore beyond the jurisdiction of this court to change, criticize, or review."

[4] Lastly, noticing the assertion of counsel for the appellant in their briefs that the conduct of the latter involved "minor matters," it is to be observed that the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office—the attempt thus to influence support of such candidate by the pupils and through them by their parents—introduces into the school questions wholly foreign to its purposes and objects; that such conduct can have no other effect than to stir up strife among the students over a contest for a political office, and the result of this would inevitably be to disrupt the required discipline of a public school. Such conduct certainly is in contravention not only of the spirit of the laws governing the public school system, but of that essential policy according to which the public school system should be maintained in order that it may subserve in the highest degree its purposes.

For the reasons above stated, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

193 Cal. 506

STUCKENBRUCK v. BOARD OF SUP'RS OF SAN JOAQUIN COUNTY et al.

(Sac. 3563.)

(Supreme Court of California. May 1, 1924.)

1. Health 🔑4—Health district with county boundaries held not invalid.

The fact that a health district, organized under St. 1917, p. 791, with the same boundaries as a county in effect superimposed upon the county a public corporation, *held* not to render the district invalid; the functions to be performed by it being essentially different from those of the county.

2. Health 🔑4—Legislature may organize health districts.

It is within the power of the Legislature in the exercise of health and police powers to provide, as in St. 1917, p. 791, for the organization of health districts.

3. Health 🔑4—Health district having same boundaries as county held not invalid as requiring two sets of officials for same duties.

The organization of a health district under St. 1917, p. 791, having the same boundaries as a county, *held* not to so provide for two sets of officials within the district exercising the same functions as to render it invalid; the duties of such officials being essentially different.

In Bank.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Suit by E. G. Stuckenbruck against the Board of Supervisors of the County of San Joaquin and others. Judgment for defendants, and plaintiff appeals. Affirmed.

P. H. Johnson, of San Francisco, for appellant.

Daniel V. Marceau, of Stockton, for respondents.

RICHARDS, J. This appeal is from a judgment of the superior court of the county of San Joaquin denying the right of the plaintiff to an injunction restraining the defendant board of supervisors of said county from proceeding with the levy and collection of a certain tax upon the property of taxpayers within the exterior boundaries of said county. The tax which it was sought to have imposed and collected was based upon certain proceedings for the formation and functioning of a health district, undertaken pursuant to an act of the Legislature, approved May 21, 1917, entitled, "An act to provide for the formation, government, organization, operation," etc., "of local health districts," etc. Stats. 1917, p. 791. The said act provided that local health districts may be organized, incorporated, and managed as provided in said act and may exercise the powers therein granted or necessarily implied; that such districts may include incorporated or unincorporated territory or both in any one or more counties, provided the territory of each district consists of contiguous parcels and that no municipal corporation is divided. The act then proceeds to provide the method for the formation of such district through the presentation to the board of supervisors of the county in which said district or portion thereof is situated, signed by registered voters in a certain proportion to the number of votes cast for Governor at the last general election. If an incorporated city or town is to be included in any such district, the governing body thereof shall by resolution request the inclusion of the city or town within the proposed health district. The petition or petitions shall set forth and describe the boundaries of the district, and after certain posting and publication of notices the matter of the granting or denial of such petition shall come before the board of supervisors for hearing, at which time the said board shall determine whether the public necessity or the welfare of the inhabitants of the proposed territory requires the formation of such district, and if it so appears to the board it shall enter an order so declaring and shall further by its said order establish the said district as a "local health district." The county clerk shall thereupon file a certified copy of said order with the secretary of state, which official shall within 10 days thereafter issue and deliver to the said county clerk a certificate showing that the said local health district has been duly formed under the provisions of said act. Thereupon the board of trustees for the newly formed district shall be appointed as provided in said act and shall proceed to function, and in so doing shall exercise the powers specifically designated under the terms of said act. For the carrying into effect of said enumerated powers the board of trustees of the districts shall annually furnish to the board of supervisors of the county or counties in which such district or portion thereof is situated an estimate of the amount of money necessary for the exercise of its purposes and powers for the next ensuing fiscal year; whereupon it shall be the duty of the said board or boards of supervisors to levy and proceed with the collection of a special tax upon all of the property within such district sufficient in amount to effectuate such purposes. Pursuant to the foregoing provisions of said act of 1917, a local health district, the exterior boundaries of which were coterminous with the exterior boundaries of San Joaquin county, was formed and proceeded to function up to the point of procuring the board of supervisors of the county of San Joaquin to proceed with the levy and collection of the special tax requisite for its activities. Whereupon this action to enjoin the board of supervisors from proceeding further with the levy and collection of such tax was commenced and prosecuted by the plaintiff herein, a taxpayer of said county subject to such tax.

[1, 2] The plaintiff in said action conceded in the trial court, and concedes here, that in so far as the formation of the district was concerned the proceedings therefor were conducted in conformity with the terms of said act; but it was his contention there, and is also here upon this appeal, that in attempting to create a health district having the same identical boundaries as the county within which it was sought to be formed the board of supervisors of said county acted beyond its powers, since the effect of its attempted action under the terms of said statute was to superimpose upon the county of San Joaquin a public corporation exercising powers and duties which were already wholly covered and exercised by the county itself under the acts governing its formation. We are unable to agree with that conclusion for the following reasons: While it is true that the boundaries of the said local health district are identical with the boundaries of the county of San Joaquin, no objection can be found within the terms of the act of 1917 for the fixation of the boundaries of such a district at an extent of area which shall be less than or equal to or greater than that bounded by the exterior lines of any one or more counties of the state of California. In point of fact, both county and municipal boundary lines may be disregarded in the formation of such health district; the former by the action of those whose petition initiates, and whose official sanction creates such district; the latter by the consent of the governing bodies of the municipalities which may lie within the exterior boundaries set for the district by those who form it. It was the evident intent of the Legislature in providing by this act for the organization of health districts throughout the state of California that county and municipal boundaries might not be considered in their formation; and this brings us to the second point to be discussed, which is that the Legislature in the adoption of the act of 1917 was engaged in the exercise of those health and police powers which it has exercised in the formation and organization of irrigation, reclamation, and drainage districts, and for the government and control of these, not under the narrower form of municipal, or even county government, but upon a district plan by which they would be constituted state or governmental agencies for the accomplishment of the purposes for which they were designed. The power of the state to exercise the powers of legislation was exhaustively considered by this court in the case of In re Madera Irrigation District, 92 Cal. 296, 318, 28 Pac. 272, 276 (14 L. R. A. 755, 27 Am. St. Rep. 106), where this court said:

> "Whenever a special district of the state requires special legislation therefor, it is competent for the Legislature, by general law, to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as, in its judgment, are proper to be exercised within and for the benefit of such district. Being created for the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge. The powers committed to a public corporation organized for the administration of a public park, or for the government of a levee district, or for the control of the police department, need be only such as are peculiarly appropriate to such organizations."

The principles above laid down have been generally adopted and applied in the organization and government of the increasing number of irrigation, reclamation, drainage, and sanitary districts throughout the state of California, and as to their applicability to the formation, functioning, and maintenance of health districts of the sort contemplated by the act under review we entertain no doubt. In the comparatively recent case of Pixley v. Saunders, 168 Cal. 152, 141 Pac. 815, the subject of the formation of a sanitary district within an area of which a municipal corporation exercising certain powers of sanitation had come to form a part, this court held that the matter of sanitation, which is merely one of the subjects within the general health powers of the state, was not a municipal affair within the inhibitions of sections 12 and 13 of article 11 of the state Constitution, but fell within that class of public purposes such as irrigation and reclamation, which the Legislature had undoubted authority to commit to governmental agencies through general laws. In that case, also, this court considered the case of Petition of Sanitary Board of East Fruitvale Sanitary District, 158 Cal. 453, 111 Pac. 368, upon which the appellant herein chiefly relies, and pointed out that the question as to the power of the Legislature to provide a single and comprehensive scheme of sanitation over an area embracing both incorporated and unincorporated territory was expressly reserved from consideration in the East Fruitvale Case.

[3] The argument of the appellant herein that the effect of the act of 1917 is to permit the formation of a health district having the same area and exercising the identical powers of a county would be to create two sets of officials exercising the same powers, and

hence likely to cause duplication, confusion, and impose needless burdens upon the taxpayer, would seem to find sufficient answer in the fact that, as the record herein discloses, the powers to be exercised by the local health district in the instant case differ materially from and are much broader in their scope than those which would be exercised by the county officials of the county of San Joaquin. Perhaps the most vital difference between these two sets of powers consists in the fact that under the county government act affecting the county of San Joaquin the health regulations of the county have no application to incorporated cities and towns, of which there are several in that county, while under the act of 1917 a health district when formed may, with the consent of the governing bodies of such cities and towns, acquire jurisdiction to operate within as fully as without their boundaries.

The appellant makes the further contention that the act in question is unconstitutional for the several reasons stated in his application herein. Practically every question discussed by the appellant in urging these objections to the constitutionality of said act was discussed and passed upon adversely to the appellant's contention in the case of In re Madera Irrigation District, supra, on the authority of which we hold the constitutional objection of appellant to said act to be without substantial merit.

The judgment is affirmed.

We concur: MYERS, C. J.; WASTE, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

193 Cal. 491

PEOPLE v. REID. (Cr. 2598.)

(Supreme Court of California. April 29, 1924.)

1. Criminal law 🔑433—Context of defendant's letters held to sufficiently show writing after crime.

Undated letters of defendant *held* sufficiently shown by their context to have been written after the crime, relative to admissibility.

2. Criminal law 🔑442—Failure to call recipient of letters held to go only to weight of evidence of time of writing.

That the prosecution did not call the recipient of undated letters from defendant—by their context indicating almost certainly that they were written after the crime—to fix definitely their date, did not render them inadmissible, but merely went to the weight of the evidence of their having been written after the crime. Code Civ. Proc. § 2061.

3. Homicide 🔑311—Requested instruction as to determining penalty objectionable as making jury's discretion arbitrary.

Requested instructed *held* objectionable as making arbitrary the jury's discretion in determining penalty to be imposed on a verdict of first degree murder.

4. Homicide 🔑311—Instruction as to jury's discretion in fixing punishment for first degree murder held correct.

Instruction as to jury's discretion in determining penalty in case of verdict of first degree murder *held* a correct statement of the law.

5. Homicide 🔑237—Conviction supported, as against defense of insanity.

Evidence *held* to support a verdict of first degree murder, carrying the death penalty, as against defense of insanity.

6. Homicide 🔑237—Morphine addict not necessarily insane.

That defendant at the time of the killing was a morphine addict is not conclusive that he was at the time insane.

7. Criminal law 🔑48—Showing required under defense of insanity.

Defense of insanity requires defendant to show that at time of crime he was so mentally deranged that he was not conscious of the wrongful nature of his act and did not know it was criminal.

8. Homicide 🔑270—Question for jury on prosecution for killing in robbery, under defense of insanity, stated.

Killing in the attempt to commit a robbery being, under Pen. Code, § 189, murder, the law superadding the intent to kill to the intent to commit the robbery, the question for the jury in such a case, under the defense of insanity, is whether defendant at the time was so mentally deranged as not to know that the act of robbing was wrongful and criminal.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeves, Judge.

Clarence Reid was convicted of first degree murder, and appeals. Affirmed.

E. M. Torchia and Charles Matthews, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

LENNON, J. Defendant was accused in an information filed in the superior court of the county of Los Angeles with the crime of murder, and upon the trial the jury found him guilty of murder in the first degree and fixed the penalty at death. From that judgment defendant appeals.

The murder occurred in the rear end of a trunk store, located at 419 South Spring street in the city of Los Angeles, at about 6 o'clock p. m. on January 21, 1923. There were present in the store at the time six persons, Munson, Safady, Mason, Ingham, Charles Weingarten, the deceased, and David Weingarten, brother of the deceased and proprietor of the business. The defendant, accompanied by one Lawrence McMullen, entered said place of business through the front door, which was slightly ajar. As they entered the store they were met by David Weingarten, who thought they had come on business. Both the defendant and his companion were carrying guns. The defendant commanded David Weingarten to "stick 'em up" and forced him to walk back to the rear of the store where the safe was located. Charles Weingarten seized the defendant's arm and held it up. While in that position the gun in the defendant's hand went off, the bullets striking the ceiling. With his other hand the defendant reached into his pocket, procured another gun, and fired straight at the deceased, killing him. The shuffling and the shooting all occurred in the space of a few seconds. After the shooting the defendant and his companion fled from the store. Jumping on the running board of a moving automobile, the defendant succeeded in making his escape. In his flight the defendant had dropped the hat he was wearing in the store. Meeting the former owner of the hat that evening about 7 o'clock and knowing that the initials of the former owner were in the hat, he told the owner that he had "bumped off" a man and for the owner of the hat to "watch out." At the trial the defendant was positively identified by an eyewitness to the shooting as one of the persons who had participated in the attempted robbery, and his companion was identified as a workman in an electrical shop just across the alley from the trunk factory where the deceased was shot.

The defendant upon the trial of the case did not deny the killing, but interposed the defense of insanity. He relies for a reversal upon three grounds: (1) The alleged improper admission in evidence of certain letters claimed to have been written by the defendant; (2) the improper giving of a certain instruction to the jury by the trial court and the refusal of the trial court to give a certain instruction requested by the defendant; and (3) the insufficiency of the evidence to warrant a verdict of murder in the first degree carrying the death penalty.

[1] At the trial of the case certain letters, claimed by the prosecution to have been written to a fellow prisoner, Herbert Wilson, by the defendant after his arrest and during his incarceration in the county jail, were introduced in evidence. For the purpose of laying a foundation for the introduction in evidence of these letters, two undisputed exemplars of the handwriting of the defendant were introduced in evidence. A handwriting expert was then called to the stand, who testified that the letters sought to be introduced in evidence had been written by the same person who had written the exemplars. The jailer of the county jail where the defendant was incarcerated then testified that he had received the letters in question, from time to time, from one Herbert Wilson, a prisoner in the county jail. This witness testified that he had received the letters during the time the defendant Reid was incarcerated in the county jail and that he had received the last of these letters but a few days before the trial. The letters were introduced in evidence by the prosecution for the purpose of showing consciousness of guilt on the part of the defendant. In behalf of the defendant it is argued that the evidence adduced by the prosecution does not positively show that the letters were written while Reid was in jail upon the charge of murder and that the letters could be material only if they had been written after the commission of the murder. In this behalf it is contended that the letters themselves are not dated, and that inasmuch as the defendant had been convicted in October, 1922, of the crime of robbery, the letters may have been written during the period of time he was incarcerated for that offense. This argument is negatived by the context of the letters, which points with almost unerring certainty to the fact that they were written and delivered to Wilson after the homicide for which the defendant was being tried had been committed. Throughout the series of letters are to be found declarations of the defendant susceptible of no other reasonable construction than that they referred to the fact that the defendant was implicated in the killing of the deceased. Thus: (1) "Herb, I know I will hang if I go to trial, but I will not reach there if I got half a chance. * * * (2) "I might plead guilty if I get a guarantee of life." (3) "I am facing the rope now." And (4) "They have got seven eyewitnesses against me." In short, the letters speak for themselves.

[2] It was not necessarily incumbent upon the prosecution to call to the stand Herbert Wilson, the fellow prisoner of the defendant, and the person from whom the jailer had procured the letters, in order to more definitely fix the time of the writing of the letters. True, as is contended, the prosecution if it had called the prisoner Wilson might have been able to have fixed definitely the date of the writing and the receipt of the letters. But the fact that the prosecution did not see fit to do so did not thereby render the letters inadmissible in evidence. Whatever objection might have been made upon this score could only have gone to the weight of the evidence as to whether or not the defendant had in fact written the letters to Wilson after the commission of the homicide. The objection that more satisfactory evidence might have been offered through the medium of the testimony of Wilson as to the date of the letters goes only to the weight of the letters as evidence. Of course, the defense would have been entitled to an instruction to the jury, and doubtless one

would have been given had it been requested, to the effect that in weighing this evidence the jury should be guided by the provisions of section 2061 of the Code of Civil Procedure, which provides that—

> "If weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

[3] The trial court did not err in refusing the requested instruction of the defendant dealing with the discretion of the jury in fixing the penalty of murder in the first degree, which was as follows:

> "In determining the question whether or not the defendant, Clarence Reid, shall suffer death or confinement in the state prison for life, you must exercise your own discretion, and with this power of discretion the court cannot interfere. You are left entirely free to act according to your own judgment."

The requested instruction, had it been given to the jury, would, in effect, have charged the jury that their discretion in determining the penalty to be imposed upon a verdict of murder in the first degree was an arbitrary discretion. That this is not the law in California is thoroughly settled by a number of decisions, including the recent decisions of People v. Wolfgang (Cal. Sup.) 221 Pac. 907, and People v. Rogers, 163 Cal. 476, 484, 126 Pac. 143.

[4] Neither did the trial court err in its instruction to the jury on the same subject. That instruction is as follows:

> "If the jury in this case should find the defendant guilty of murder in the first degree, and they also shall find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The jury in a criminal case for murder is vested with a discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree but does not show some extenuating fact or circumstances, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment."

In the case of People v. Wolfgang (Cal. Sup.) 221 Pac. 907, substantially the same instruction was given by the court and there held to be a correct exposition of the law.

[5-8] We have given careful consideration to the contention that the evidence is insufficient to warrant a verdict of murder in the first degree carrying the death penalty. A review of the evidence upon that phase of the case which appertains to the mental condition of the defendant satisfies us that the evidence is sufficient to support the verdict rendered. The fact that the defendant was a morphine addict at the time of the killing is not conclusive evidence that he was at that time insane. Where the defense of insanity is interposed, the burden is upon the defendant to support that defense by showing that he was at the time of the commission of the crime so mentally deranged that he was not conscious of the wrongful nature of the act with which he was charged and did not know that it was criminal. People v. Bundy, 168 Cal. 777, 145 Pac. 537. Where the killing is done in the perpetration or attempt to perpetrate certain felonies, including that of robbery, the act itself is prima facie evidence of premeditation, and the crime is made murder in the first decree regardless of whether or not the defendant had the intent in the first instance or at the time of the shooting to kill. Pen. Code, § 189; People v. Manriquez, 188 Cal. 602, 206 Pac. 63, 20 A. L. R. 1441; People v. Denman, 179 Cal. 497, 177 Pac. 461; People v. Hadley, 175 Cal. 118, 165 Pac. 442; People v. Witt, 170 Cal. 104, 148 Pac. 928; People v. Raber, 168 Cal. 316, 143 Pac. 317; People v. Bostic, 167 Cal. 754, 141 Pac. 380; People v. Milton, 145 Cal. 169, 78 Pac. 549. In short, whenever one in doing an act with the design of committing a felony takes the life of another, this is murder. The law in such a case superadds the intent to kill to the original intent to commit the felony. People v. Olsen, 80 Cal. 122, 22 Pac. 125; People v. Doyell, 48 Cal. 85, 94. The question therefore before the jury, in view of the defense interposed, was whether or not the defendant at the time of the commission of the crime of robbery was so mentally deranged as not to know that the act of robbing the store was wrongful and criminal. The sum and substance of the testimony of Dr. Bowers and Dr. Parkin, medical experts introduced in behalf of the defendant, was that the defendant was mentally below par. The testimony of the doctors as to what would be the condition of a morphine addict who had run out of morphine and given himself a shot of three grains of cocaine is based solely upon the testimony of the defendant that this is what had occurred. The testimony of the defendant was impeached generally by proof of his former conviction of a felony, and it may well have been that the jury did not believe his testimony concerning his use of narcotics and their effect upon him on the day of the killing. It is also to be noted that when Dr. Parkin was asked a hypothetical question setting forth the facts of the robbery in detail and including the fact of the taking of the cocaine by the defendant as to whether or not, in his opinion, the defendant knew at the time of the robbery what he was doing, the doctor's answer was that he did know.

Opposed to the testimony in behalf of the defendant concerning the question of whether or not he was conscious of the nature of the act he was committing is the testimony of the eyewitnesses to the killing, who testified to the acts and conduct of the defendant at the time of the robbery. This testimony clearly shows that the defendant at that time had reasoning capacity and was aware of the nature of the act he was committing. In addition to all this there is the admitted flight of the defendant from the scene of the crime, coupled with the further fact that later in the evening when the defendant met the former owner of the hat which he, the defendant, had dropped in the store at the time of the robbery, he told the former owner of the hat to "watch out" as he, the defendant, had "bumped off" a man. The jury, with this evidence before it, doubtless came to the conclusion, and correctly, in our opinion, that the defendant at the time of the commission of the crime was not so mentally deranged as to come within the protection of the law upon the ground of insanity. Finally, it may be said, as is indicated by our discussion of the facts of the case, that upon the question as to the mental condition of the defendant at the time of the killing there was a substantial conflict in the evidence. The verdict will not be disturbed.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; RICHARDS, J.

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193 Cal. 498

FELT v. WAUGHOP, City Clerk, et al.
(S. F. 11133.)

(Supreme Court of California. April 30, 1924.)

1. Mandamus 🔑23(2)—Elector and taxpayer is person "beneficially interested" within statute as to list of candidates.

A petition for a writ of mandate to compel city clerk to certify a correct list of candidates for office of city attorney sufficiently shows that petitioner is "beneficially interested," within Code Civ. Proc. § 1086, where it alleges that petitioner is an elector and taxpayer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beneficially Interested.]

2. Municipal corporations 🔑138—City attorney required to be formally admitted to practice.

Long Beach Charter, art. 18, § 204, providing that candidates for city attorney must be qualified to practice in all state courts for at least five years before election, requires formal admission to practice by an order entered by a court possessing requisite jurisdiction, and applicant must have taken prescribed oath requisite to entitle him to practice law in state courts.

3. Mandamus 🔑74(3)—Will lie to compel city clerk to prepare ballots and list of candidates as governed by real facts.

While Long Beach Charter, § 75 et seq., confers no discretion on city clerk in preparing ballots and list of candidates other than to determine whether nominating papers have been signed and filed as prescribed in charter, or whether signers are qualified electors, and he has no duty to ascertain whether candidates so nominated are qualified to hold and exercise office, when real facts have been ascertained and determined by a competent tribunal, a writ of mandate will lie to compel city clerk to prepare ballots and list of candidates as governed by such facts, since jurisdiction under Const. art. 6, § 4, to issue writ of mandate carries with it authority to ascertain whether facts exist upon which its issuance is to be predicated.

4. Mandamus 🔑74(3)—Will lie to compel city clerk to omit candidate's name from ballot, where disqualified from holding office.

Where a candidate for office of city attorney was disqualified from holding such office by law, though time had passed within which city clerk might in compliance with charter deliver to city council a correct list of candidates, court might, under Const. art. 6, § 4, by writ of mandate, compel city clerk and council to omit candidate's name from ballots and from list of candidates to be published in proclamation of election.

In Bank.

Application by A. L. Felt for writ of mandate to Harry C. Waughop, City Clerk of Long Beach, and others. Writ granted.

Anderson & Anderson, of Los Angeles, and J. J. Hays, of Long Beach, for petitioner.

Burr A. Brown, City Atty., of Long Beach, for respondent.

MYERS, C. J. Petitioner brings this proceeding as a resident, elector, and taxpayer of the city of Long Beach to procure a writ of mandate against the respondents respectively, city clerk and members of the city council of said city, to compel the city clerk to certify a new and correct list of candidates for the office of city attorney of said city to be voted for an election to be held therein on the 13th day of May, 1924, by including in said list the names of two candidates who have complied with all the requirements of the provisions of the city charter relating to the signing and filing of nomination papers and by omitting from said list the name of a third candidate, Burr A. Brown, who has likewise complied with all of said requirements. Petitioner prays that said writ of mandate also require the city clerk to cause to be correctly prepared, printed, and delivered to the election officers correct official ballots to be used in said election in voting for city attorney by including thereon the names of said two candidates and omitting therefrom the name of said third candidate; also commanding said city clerk to cause to be correctly printed and mailed to each qualified elector sample ballots made up in conformity therewith. Petitioner also prays that the writ of mandate command the city council of said city to cause to be published its election proclamation containing a correct list of candidates for city attorney as above indicated.

Section 69 of article 7 of the charter provides that within a specified time prior to the signing of the nominating petition of any candidate the candidate shall take an oath of affirmation therein prescribed, and the same shall remain as a matter of record in the office of the city clerk. Section 70 provides that the name of a candidate shall be printed upon the ballot when a declaration of candidacy has been filed by the candidate and a petition of nomination has been filed in his behalf "in the manner and form and under the conditions hereinafter set forth." Section 71 prescribes the form of the petition of nomination, and provides that it shall contain not less than 25 or more than 35 signatures of qualified electors. Section 73 prescribes the qualifications of such electors. Section 74 provides that every petition of nomination must be subscribed and sworn to at the office of the city clerk before him or one of his deputies. Section 75 provides that on the thirty-fifth day before the day of election the city clerk "shall ascertain whether the signers are duly qualified as hereinbefore provided"; and, if 25 or more signers are found qualified, then the city clerk shall so certify and shall file the petition. Then follow provisions respecting supplemental nominating petitions in the event the first be found to have been insufficiently signed. Section 78 provides for the certifying of the list of candidates to the city council by the city clerk and the publication of the list as so certified, by the city council, in the proclamation calling the election. Section 79 provides for the printing of ballots, and that "the ballots shall contain the list of names and respective offices as published in the proclamation aforementioned," and prescribes the form thereof. Section 80 provides that the city clerk shall print and mail sample ballots identical with the ballot to be used at the election, except as to quality and color of paper and numbering.

[1] The ground upon which petitioner seeks the removal of the name of the one candidate from the certified list of candidates and from the ballot is found in section 204 of article 18 of the charter, which provides that the city attorney "must be qualified to practice in all the courts of the state of California, and must have been so qualified for at least five years next preceding the day of his election." It is alleged in the petition herein that the two candidates above referred to are so qualified, and that the third is not; it being alleged that the third candidate was not admitted to practice in the courts of this state or in any way qualified to practice therein prior to April, 1921. Petitioner alleges that he has made demand upon the city clerk to certify to the city council a correct list of candidates for city attorney; that the clerk has refused to do so, and that, since the demand, the clerk has certified a list to the city council including the name of the third candidate who is claimed to be disqualified. Petitioner has also demanded that the city clerk cause to be printed and mailed to the voters sample ballots containing a correct list of candidates, and to be prepared, for the election, official ballots containing such correct list, and that the clerk refuses so to do, and threatens to cause said ballots to be printed containing the same of said disqualified candidate. Petitioner also alleges facts from which it is made to appear that a demand upon the city council under the circumstances alleged would be unavailing. In response to an order to show cause herein respondents have appeared and filed a demurrer and answer. The demurrer makes the point that the plaintiff has not legal capacity to sue, in that he is not a party beneficially interested as required by section 1086 of the Code of Civil Procedure. A similar question was considered and determined by the District Court of Appeal in the case of Conn v. City Council of the City of Richmond, 17 Cal. App. 705, 710, 121 Pac. 714, 719. We are satisfied with the conclusion there reached, and hold in accordance therewith that petitioner herein has such a beneficial interest in the outcome of this proceeding as to entitle him to maintain this action.

The other ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action, and this will be considered in connection with the merits of the case. The answer filed tenders certain issues of fact, but, in so far as the determination of such issues would present an obstacle to the decision of this case upon its merits, they have been eliminated by stipulations entered into by the respective counsel at the hearing hereof.

[2] Respondents admit that Brown, the third candidate, was not in fact admitted or licensed to practice law in the courts of this state prior to April, 1921. It follows from this that he is not qualified under the terms of the charter to hold and exercise the office of city attorney of that city. By way of affirmative defense in their answer respondents allege that said Brown was duly admitted, qualified, and licensed to practice law in all courts of the state of Iowa in 1911, and that ever since said time he has

possessed the necessary intellectual and moral qualifications to entitle him to be admitted to practice law in the courts of this state. We are satisfied that the requirement of the charter that "he must be qualified to practice in all courts of the state of California, and must have been so qualified for at least five years next preceding the day of his election" requires something in addition to the mere possession of the intellectual and moral qualifications above mentioned. It requires that in addition thereto he must have been actually and formally admitted to practice by an order entered by a court possessing the requisite jurisdiction, and must have taken the prescribed oath requisite to entitle him to practice law in the courts of this state. This conclusion finds some support in the case of State v. Marks, 30 La. Ann. 97, cited and quoted from in the recent case of People v. La Barre (Cal. Sup.) 224 Pac. 750. We thus have presented the case of a candidate for a municipal public office who has duly performed and complied with all of the requirements of the city charter requisite thereto, but who is in fact and in law disqualified from holding or exercising the office to which he is seeking to be elected.

[3, 4] It is apparent under the provisions of the charter that the city clerk is vested with no discretion other than to determine the question of fact as to whether or not the nominating papers have been signed and filed in the manner prescribed in the charter, and the further question of fact as to whether or not the signers of the nominating petitions are qualified electors. Those facts must be determined by him from an inspection and investigation of the nominating papers thus presented to him, in connection with the register of voters and other public records. He is not vested with the authority or burdened with the duty of ascertaining or determining, either as a matter of fact or as a matter of law, whether or not the candidates who thus offer themselves are qualified to hold and exercise the offices which they are respectively seeking. Counsel on both sides in effect so concede. It would seem, therefore, on the face of the record to be the plain duty of the city clerk to do those things which he has done and is proposing to do, and to refrain from doing those things which petitioner is here seeking to compel him to do. Upon the face of the record as presented to him there was nothing for the city clerk to do but that which he has done and that which he is proposing to do. But, when the real facts shall have been ascertained and determined by a competent tribunal, having jurisdiction so to do, to be different from the apparent facts as presented to the city clerk by his records, his duty in the premises will be governed by the real facts so ascertained and determined. In the case of Bordwell v. Williams, 173 Cal. 283, 159 Pac. 869, L. R. A. 1917A, 996, Ann. Cas. 1918E, 358, this court issued its writ of mandate to compel a county clerk to omit from the ballots to be prepared by him the name of a candidate who had complied with all of the requirements of the law necessary to place his name upon the ballot as such candidate, but who desired and had attempted to withdraw his candidacy for the nomination. In that case, as in this, it was the plain duty of the election officer, under all of the statutory provisions, to cause said name to be printed upon the ballots. It was argued there, as here, that the duty was mandatory upon the clerk to print the names of candidates appearing upon the certified list transmitted to him by the secretary of state, and upon that point this court said:

> "Undoubtedly the county clerk acts ministerially, and the information upon which he so acts is that received by him from the secretary of state. But it does not follow that the certificate of the secretary of state must finally conclude everyone with respect to the form and contents of the ballot."

This court there referred to section 27 of the Primary Election Law (St. 1913, p. 1408) as authority for its action therein. We do not find in the Long Beach charter any similar or equivalent provision, but so far as we are advised it has not been held by any court that the presence of such an express statutory provision or its equivalent is essential to the jurisdiction of a court of general jurisdiction to issue a writ of mandate in such a case as this. The contrary was expressly held by the Supreme Court of Nebraska in Gorder v. Connor, 56 Neb. 781, 77 N. W. 383, 385. The jurisdiction of this court to issue the writ is conferred upon it by the Constitution. Article 6, § 4. The jurisdiction to issue the writ carries with it the authority to ascertain and determine whether or not the facts exist upon which its issuance is to be predicated. Conceding, without deciding, that the mode and manner of exercising this jurisdiction is subject to regulation by the Legislature, it follows that the writ will issue herein only "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office. * * *" The fact is admitted herein that the candidate, Brown, has not been licensed or admitted to practice in the courts of this state for a period of five years next preceding the date of the election. We conclude therefrom that he is disqualified to hold and exercise the office of city attorney, and is therefore not qualified to be a candidate for that office. These facts thus determined render it the duty of the respondents herein, specially enjoined by law, to omit his name from the ballots and from the list of candidates to be published in the proclamation of election. The time has passed within which the city clerk may, in compliance with the charter provisions, make and deliver to the city council a correct list of candidates. The necessity of omitting this certificate, however, presents no greater obstacle to the issuance of the writ than did the fact that the sample ballots containing Mr. Bordwell's name had already been printed and circulated at the time of the issuance of the writ in the Bordwell Case. Some of the reasons why the writ should issue in a situation such as this are suggested in the following language from the opinion in the Bordwell Case:

> "This interpretation of the statute is in accord with the fundamental purpose of all election laws, i. e., to enable the voters to exercise a free, orderly, and intelligent choice. We can conceive of no good reason why a ballot should contain the name of a person who is not in fact a candidate for nomination, even though he may once have taken the steps which entitle him to become such candidate. The presence of his name (like that of a candidate who has died) could operate only to deprive uninformed electors of their votes, to the injury of one or more of the actual candidates, and to the possible perversion of the true popular will. We are not prepared to hold that the law requires this result. To give to the certificate of the secretary of state the conclusive effect contended for by the respondent would be to elevate form above substance. We believe, on the contrary, that the statute contemplates a submission to the electors of a choice between persons who are candidates in fact, and that where, from any cause, the ballots do not present that choice, the courts are authorized, under section 27 of the act, to direct the officials having control of the preparation of the ballots to prepare them in proper form."

The demurrer is overruled and it is ordered that a peremptory writ of mandate issue as prayed for herein, omitting therefrom the provision requiring the city clerk to certify a new and correct list of candidates to the city council.

We concur: LENNON, J.; WASTE, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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66 Cal. App. 252

Ex parte TAYLOR. (Cr. 1090.)

(District Court of Appeal, Second District, Division 2, California. March 19, 1924.)

Habeas corpus 🔑85(1)—Evidence held not to show that stolen watch was received with guilty knowledge.

On application for writ of habeas corpus by petitioner detained for receiving stolen goods, under Pen. Code, § 496, evidence before committing magistrate *held* not to show that a stolen watch received by petitioner was taken with guilty knowledge.

Application for writ of habeas corpus by Dagmar E. Taylor, directed to the sheriff of Los Angeles county, to secure release of petitioner upon charge of receiving stolen goods. Petitioner discharged.

S. S. Hahn, of Los Angeles, for petitioner.
C. W. Ostrom, of Los Angeles, for respondent.

WORKS, J. Petitioner is detained by the sheriff of Los Angeles county under commitment made pursuant to an order binding her to answer to a charge of receiving stolen goods. Petitioner contends that she is imprisoned without probable cause. Section 496 of the Penal Code fastens the crime of receiving stolen goods upon "every person who for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen." The point made by petitioner is that she was committed without evidence showing that an article received by her, a certain watch, was taken with guilty knowledge.

The evidence before the committing magistrate showed that the watch in question, along with a considerable number of other articles of jewelry, was taken by robbers from a manager of a "loan association." Upon an occasion after the robbery three peace officers, Cahill, Peoples, and Sweesey, called upon petitioner at the apartment which was her place of residence. The testimony of these men, given in the order in which their names are set forth above, contains the only evidence bearing upon the point presented by petitioner. Cahill was asked who conducted the conversation with petitioner which ensued upon their call at her apartment. He answered:

> "I was the one that done the first questioning."

He then proceeded:

> "Deputy Sheriff Peoples was immediately present. I dare say Mr. Sweesey was in the other room at the time. * * * I asked the defendant if she had any jewelry that had been left her by Jimmie Blanton, and she said, 'What is it all about? Tell me something.' And I said, 'Well, you are evidently very conversant with what we are trying to get you to help us in.' I said, 'We are looking for the jewelry that you have in your possession,' and I said, 'The easier way is the better way, and we would solicit at this time your co-operation and expedite matters, if the jewelry is here, and save us the trouble of going about and searching for it.' I said, 'We know, or feel that we know, where Jimmie is.' I said, 'Did you have a telegram from San Francisco with regard to his coming to-day?' 'Well,' she said, 'I know they are out of the city and due today.' I said, 'Then, what became of the jewelry that Jimmie gave you?' She said, 'It is not here.' Then I said, 'Now, I am going to appeal to you again to lend us your co-operation.' I said, 'We are certainly working diligently on this case, and we want to expedite matters, and if you have

the jewelry hidden in this house, kindly turn it over and cause us less trouble in searching.' She said, 'No; it is not here.' Then I said, 'Will you take us to where it is? Is it in a safety deposit box?' 'Well,' she said, 'I am not saying.' I said, 'Then what is Jimmie to you?' She said, 'He is my husband.' And I said, 'Then do you expect him today?' And she said, 'Well, I am expecting him.' * * * Peoples was present during that conversation. Then we started to look through the dresser drawers. I said, 'If you don't go about and do this,' I said, 'we will go ahead and look for the jewelry in the drawers, that meeting with your approval.' And she said, 'Go ahead.' * * * Q. Now, was Officer Sweesey present when you asked permission to search the house? A. Yes; he had come in at that time."

The officers then proceeded with a search, and Cahill found a small bar pin which, it is to be observed, was not one of the articles of jewelry taken by the thieves from the manager of the loan association. Cahill further testified:

> "Mr. Sweesey at this time was looking through the left and upper drawer of the same dresser, and I turned to the defendant and asked her if that little bar pin was hers. She said, 'Yes; that is mine.' I said, 'Where did you get it?' She said, 'From a friend.' Then I was attracted by Mr. Sweesey asking a question. He had raised a little watch out of the drawer and asked the defendant if that was her watch. * * * and she stated, 'Yes.' Now, that was all the jewelry that we were able to find."

Peoples testified that he talked with petitioner after Cahill's conversation with her. After some questions about other matters, Peoples further said:

> "Mr. Sweesey was present at one conversation, rather through the latter part of it. I was talking with her before, and I said, 'Won't you please tell me where those diamonds are?' I said, 'I know you have got some rings and diamonds, and I would like to get them.' She said, 'I don't know anything about them.' I said, 'Don't you think it would be better if you tell us and clear this matter up and save us a lot of trouble?' She said, 'I am not telling nothing.' Just then Mr. Sweesey came up, and he started talking about the watch, so she said, 'In just a few moments, Mr. Peoples, I would have told them.'"

Sweesey testified very briefly. He said upon the subject of present interest:

> "The only conversation I had I picked up the watch and asked who that belonged to, and I do not remember the answer. * * * I addressed it to the defendant, but I do not remember the answer."

Respondent contends that it may be inferred, with reason, from certain answers and remarks which petitioner made in response to the inquiries of the officers, that she received the watch with knowledge of the fact that it had been stolen. The utterances of petitioner to which this effect is ascribed are these:

> "What is it all about? Tell me something;" "It is not here;" "No, it is not here;" "Well, I am not saying;" "I don't know anything about them;" and "I am not telling nothing."

It is asserted that, as the watch was in fact part of the stolen jewelry, petitioner's answers, being evasive and calculated to deceive, as it is claimed, were such as to justify an inference of guilty knowledge on her part as to that particular article. We think that such an inference cannot properly be drawn from her statements. Cahill, who first talked with her, spoke only of jewelry in general. Peoples, the next inquisitor, was more specific and referred to diamonds and rings. The conversation about the watch came later. If the officers had found in petitioner's possession diamonds and rings which were a part of the missing loot, then some tangible question would be presented as to whether petitioner's utterances were so evasive and so calculated to deceive as to justify the inference that her possession of them was coupled with a guilty knowledge. This is not so as to the watch. There was nothing in the remarks and inquiries of the officers which can render her responses applicable to that piece of jewelry, granting that they were evasive and deceitful as to jewelry consisting of diamonds and rings. In addition to all that we have said it is also to be observed that the officers failed to make petitioner acquainted with the fact that they were seeking stolen goods, except in so far as she might have inferred the fact from their conduct. Further, they never told her that there had been a theft, either by Jimmie Blanton or by any other persons. Further still, although the record before us shows that the manager of the loan association was robbed by several men, there is nothing in the evidence to indicate that Blanton was among the lawbreakers or that he had any connection with their criminal act.

Petitioner is discharged.

We concur: FINLAYSON, P. J.; CRAIG, J.

66 Cal. App. 227

KUHN et al. v. DICKEY. (Civ. 4614.)

(District Court of Appeal, First District, Division 2, California. March 18, 1924. Rehearing Denied April 15, 1924. Hearing Denied by Supreme Court May 15, 1924.)

1. Appeal and error ⟹194(2)—Objection for first time on appeal that answer did not deny all allegations of complaint held too late.

Point that many allegations of complaint were not denied in answer, never addressed to the trial court—defendant's counsel at opening of trial stating, without objection, that answer denied each and every allegation of complaint, and trial being on that theory—is too late.

2. Fraud ⟹58(2) — Finding against party charging false representations sustained.

Finding, in action for false representations in sale of restaurant, that defendant did not falsely represent certain things, *held* sustained by his evidence as to what representations he did make, and of the truthfulness thereof, and what representations he did not make.

3. Fraud ⟹45—Evidence of buyer's experience held not pertinent to issue of seller's false representations.

To the issue whether defendant, in sale of restaurant, falsely represented that during the regular sessions of school the business was so great that customers waited outside, testimony that there was no such occurrence while plaintiffs were in possession is not pertinent.

4. Fraud ⟹13(1) — Defendant's representations being true, immaterial whether plaintiffs relied thereon.

The court having found, as authorized by evidence, that the representations made by defendant in the sale of a restaurant were not false, it is immaterial whether plaintiffs in buying relied on the representations.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by A. Kuhn and another against John Dickey. Judgment for defendant, and plaintiffs appeal. Affirmed.

John C. Scott, of Oakland, for appellants.
Ramsey Probasco, of Oakland, and Clarence De Lancey, of San Francisco, for respondent.

STURTEVANT, J. The plaintiffs commenced an action against the defendant to recover a judgment for damages alleged to have occurred by reason of false representations alleged to have been made by the defendant in the sale of a restaurant. The defendant interposed an answer and cross-complaint and asked a judgment for the balance due on two promissory notes evidencing the unpaid balance on the purchase. The trial court awarded the cross-complainant a judgment as prayed for, and the plaintiffs have appealed.

[1] The first point made by the appellants is a contention to the effect that many of the allegations contained in the plaintiffs' complaint were not denied in the answer of the defendant. The contention is advanced at a date that is far too late. When the defendant's answer was interposed, no objection of any kind or nature was made to its form. When the case was called for trial, the attorney for the plaintiffs commenced the trial of the case by reading to the trial court the plaintiffs' complaint. Thereupon the attorney for the defendant stated to the trial court, "We have set up an answer denying each and every allegation of the complaint. * * *" To that statement no objection was made. Immediately thereafter the attorney for the plaintiffs proceeded to call witnesses and propounded questions to those witnesses showing that he was attempting to prove every allegation contained in the complaint. Neither during the presentation of the case for the plaintiffs, nor the presentation of the case for the defendant, do we find a single objection to the effect that any certain issue was not made by the pleadings. In short, between the two covers of the transcript we find no place where such a point was addressed to the trial court.

[2] The second point made by the appellants consists of attacks by them called first proposition, second proposition, third proposition, and fourth proposition, and all of which are attacks on the findings. The trial court found:

> "That it is not true that at said time the defendant with the intent to deceive, cheat or defraud these plaintiffs did falsely represent to them that the business was a good paying business, or that he falsely represented that he had thereat daily sales of from $130 to $180 during all of the time of the regular sessions of the University of California. * * *"

The finding is abundantly sustained by evidence introduced by the defendant. That evidence was to the effect that the defendant represented to the plaintiffs that at times during the regular sessions the receipts were from $130 to $180. The defendant followed that testimony by introducing his books to prove the truth of the representation. He testified that he had not represented that such were his daily receipts during all of the regular sessions.

[3] The trial court found that the defendant did not falsely represent "that during the regular sessions or terms of said University of California the business at said restaurant was so great that the customers thereat so filled the place as to necessitate their standing in line on the outside waiting to be served. * * *" As to whether or no such an incident ever occurred while the defendant was managing the business the plaintiffs tendered no testimony whatever. The testimony tendered by the plaintiffs was to the effect that such an incident did not occur

during the time that they were in possession. Such testimony was not pertinent to the issue on trial.

The third proposition assumes that the trial court found that the defendant represented "that it was a good paying business," "that during the regular sessions of the University the daily receipts from the business were from $130 to $180," and "that during the summer sessions the daily receipts were from $80 to $100"; whereas, the finding of the trial court was that such representations were not false, and, as stated above, the defendant introduced an abundance of evidence to the effect that the representations made by the defendant were not false. The fourth proposition is that the trial court found "that it is not true that plaintiffs did rely upon any representations made by the defendant or that plaintiffs believed that such representations were true."

[4] That finding is also attacked. The defendant introduced evidence to the effect that the plaintiffs, before purchasing, at meal times attended at the restaurant on several different days and on some days twice a day, and remained at the restaurant for considerable periods of time on each occasion; that on two occasions they went through the restaurant making a minute examination of the equipment; and that for some days prior to the purchase they were in the immediate neighborhood making inquiries about and investigating that particular property and similar properties. Moreover, when we consider that the trial court found that the representations made by the defendant were not false, then we must assume that the representations were true, and it becomes immaterial, therefore, whether the plaintiffs acted upon the truthful representations made by the vendor or otherwise.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

66 Cal. App. 281

JARRETT v. NORTON et al. (Civ. 3920.)

(District Court of Appeal, Second District, Division 2, California. March 20, 1924.)

Contracts ⚷41—Evidence held to show written agreement between parties became operative without fulfillment of conditions precedent.

Though written contract between parties, which authorized defendant to sell the personal property of plaintiff on a rancho, leased to defendant, for the joint benefit of both, was not delivered, and it was orally agreed to deliver it to defendant on payment by him to plaintiff of a certain sum, plaintiff by her conduct in permitting defendant to take notorious possession of the rancho *held* to have executed the contract; she having waived payment from defendant as a condition precedent to delivery of instrument.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Pearle H. Jarrett against Willard A. Norton and another. Judgment for defendants, and plaintiff appeals. Affirmed.

James McLachlan, of Los Angeles, and Frank H. Snyder, of Glendale, for appellant.

Ernest E. Nichols, of Los Angeles, for respondent Norton.

D. H. Laubersheimer, of Los Angeles, for respondent Kirk.

WORKS, J. After certain preliminary negotiations, plaintiff and defendant Norton signed an agreement by the terms of which plaintiff leased to Norton a rancho owned by her and upon which she had been residing. The agreement also established a relationship between plaintiff and Norton concerning the live stock and crops then upon and thereafter to be produced upon the property which, if it did not constitute a partnership, authorized Norton to sell and deal in the personal property mentioned for the joint benefit of the two. Although the agreement between the parties was signed, no manual delivery of it was made, and there was a collateral oral understanding that no delivery was to occur until Norton should pay to plaintiff a certain sum of money which by the terms of the written agreement he bound himself to pay upon the "execution and delivery" of the paper. Despite this oral understanding, however, and without the payment of the sum mentioned, plaintiff vacated the rancho immediately after the signing of the written agreement, took up her residence an eighth of a mile distant from it, and permitted Norton to enter into possession of her real property and into the active management of it, as well as into the possession, control, and management of the personal property upon it. Plaintiff's conduct in this regard was influenced by statements which Norton made to her to the effect that he would soon make the payment which was to have consummated the agreement. This he said he would do out of moneys to come from the estate of his mother, who had then recently died in the East. Norton's entry on the ranch was apparently near June 1 of a certain year, the record not being exactly clear on the subject, and he remained there until December of the same year, under repeated promises that he would make the overdue payment as soon as his mother's estate was settled. Plaintiff occupied her new residence the greater part of the summer and was cognizant of what took place on the rancho. Norton's possession was maintained by two men whom he put in charge of the property, and he was frequently on it himself. Through these men, and by his own presence, Norton openly and notoriously conducted the rancho during the period of his possession, and plaintiff had nothing whatever to do with its management. Norton, among other things, cut, every three or four weeks, alfalfa which was growing on the property at the time of his entry and sold it and collected the proceeds. Toward the latter part of the year he sold to defendant Kirk certain cattle, hogs, and turkeys which were on the rancho at the time he took possession.

This action was commenced to recover from both defendants as upon a conversion of the personal property sold by Norton to Kirk. Judgment went for defendants, and plaintiff appeals.

It is contended by appellant that certain of the findings of the trial court are not supported by the evidence, but the disposition of all question as to these findings depends upon the settlement of but one point: Did the written agreement between plaintiff and respondent Norton become operative? If it did, the latter had an undoubted right to make the sale to Kirk. We fail to see why the agreement did not become operative. Appellant demeaned herself toward Norton and toward his rights under the contract exactly as she would have demeaned herself if the payment which was due from him had been made. Norton could have acquired no greater rights under the contract by making the payment than he was allowed by appellant to exercise without making it. We cannot but conclude that the agreement was executed by the acts of appellant. Undoubtedly, she could have agreed expressly to waive the payment due from Norton as a condition precedent to delivery of the instrument. This being so, we are satisfied that the trial court was justified in finding from the evidence that her acts and conduct were the equivalent, under the law, of such an express agreement.

"Whenever it appears that the contract or arrangement between the parties has been so far executed or completed that they must have understood that the grantor had divested himself of title, and that the grantee was invested with it, delivery will be considered complete, though the instrument itself still remains in the hands of the grantor." Moore v. Trott, 162 Cal. 268, 275, 122 Pac. 462, quoting from Ruckman v. Ruckman, 32 N. J. Eq. 259.

One or two questions are presented by respondent Kirk as pertaining to his case as a separate defendant, but a treatment of them is not necessary after the conclusion which we have reached upon the question above discussed.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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66 Cal. App. 219

COMER v. LOS ANGELES RY. CORPORATION. (Civ. 4201.)

(District Court of Appeal, Second District, Division 2, California. March 17, 1924.)

1. Trial 🔑191(8)—Instruction held erroneous as assuming acts negligent.

Instruction that, if street car conductor made plaintiff automobilist change out of his safe course into broken electric wire, then he should recover, *held* erroneous as virtually assuming any conduct of conductor causing plaintiff to change course would be conclusive proof of negligence.

2. Electricity 🔑19(12)—Contributory negligence of automobile driver injured by electric wire held for jury.

In action for personal injuries and damage to automobile by running into broken trolley wire carrying dangerous current, *held*, that question of contributory negligence was properly submitted to jury.

3. Trial 🔑194(17)—On issue of master's liability to third person, instruction as to effect of notice to servant held error.

Where trolley wire broke and plaintiff ran his automobile into it, an instruction that it was defendant street car company's duty through its agents in charge to notify persons rightfully using street, of such broken wire, and that knowledge of motorman and conductor was knowledge of corporation, was erroneous, since matter of notice was question of fact, rather than of law.

4. Trial 🔑253(4)—Instructions held not to eliminate question of contributory negligence of automobilist.

Instructions *held* not objectionable as virtually eliminating question as to whether or not plaintiff should have known of broken trolley wire in time to have avoided colliding with it.

Appeal from Superior Court, Los Angeles County; J. L. Fleming, Judge pro tem.

Action by C. E. Comer against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

CRAIG, J. Respondent suffered personal injuries and damage to his automobile by running into a broken trolley wire of appellant while driving in a southerly direction on Vermont avenue, in the city of Los Angeles. Defendant appeals from the judgment against it, and in doing so relies principally upon alleged error of the trial court in the giving of certain instructions and refusing others asked. It is also claimed that the evidence is insufficient to sustain the verdict.

It appears that as a street car had passed under it the trolley wire above the southbound track became severed at a point some distance south of the intersection of Vermont avenue with Tenth street, and that a considerable portion of the wire lay between the tracks. The car stopped, and while the motorman was adjusting his trolley and sweeping the wire over against one of the rails the conductor attempted to warn the drivers of approaching vehicles. There was much travel upon the street, and although several people were signaled the respondent did not see the conductor until almost upon him, when respondent suddenly swerved to the left to avoid striking him, and hit the wire. It was after dark, and respondent's headlights were burning. He saw the car, but from the fact that it was not at a crossing he paid little attention to it, intending to drive down past it on the right-hand side. He testified that he saw a person dart out before him, as from the gutter, and that he thought some one was hailing him for a ride; that he had money with him, and was in a hurry, and that he would not have taken on a passenger, but that he immediately jumped on his brake and clutch with both feet; that there was at once a flash, and a mass of flame and sparks about him, whereupon it seemed as though he were dealt a blow on the back of the neck, and he next found himself in the street, and saw his automobile moving away with the wire hanging across it.

After the wire fell it sputtered and squirmed around, subsequently becoming welded to a rail of the track, and there was testimony that it got very hot, first turning red, then white. The conductor testified that it was five or six minutes from the time his car first went dark and he discovered the broken wire until respondent's accident; that until the accident happened he had not looked up at the wire, but that there was a reflection on the pavement, and he was conscious of a glow. Other witnesses testified to having seen light from the wire before the collision, while still others said that it did not extend far along the wire, and that there was not much light given off. Respondent stated positively that it did not give off any light and that he did not know the wire was down until he struck it with his machine, when "everything lit up."

At appellant's request the jury were instructed that there was no duty imposed upon defendant's employés to give any warning of the presence or position of the broken wire after it had become sufficiently illuminated so that any person traveling on the street could have seen it by the exercise of ordinary care, and that, if they believed that the wire at the time of the accident was sufficiently bright or glowing that the plaintiff by the exercise of ordinary care could have seen and known of its presence and position in time to have avoided the collision, they must return a verdict for the defendant.

From a careful reading of the record before us, and summarizing the many exhaustive instructions given on behalf of appellant, it may fairly be concluded that in rendering a verdict for respondent the jury must have concluded that a preponderance of the evidence showed that after the wire broke defendant's motorman and conductor had a reasonable opportunity to cause the plaintiff to avoid the accident, but did not do so; that the wire was not of sufficient brightness so that the plaintiff by the exercise of ordinary care could have seen it and known of its presence or position; that the conductor did not use the care and caution that an ordinarily prudent person in his position would have exercised; that the plaintiff was not guilty of contributory negligence, and that because of the foregoing facts the conduct of the conductor made plaintiff change out of his safe course into and against defendant's electric wire, and that therefore, the company was liable. Conceding that these findings of fact were supported by the evidence, instruction No. XIX directed this conclusion if the jury should so find, and is not in accord with our view of the law.

[1] The jury were therein charged that:

> "If you find that as a matter of fact plaintiff was driving his automobile southerly on the west side of the west car track in an ordinarily cautious and prudent manner, and that his route therein was, so far as the down trolley wire was concerned, safe and unobstructed for him to travel straight ahead, then I charge you that if you further find that the conduct of the conductor was such that it made plaintiff, without fault on his part, change out of his safe course into and against defendant's electric wire, then the plaintiff should recover against the defendant in this case, and you should find damages in his favor as defined in these instructions, unless you further find that the plaintiff could, by the use of ordinary care, have avoided the said wire."

This instruction we think was erroneous in that it virtually assumed that any conduct on the part of the conductor which caused plaintiff to change his course and run into the wire would be conclusive proof of negligence. The defendant was not an insurer and was not liable unless there was negligence; and the question whether there was or was not negligence was an ultimate fact which should have been left for the determination of the jury from a consideration of all the probative facts in evidence. Merely causing plaintiff to change his course and run into the wire was not conclusive proof of the ultimate fact of negligence, because it was not necessarily inconsistent with the exercise of due care by the conductor. It was a probative fact merely tending to show negligence, and which was not within the province of the trial court to decide. McKeon v. Lissner (Cal. Sup.) 223 Pac. 965.

[2] We do not agree with appellant's contention that the court erred in refusing to grant its motion for nonsuit, or to give the peremptory instruction directing a verdict for defendant. In Reaugh v. Cudahy Packing Company, 189 Cal. 335, 208 Pac. 125, it was held that—

> "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury."

In view of the contradictory testimony above outlined, we are not at liberty to say that the evidence of contributory negligence was "conclusive," since there was evidence tending to show that the plaintiff was not negligent. Rolland v. Porterfield, 183 Cal. 466, 191 Pac. 913; Lanning v. Talmage (Cal. App.) 225 Pac. 25.

[3] Appellant also attacks an instruction wherein the jury were charged that, as soon as the defendant, through its motorman and conductor, knew that its trolley wire had broken and fallen into the street, thereby rendering travelers liable to injury, it was defendant's duty through its agents in charge thereof to notify persons rightfully using the street, and that failure to do so would constitute negligence, in that the knowledge of the motorman and conductor was knowledge of the corporation. It was testified upon the trial that appellant's car system was under the management of different departments, each separate and distinct from the other; that the wires were under control of the line department, while the motorman and conductor were members of the operating department, and that there was some evidence from which it is argued that these departments were so independent of each other that the line department might not be apprised of difficulties encountered by operatives until notified by the superior to whom it was the duty of the conductor to report. Appellant's amended answer alleged that "at the time of the breaking of the wire a passing southbound street car stopped, and the conductor in charge thereof went to the north to warn approaching traffic from the north of the breaking of said wire, and the said conductor gave due warning and notice to the said plaintiff of the broken wire," and, "that as soon as the wire was broken the defendant, through its servants and agents, undertook to and did give the plaintiff ample notice and warning"; and "defendant denies that it had time or opportunity to give any other or further or different notice than it did give to the said plaintiff, but alleges that if the said notice to him was not sufficient it was because defendant had no opportunity to give a further or different notice." The conductor testified that he assumed it was incumbent upon him to give alarm, and that he felt that it was his duty to prevent people from being injured, although he had no specific instructions to do so. Appellant cites Read v. City and Suburban Ry. Co., 115 Ga. 366, 41 S. E. 629, which holds that notice to the servant of a corporation with respect to a matter over which he has no authority and as to which he has no duty to perform is not notice to the corporation. It was there held that under the circumstances shown by the evidence the motorman and conductor acted of their own accord in guarding the crossing. If that opinion be construed to have universal application to street car companies, it is the only holding of its kind that has come to our attention, and seems to be contrary to the general trend of authorities. In Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 28 South. 823, 84 Am. St. Rep. 620, it was held that the inquiry as to the liability of the master or principal is whether, from the nature of the act itself, as actually done, it is an act done in the master's business or one wholly disconnected therefrom by the servant, not as a servant, but as an individual on his own account. As was said in McDonald v. Randall, 139 Cal. 246, 250, 72 Pac. 997, 998:

> "That a corporation is not chargeable with the knowledge of one of its officers or agents who is acting on his own behalf, and not for the corporation, is beyond question the law."

And in Brimberry v. Duffield Lumber Co., 183 Cal. 454, 191 Pac. 894, it was said that the company must be held responsible unless it clearly appears that the servant could not have been, directly or indirectly, serving it in an act the negligent performance of which caused injury. Section 2332 of the Civil Code provides:

> "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

It might well be that a person on the street, under no legal duty to the street car company or to the public, would under the circumstances have felt that it was his duty to prevent people from being injured, yet we do not feel convinced, considering the fact that much evidence upon the subject was offered to the jury, that the trial court was justified in charging them as a matter of law upon the question of knowledge. The relationship of employés to their principal may be so varied by the hiring, the rules and regulations of the company, and working conditions, that it cannot be said that from every state of facts it is their duty in good faith and the exercise of ordinary care and diligence to communicate to the proper department all knowledge of any situation which may threaten injury or prove to be dangerous. Such a conclusion results from facts and circumstances which of necessity differ, and it is therefore more a question of fact than of law.

Appellant asserts that the trial court committed error in giving plaintiff's instruction numbered 6, as follows:

> "You are instructed that the plaintiff, as he drove along South Vermont avenue at and about the place of accident, had a right, in law, to assume that the street was in a reasonably safe condition for his travel, and further had a right to assume that no trolley wire of defendant, or any other obstruction, was down in or upon the street that would interfere with his reasonably safe travel, and he had a right, in law, to indulge this assumption until he had actual knowledge that the wire was down, or had such notice that an ordinarily prudent person would have known that the wire was down and that there was danger therefrom, and, unless you find by a preponderance of the evidence of the whole case that plaintiff had this knowledge or notice, then he was not guilty of contributory negligence in not knowing that the wire was down."

And also No. 8, which reads:

> "Although you may believe that the conductor of the defendant attempted to give the plaintiff notice that there was danger if he proceeded in the route he was going, yet if you further find that the conduct, whatever it was, of the conductor was such that an ordinarily prudent person would not have known he meant the wire was down, or that there was danger in the plaintiff traveling there, then you will find that the plaintiff had no notice, so far as the acts of the conductor were concerned, as to there being any danger in traveling along the street at the time and place of accident, except the danger of striking the conductor pursuing the course he was then traveling."

[4] It is claimed that by these two instructions the court virtually eliminated from the consideration of the jury the question as to whether or not the plaintiff should have known of the broken wire in time to have avoided colliding with it. We do not think this criticism is well founded. A fair construction of these instructions would make it clear that the plaintiff would be held guilty of contributory negligence if he had actual knowledge of the danger or such knowledge as would constitute notice to an ordinarily prudent person that the wire was down, and this we conceive to be the correct statement of the law.

It is also contended that the trial court should not have instructed the jury that there was no evidence proving or tending to prove that the motorman in any sense attempted to warn the plaintiff or any persons that the wire was down. It is conceded that there was no evidence to that effect, but it is argued that the instruction was erroneous nevertheless, because the jury might have drawn the inference from it that a duty devolved upon the motorman to give warning to the public that the wire was down. We do not think that from the context of the instructions as a whole such statement can be said to have been used for any purpose other than to limit the evidence to acts of the conductor, but, since the case must be reversed for the reasons herein stated, the trial court may so frame its instructions upon another trial as to eliminate doubt in this respect.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

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66 Cal. App. 303

GORDON v. GREEN. (Civ. 4184.)

(District Court of Appeal, Second District, Division 1, California. March 21, 1924. Hearing denied by Supreme Court May 19, 1924.)

1. Appeal and error ⚷1097(1)—Application of "law of the case" stated.

Where the pleadings were the same and findings of fact not materially different from those on a former trial, the evidence may be assumed to be the same, and the former decision on such findings is the "law of the case."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law of the Case.]

2. Appeal and error ⚷1099(4)—Findings held to differ in no material respect from those on former trial.

Findings *held* not materially different from those found insufficient on the first appeal, to show any consideration for modification of a lease.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Elizabeth Y. Gordon against R. A. Green. Judgment for defendant, and plaintiff appeals. Reversed.

MYERS, C. J., and SEAWELL, J., dissent from the order denying a hearing.

Waldo M. York and H. Parker Wood, both of Los Angeles, for appellant.

C. S. Tappaan and Stewart & Stewart, all of Los Angeles, for respondent.

CONREY, P. J. This action was brought to recover certain rents alleged to be due and unpaid under the terms of a written lease. The present appeal relates only to the judgment in favor of the defendant on the first cause of action set out in the complaint. The defense of the defendant was that there had been a change in the written contract of lease by an oral executed agreement, whereby the claimed rent was paid.

A former appeal from a judgment in favor of the defendant in this action was decided by the Court of Appeal for the First District in Division 1 thereof. 51 Cal. App. 765, 197 Pac. 955. That appeal was taken upon the judgment roll alone. The principal facts constituting the cause of action are set forth in the decision cited. In its findings at the first trial the court found that defendant had entered into possession of the premises described in the lease set forth in the first cause of action, but further found that such terms were subsequently changed by an oral agreement between the parties and that such agreement was carried out by the lessee and accepted by the lessor. This change in the lease as found by the trial court consisted in an agreement which in substance provided that, pending the hard times and general depression of the hotel, apartment house, and rooming house business in the city of Los Angeles, the lessor agreed to accept in lieu of the amounts specified in the lease all of the income derived from the premises over and above the expenses of the business and a moderate allowance for the support of the defendant and his wife for managing said business. It further found that this condition had improved after the 8th day of September, 1919, since which time defendant had promptly paid to plaintiff monthly the rent according to the terms of the lease. On the former appeal it was decided that the carrying out of the oral agreement by defendant did not validate the contract, for the reason that it was simply the performance of the very act which defendant was legally obligated by his written contract to do, and that defendant therefore suffered no prejudice by the performance of the alleged modification; that the modified agreement as found by the court to have been made between the parties was a mere nudum pactum, which did not relieve the defendant from the obligations under his lease.

[1] Appellant contends that the decision on the former appeal establishes the law of the case, and that under the law as thus declared the present judgment must be reversed, because there is no material difference between the issues and the facts found at the former trial and those shown in the record of the present trial. There was no change in the pleadings. There is a bill of exceptions in which is set out the evidence received by the court at the second trial. It is not necessary that we examine that evidence, unless there is some material difference between the present findings of fact and the findings of fact which were before the court on the former appeal. Comparing the findings of fact as made at the second trial with the statement of the substance of the findings made at the former trial, stated in the decision on the former appeal, we find no substantial or material difference between them. This being so, it may fairly be assumed that there is no difference between the evidence received at the first trial and that received at the second trial which would prevent the application to this appeal of the doctrine that the law of the case as established on the first appeal controls the decision of the second appeal. This rule or doctrine has been thoroughly re-examined and expounded by the Supreme Court in the recent case of the Estate of Baird (Cal. Sup.) 223 Pac. 974. It is there declared that, where the Supreme Court upon one appeal has declared that all the evidence adduced at the trial was insufficient as a matter of law to establish a certain conclusion (in that case the legal adoption of a child), and the evidence received at a later trial is substantially the same in all vital particulars as the evidence received at the former trial, it of necessity follows that the doctrine of "law of the case" applies.

[2] In support of his contention that notwithstanding the former decision the court may now properly re-examine the question as to whether there was or was not a sufficient consideration for the agreement of the parties modifying the lease, respondent insists that, because the previous appeal was on the judgment roll alone without the evidence, it does not appear that there was any decision that would necessarily be applicable to the facts presented on this appeal. It may be conceded that, if the findings which are the basis of the present judgment were in any material respect different from the former findings of fact, it would now be appropriate to consider such new or different findings and the evidence relating thereto, and to determine whether such different or additional findings are sufficient to sustain the present judgment, notwithstanding the decision on the former appeal. Respondent seems to find that difference in the fact shown in the present findings, and (we will assume for the purposes of the argument) supported by the evidence, that it was a part of the oral agreement that defendant would operate and keep open the hotel business on said leased premises, and would keep strict account of the income and expenses and render monthly statements and pay over to plaintiff the net income derived therefrom, less "a moderate sum" for the support of defendant R. A. Green and his wife, and in the further fact that under the lease itself there was no obligation on the part of the defendant or his wife to personally manage the hotel business; that this new obligation assumed by both the defendant and his wife constituted a consideration which, when executed, would be sufficient to support the defense under said oral agreement. We observe first that, while the findings of fact now before the court do say that in the oral agreement it was provided that defendant R. A. Green would operate and keep open said hotel business, etc., they do not say that said agreement included any obligation or promise that defendant's wife would manage or have anything to do with the management of said hotel. Turning to the statement of the substance of the findings made at the first trial

as set forth in the former decision on appeal, we see that the court in its former findings determined that the alleged modification of the lease contained an agreement which included an acceptance by the lessor, in lieu of the amount specified in the lease, of the income derived from the premises "over and above the expenses of the business," and a moderate allowance for the support of the defendant and his wife for managing said business. It thus appears that it was in the former findings and not in the present findings that the fact was established that the defendant's wife was to render services in the management of the business. So far as that point is concerned, if it is at all material, this would make a stronger case for the defendant than the case presented under the present findings. Nevertheless, the court on that appeal determined that such oral agreement was without consideration sufficient to support the same, and that it did not constitute a defense to the plaintiff's action. That decision having become final, it is binding now, even if it were to be conceded that on the former appeal the court should have reached a different conclusion.

The judgment is reversed.

We concur: HOUSER, J.; CURTIS, J.

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66 Cal. App. 331

ANGLO AMERICAN LAND CO. v. SUNDBERG et al. (Civ. 4871.)

(District Court of Appeal, First District, Division 2, California. March 25, 1924.)

1. Appeal and error ⚿1040(4)—Sustaining demurrer to second count of complaint held harmless error.

Plaintiff was not deprived of any substantial rights by sustaining of a demurrer to second count of his complaint, where second count was but a duplication of the first, with some surplusage which might have been stricken under Code Civ. Proc. § 463, and there was still left of his pleading everything which plaintiff was entitled to have remaining therein.

2. Pleading ⚿192(5), 362(3)—Immaterial matter in complaint should be attacked by motion to strike.

To get rid of immaterial matter in a complaint, attack should be made by motion to strike instead of a demurrer, in view of Code Civ. Proc. §§ 430, 453.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the Anglo American Land Company, a corporation, against E. H. Sundberg and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Russell P. Tyler and Thomas Lloyd Lennon, both of San Francisco, and J. J. Trabucco, of Mariposa, for appellant.

Jones & Dall, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action to quiet title to two parcels of land located at Larkspur, Marin county, Cal. It framed its complaint in two counts. The defendants interposed a demurrer as to each count. The trial court overruled the demurrer to the first count, and sustained the demurrer to the second count without leave to amend. Later a judgment was entered up dismissing the cause of action pleaded in the second count. From that judgment the plaintiff has appealed. Under the facts presented in the record we think that the judgment must be affirmed, whether it was erroneous or otherwise, because, after an examination of the entire record, the court is clearly of the opinion that the ruling of the trial court, if it be conceded to be error, has not resulted in a miscarriage of justice, and in short has not deprived the plaintiff of any substantial right.

[1, 2] The first cause of action pleaded in the amended complaint is a full and complete statement of an ordinary count to quiet title. By overruling the demurrer to that cause of action, the trial court properly preserved to the plaintiff all of the rights to which the plaintiff was entitled. In the second count the plaintiff repeated word for word every allegation contained in the first count, and, having done so, it thereupon proceeded to specify what the plaintiff conceived to be the specific claim or claims of the defendants. In doing so the plaintiff inserted nearly 40 folios of alleged defects in the purported proceedings theretofore had by the town of Larkspur in an attempt to install certain improvements under the "Improvement Act of 1911." St. 1911, p. 730. Under the decisions of the Supreme Court of this state no duty rested upon the plaintiff to insert such allegations in its complaint, the allegations were not necessary to the sufficiency of its pleadings, and all of said allegations were in the nature of anticipating a defense, and were immaterial matter, and, being immaterial, all of said matters could have been stricken from the pleading if a proper motion in that behalf had been made. Code Civ. Proc. § 463; Crook v. Forsyth, 30 Cal. 662; People v. Center, 66 Cal. 551, 562, 563, 5 Pac. 263, 6 Pac. 481; Hyde v. Redding, 74 Cal. 493, 498, 16 Pac. 380; Stratton v. California Land, etc., Co., 86 Cal. 353, 361, 24 Pac. 1065; McNeil v. Morgan, 157 Cal. 373, 376, 108 Pac. 69; 32 Cyc. 1354. From the transcript it appears that the defendants interposed a motion to strike out, but the motion was not set forth in the transcript, nor does the transcript show what order the trial court made thereon. The demurrer interposed to the second count contained 15 folios of assignments, each and all of which are addressed to the

immaterial allegations above referred to. The initial paragraphs of the count stated a cause of action, and the cause of action was not annihilated by adding the immaterial matter. To get rid of the immaterial matter, the attack should have been by a motion to strike instead of a demurrer. Cf. Code Civ. Proc. §§ 430, 453. When the demurrer to the second count had been sustained, there was still left of the pleading everything which of right the plaintiff was entitled to have remaining in the pleading. In other words, the plaintiff had inserted in its amended complaint the first count, which was perfectly good. It had also inserted a second count, which was but a duplication of the first count with some surplusage added thereto. Conceding, without deciding, that the trial court erred in sustaining the demurrer to the second count, the plaintiff was entitled to proceed on the first count and introduce every bit of evidence which it could have introduced on the second count. When the defendants shall have answered the first count and shall have set forth all of their claims, the burden will rest on the defendants to sustain their claims by proving the same at the date of trial. It is therefore clear, as we stated above, that the appellant has not been deprived of any substantial rights by the ruling complained of.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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66 Cal. App. 256

ADAMSON v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 4732.)

(District Court of Appeal, First District, Division 2, California. March 20, 1924. Hearing Denied by Supreme Court May 19, 1924.)

1. Street railroads 🔑99(1)—Driving of automobile close to street car tracks held not contributory negligence.

That one driving a taxi colliding with a street car which was being backed without a warning or lookout was driving closer to street car tracks than required under traffic conditions did not constitute contributory negligence.

2. Street railroads 🔑90(3)—Backing of street car without warning or lookout held negligent.

That a street car was operated backward without any audible warning or without notice by flagging or otherwise, thereby colliding with plaintiff's automobile, *held* negligence as a matter of law.

3. Negligence 🔑136(14)—Where one of parties departs from usual custom to injury of another questions of negligence are for jury.

Where a usual custom has obtained, and one of parties has to discomfiture of other without notice departed from such custom, question of negligence of defendant and contributory negligence of plaintiff are for jury to determine in light of all facts, including alleged custom and deviation.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by William F. Adamson against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

George Lull, City Atty., and Charles S. Peery, Asst. City Atty., both of San Francisco, for appellant.

William A. Kelly and Harold C. Faulkner, both of San Francisco, for respondent.

STURTEVANT, J. In this case the defendant city appeals from a judgment rendered in favor of the plaintiff. The judgment was for damages rendered in a personal injury case. In his complaint the plaintiff charged that the injuries were caused by the negligent operation of one of the street cars owned by the defendant. In its answer the defendant denied all allegations of negligence which were pleaded in the complaint and affirmatively pleaded the contributory negligence of the plaintiff. Both parties introduced evidence in support of their respective allegations, and the trial court gave instructions to the jury on all of the issues made by the pleadings. The jury returned a general verdict in favor of the plaintiff.

[1] At this time the appellant makes one point, and that point is to the effect that the evidence did not show that the defendant was guilty of negligence, but it did show that the plaintiff was guilty of negligence.

Geary street runs east and west, and there is located in the street a double set of tracks; the northerly track is used for cars traveling in a westerly direction and the southerly track is used for cars traveling in an easterly direction. Between the cross streets, Presidio avenue and Masonic avenue, the defendant maintains a car barn. From the northerly track there are switches on which a car can be drawn from that track into the car barn. On the morning of November 18, 1918, the plaintiff was driving a taxicab containing some passengers. He had picked up his passengers on upper Market street, and was on the way to his point of destination, which was a house out near the beach toward the westerly end of Geary street. He drove out Geary street. As he did so one of the street cars of the defendant was being switched back from Masonic avenue easterly along the northerly or out-bound track on Geary street toward the car barn, where it was to be turned in for the night. It was standing, or almost imperceptibly moving, when the respondent drove his taxicab westerly along Geary street. There was no other traffic at that hour of the night. The parties make no issue to the effect that the car did not have a right to be in the place where it was, but the fact is conceded by both parties. As the plaintiff drove westerly the street car was ahead of him on the northerly track. It had no headlight on the eastern end. It had lights inside which shone out through the glass windows. At the point where the car was located the street is broad, and there is an abundance of traveling space on each side of the tracks. As the plaintiff proceeded on his way he could see the street car ahead on the northerly track, but there is no evidence that during that time the car made any motion indicating that it was not outward bound. The plaintiff drove past the municipal car barn toward the ocean. While he was so driving he proceeded to pass the car in question on the right-hand side thereof. He assumed that the car was going in the same direction that he was going, whereas, although the car was on the track used by cars going in a westerly direction, the operator of the car was in the act of moving it in an easterly direction. But the testimony is all one way to the effect that the plaintiff did not know that fact, nor was there anything to call such fact to his attention. There was no headlight on the easterly end of the car; there was no person on the easterly end of the car; no gong was sounded and no warning of any kind was given indicating the direction the car was moving. The operator in charge of the car stood on the west platform driving the car in an easterly direction. In other words, the street car, without a headlight, without sounding a gong or bell, and without giving any other kind of a signal, was being backed in an easterly direction along a street car track customarily used by westerly bound cars, and at that time the car had no person in the position of a lookout in the direction in which the car was traveling. When the plaintiff had reached a position on the right-hand side of the street car, the car slowly moved eastward, and, at the same time taking the curve, the overhang of the end of the car was projected outward from the general line of the street car track in such a manner and to such an extent that the corner of the car ran into and collided with the plaintiff sitting at the wheel of his taxicab. Immediately before the impact the automobile was running parallel with the tracks and five or six feet north.

We shall address ourselves first to the claim that the plaintiff was guilty of contributory negligence. The claim of the defendant on this subject is that the plaintiff was guilty of contributory negligence in driving so close to the defendant's car when he was not compelled under the circumstances to do so. In the case of O'Connor v. United Railroads, 168 Cal. 43, 48, 141 Pac. 809, 811, the court was considering the same claim regarding a plaintiff who was driving 14 or 16 inches from the defendant's tracks. The court said:

> "It is undoubtedly true that plaintiff was required to exercise reasonable care in driving along the public street in the vicinity of the track of the defendant; such care and diligence as a reasonably prudent man would have exercised under the circumstances. As a general rule, whether a person has exercised ordinary care or not is to be left to the jury to be determined by them from all the circumstances surrounding him at the time. *But it was not negligence per se for the plaintiff to drive along the street as he did in proximity to the track of the defendant. This of itself did not constitute negligence at all.* The streets of a municipality are for the use of the traveling public and the right of a street car company is only to use it in common with the public. The fact that the company has been granted a right to lay tracks and operate cars along the streets gives it no exclusive right to travel even over that portion of a street covered by its tracks. Other vehicles have a right to travel over the entire street, including the space between the tracks. *Nor is this right restricted to the times when other portions of the street may be crowded or in bad condition.* Nor is a traveler in doing so in any sense of the term a trespasser." (Italics ours.)

[2] Turning to the issue of negligence on the part of the defendant, it will be noted that at the time of the accident the defendant's car was being operated backward without any audible warning, and without notice by flagging or otherwise; nevertheless the defendant claims that such facts show no negligence as a matter of law. In this contention we think that the appellant is in error. In the case of Swain v. Fourteenth St. R. R. Co., 93 Cal. 179, 184, 28 Pac. 829, 830, the court was considering the act of the operator of a car who was at his post but was looking behind the car instead of ahead of it. The court said:

> "This evidence was also sufficient to show that the driver of the car was negligent in omitting, without any apparent excuse, to look ahead and observe whether the track was clear. It is the duty of such a driver, equally with the driver of any other vehicle, to observe what is in the road before him, so as to avoid inflicting injury upon others, if practicable."

[3] When, as in the instant case, the street car is not being operated in the ordinary and usual direction, but is being backed, the necessity for the application of the same rule is not less, but is greater. Where, as here, a usual practice or custom has obtained, and where, as here, the claim is made that one of the parties has, to the discomfiture of the other, without notice, departed from the usual custom, or practice, the courts have by an unbroken line of decisions held that the question of negligence on the part of the defendant, and the question of contributory negli-

gence on the part of the plaintiff, are both questions for the jury to determine in the light of all of the facts, including the evidence tending to establish the alleged custom or practice and the alleged deviation therefrom. Lawyer v. Los Angeles Pacific Co., 161 Cal. 53, 58, 118 Pac. 237; Carter v. Sioux City Service Co., 160 Iowa, 78, 89, 141 N. W. 26, where, at page 30, the Supreme Court of Iowa says:

> "In the case before us it was incumbent upon the jury to say whether one or both of these parties was responsible by his negligence for the collision. The jury could not say whether either one of these parties was negligent without having some conception of what under all the circumstances he ought to have done. What was the usual method (or usual methods if more than one) of piloting the street car across these tracks was to our minds an appropriate circumstance for the consideration of the jury. Not that any particular method was binding as a matter of law upon either party, but that the jury was entitled to all the circumstances. If there was or was not a departure from the usual method, such was proper evidence for whatever light it might bring. * * * Its admissibility for this purpose is considerably emphasized. There was a collision at an intersection where both parties had a right to pass. The safe passage of each depended upon their co-operation and mutual understanding. If there were usual methods practiced which were mutually understood by both parties, then a departure from such methods by one tended naturally to the discomfiture of the other."

In Lawyer v. Los Angeles Pacific Co., supra, Mr. Justice Melvin cites with approval North Chicago St. R. Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077. In that case (202 Ill. 347, 66 N. E. on page 1078) the Supreme Court of Illinois said:

> "The existence of this custom entered into the consideration of the question whether the motorman was in the exercise of ordinary care in propelling the car northwards on the west track at such a rate of speed as 12 or 15 miles per hour, and also bore upon the question of the carefulness or negligence of the deceased in leaving the space between the tracks and going upon the west track in order to be out of danger from a car moving northward. * * * But whether he had the right to rely solely upon his knowledge of the custom and to omit other precautions and yet be deemed in the exercise of ordinary care, was a question of fact to be determined by the jury upon consideration of all the testimony bearing upon the point."

In each of the last three cases which we have cited, the injured party was approached from and hit in the back. That fact does not makes those cases inapplicable to this case.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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66 Cal. App. 186

MT. SHASTA POWER CORPORATION v. DENNIS et al. (Civ. 2751.)

(District Court of Appeal, Third District, California. March 13, 1924. Hearing Denied by Supreme Court May 12, 1924.)

1. Eminent domain 🔑254—Right of appeal by condemnor held waived by payment of judgment.

Right of appeal by appropriator *held* waived by payment of judgment and taking possession in eminent domain proceedings, in view of Code Civ. Proc. §§ 1251, 1252, 1254, 1255a, 1257, and Const. art. 1, § 14.

2. Eminent domain 🔑258—Appeal within 30 days stays issuance of execution or assessment of damages.

An appeal by plaintiff in eminent domain proceeding within 30 days after entry of judgment will operate to say issuance of execution, under Code Civ. Proc. § 1252, or assessment of damages, under section 1255a.

3. Appeal and error 🔑157—Profitableness of compliance with judgment held not to prevent compliance from waiving right of appeal.

That parties may find it more profitable to comply with judgment and accept fruits thereof than to suffer losses incident to an appeal cannot be said to render compliance with judgment compulsory as affecting waiver of right to appeal.

4. Eminent domain 🔑254—That judgment was paid "without prejudice to" right to appeal, did not prevent waiver of right.

That money was deposited to pay judgment in eminent domain proceedings "without prejudice to" plaintiff's right of appeal was immaterial as affecting waiver of right to appeal.

5. Eminent domain 🔑165—No right given condemnor to recover back part of compensation paid into court for landowner.

There is no provision, constitutional or statutory, giving plaintiff in eminent domain proceedings right to recover any part of compensation paid into court for defendant, under Code Civ. Proc. § 1251, in event of judgment for smaller sum upon second trial.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by the Mt. Shasta Power Corporation against Malcolm Dennis and others. From an adverse judgment, plaintiff appeals. Appeal dismissed.

W. B. Bosley and T. J. Straub, both of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Carter & Smith, of Redding, for respondents.

FINCH, P. J. This is a motion to dismiss plaintiff's appeal from that part of the judgment herein which fixes defendants' damages for the taking of their property for a public use.

The defendants are the owners of certain lands riparian to Pitt river. Fall river empties into Pitt river above these lands. Having determined to divert all of the water naturally flowing in Fall river to its hydroelectric power plant, and thence convey the water to Pitt river at a point below defendants' lands, this proceeding was commenced for the purpose of condemning defendants' riparian rights in so far as the waters to be diverted from Fall river are material thereto. September 15, 1922, the jury returned a verdict fixing the amount of defendants' damages on account of the proposed taking. September 22, 1922, judgment was entered on the verdict. On the same day the plaintiff served and filed its notice of intention to move for a new trial. September 29, 1922, the plaintiff paid into court for the defendants the amount of the judgment and costs, and, in connection therewith, filed a written statement as follows:

> "To the Above-Entitled Court and to Mr. S. W. Witherow, Clerk Thereof:
>
> "Mt. Shasta Power Corporation, plaintiff in the above-entitled action, in compliance with, and for the purpose of preserving, its rights under the final judgment of condemnation entered in the above-entitled cause * * * and title 7, pt. 3, of the Code of Civil Procedure of California, herewith deposits in the above-entitled court, for the defendants above named, * * * the compensation awarded by said judgment to said defendants. * * * The said plaintiff, however, by depositing the aforesaid sums of money in said court for said defendants, as aforesaid, does so without prejudice to, and without any intention on its part to waive its right to prosecute its pending motion for a new trial in the above-entitled proceeding, or its right to appeal from said judgment."

From affidavits introduced by defendants in opposition to plaintiff's motion for a new trial, it appears that on the 1st and 2d days of October, 1922, the plaintiff "diverted substantially all of the waters of Fall river" to its power plant, "without the consent or acquiescence of any of said defendants." Plaintiff introduced an affidavit to the effect that on the 30th day of September and on the 1st, 2d, and 22d days of October it "temporarily diverted some of the waters of Fall river" for the purpose of "testing out and adjusting the machinery in said power house," and other stated purposes, "with the consent and acquiescence of said defendants." October 9, 1922, the money deposited by plaintiff was, on the order of the court, paid to defendants. October 20, 1922, defendants filed a satisfaction of the judgment. October 23, 1922, plaintiff filed notice of motion for an order authorizing plaintiff to take possession of and use the property condemned, during the pendency of the action, and offer "to pay into court such further sum as may reasonably be required by the court as a fund to pay any further damages and costs that may be recovered in this proceeding, as well as all damages that may be sustained by the defendants, if, for any cause, the property shall not be finally taken for public use—all in accordance with the provisions of section 1254 of the Code of Civil Procedure. This motion will be made without prejudice to plaintiff's right to further prosecute its motion for a new trial now pending in the above-entitled court and cause, and also without prejudice to its right to take and prosecute an appeal from the judgment heretofore entered in said court and cause." On the same day the court made an order reciting that plaintiff had paid into court an additional sum of $3,000 as required by the court and authorizing plaintiff "to take possession of and use the property described in said judgment for the purposes stated in said complaint, during the pendency, and until the final conclusion of said action." No claim is made that the plaintiff has not been in possession of the property condemned since the making of the foregoing order. December 18, 1922, plaintiff's motion for a new trial was denied and on January 6, 1923, it served its notice of appeal. Defendants' motion to dismiss the appeal is made upon the ground that "plaintiff has waived its right to appeal from said judgment by the voluntary payment of the amount of said judgment, and by taking possession of and using and appropriating the property condemned in said action and for which the amount of said judgment was paid as just compensation." The following sections of the Code of Civil Procedure are applicable to the questions here raised:

1251. "The plaintiff, must, within thirty days after final judgment, pay the sum of money assessed."

1252. "Payments may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases."

1254. "At any time after trial and judgment entered or pending an appeal from the judgment, * * * whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if for any cause, the property shall not be finally taken for public use, the superior court in which the proceeding was tried may * * * authorize the plaintiff * * * to take possession of and use the property during the pendency of and until the final conclusion of the litigation. * * * The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation."

1255a. "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees."

1257. "The provisions of part two of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that upon the payment of the sum of money assessed, * * * the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned * * * as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion, for new trial or appeal shall, after such payment, * * * in any manner retard the contemplated improvement."

[1-5] Appellant contends that its payment of the damages awarded the defendants was not voluntary, but that, under the provision of section 1251, herein quoted, it was compelled to make such payment within 30 days after final judgment, "as failure to comply with this provision would have subjected appellant to liability to execution, or to extra damages upon abandonment," as provided by sections 1252 and 1255a. An appeal by plaintiff, however, within 30 days after entry of the judgment would have operated to stay the issuance of execution under the provisions of the one section or the assessment of damages under the other. Colusa, etc., R. R. Co. v. Superior Court, 31 Cal. App. 746, 761, 161 Pac. 1011. Plaintiff had the option of paying the damages awarded and taking possession or appealing from the judgment and remaining out of possession until the final determination of the compensation to be paid. Appellant further urges that it had theretofore acquired the rights of substantially all persons other than defendants in the water to be diverted, that it could not operate its power plant without such water, that its loss from failure to operate its plant would have greatly exceeded the amount of the judgment, and that therefore the payment of the compensation awarded and the entry into possession were not voluntary but compulsory and did not constitute a waiver of appeal.

The fact that a party may find it more profitable to comply with a judgment and accept the fruits thereof than to suffer the losses incident to an appeal cannot be said to render such compliance compulsory. The necessities of the plaintiff and its intention in making payment and taking possession, however, are not decisive of the case. In taking possession, the plaintiff was exercising a statutory right, and the effect of its acts must be measured by the provisions of the statute. In taking the fruits of the judgment under the authority of the statute, the plaintiff could not impose conditions upon defendants' acceptance of the money paid which are not provided by the statute. It is not perceived that the plaintiff's attempt to limit the effect of its payment and entry is material. Its statement, in connection with the payment of the money into court, that the same was deposited "without prejudice to * * * its right to appeal from said judgment" is of no value in determining the question of its right to appeal, a right which is wholly dependent upon the statute. Ordinarily the voluntary compliance with a judgment and the acceptance of the fruits thereof by a party are inconsistent with a right of appeal by such party. By accepting the money paid into court in a proceeding in eminent domain a defendant thereby abandons "all defenses interposed by him," excepting the one saved to him by the statute, "his claim for greater compensation." But for this saving clause the acceptance of payment by a defendant of the amount awarded him as damages would be an abandonment of all defenses. The Constitution (article 1, § 14) provides:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner."

Such compensation "is not paid into court for him until he can take it." Steinhart v. Superior Court, 137 Cal. 575, 579, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183. There is no provision, constitutional or statutory, giving a plaintiff the right to recover any part of the compensation so paid in the event of a judgment for a smaller sum upon a second trial. The facts involved in the case of Los Angeles, etc., Ry. Co. v. Rumpp, 104 Cal. 20, 37 Pac. 859, differ from those in this, in that the defendant there appealed, after accepting the compensation paid into court by the plaintiff, and that—

> "The payment of the money into court by the plaintiff was not accompanied by a motion for a new trial or notice of appeal, or other objection to the amount found by the jury."

The grounds, however, upon which the decision is based, are independent of such failure to appeal or object. Commencing on page 25, it is said:

> "It paid its money and took possession of the land condemned. * * * Upon payment of the money plaintiff acquired a vested right in the property, and the defendant a vested right in the compensation. * * * The abandonment by the defendant of all defenses except her claim for greater compensation confirmed plaintiff's right to the property, and estopped her from denying that right, and the plaintiff, we think, is equally estopped to say that the money received by the defendant is not hers. It is urged, however, that the appeal from the first judgment vacated it, and with it the finding of the compensation awarded to the defendant. But if that were true the plaintiff's right to the possession was swept away with the defendant's right to the compensation. Plaintiff's right to possession, depending, as it does under the Constitution, upon compensation first made, cannot exist without it. It is therefore clear that the appeal of defendant, accompanied by her abandonment of other defenses, did not, as in ordinary cases, vacate the judgment. Nothing that was in issue upon the first trial was in issue upon the second. The sole questions were whether the defendant was entitled to 'greater compensation,' and, if so, how much additional compensation was she entitled to. The statute requires the court to pay to the defendant the damages awarded by the jury so deposited by the plaintiff, but makes no provision or requirement that any part of it under any circumstances shall be repaid. Under a statute of the state of New York containing a similar provision for the payment or deposit of the compensation for the land, etc., an appeal is provided for, and on such appeal a new appraisal may be ordered. * * * The statute then provides: 'If the amount of the compensation to be paid by the company is increased by the second report the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or deposited in the bank, as the court shall direct; and if the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid.' * * * Under the above statute not only is the whole question of compensation set at large by the order for a new appraisement, but if the amount is reduced there is an express requirement that it shall be repaid, * * * whilst under our statute we find no requirement that anything shall be refunded."

In support of appellant's contention that payment of the damages awarded and entry into possession did not constitute a waiver of an appeal, Lewis on Eminent Domain (3d Ed.) § 808, is cited. It is there said:

> "If the petitioner pays the damages awarded, this will, in the absence of any statute, waive an appeal, but the deposit of damages for the purpose of obtaining possession will not deprive the petitioner of the right of appeal."

In support of the latter part of the statement the author cites cases from Indiana, Louisiana, Michigan, and Missouri. The statutes considered in those decisions were essentially different from those of this state. The Indiana statute authorized the plaintiff to take possession upon payment of the amount of the award and provided:

> "The award of said arbitrators may be reviewed by the circuit court * * * and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." Cleveland, C., C. & St. L. Ry. Co. v. Nowlin, 163 Ind. 497, 72 N. E. 257.

The Louisiana statute provided:

> "In the event of any change being made by the final decree in the decision of the cause, the corporation shall be bound to pay the additional sum assessed, or be entitled to recover back the surplus paid, as the case may be." New Orleans Terminal Co. v. Fireman's Charitable Ass'n, 115 La. 442, 39 South. 437.

The Michigan statute provided that if the compensation—

> "is increased by the second report, the difference is to be a lien on the land appraised, and be paid by the company. If the amount is diminished, the difference shall be refunded to the company." Fort St. Union Depot Co. v. Peninsular Stove Co., 103 Mich. 637, 61 N. W. 1007.

The Missouri statute was similar to that of Indiana. St. Louis, K. & N. W. R. Co. v. Clark, 119 Mo. 357, 24 S. W. 157; St. Louis, etc., R. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 9 L. R. A. (N. S.) 426, 116 Am. St. Rep. 499, 8 Ann. Cas. 822. The statute construed in Madisonville, H. & E. R. R. Co. v. Ross, 126 Ky. 138, 103 S. W. 330, 13 L. R. A. (N. S.) 420, cited by appellant, provided:

> "When an appeal shall be taken * * * by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs."

Here it clearly appears that the statute contemplated a right of appeal, notwithstanding the payment. In Chicago, S. F. & C. Ry. Co. v. Phelps, 125 Ill. 482, 17 N. E. 769, the owner had expressly agreed to refund the money paid as compensation in the event of a reversal of the judgment. In Kansas City Southern Ry. Co. v. Boles, 88 Ark. 533, 115 S. W. 375, the plaintiff had paid into court the compensation awarded under a mistake as to its rights, and it was held that, under such circumstances, plaintiff's right of appeal was not waived. In City of Rosebud v. Vitek (Tex. Civ. App.) 210 S. W. 728, the statute (article 6530, Rev. Stats.) construed provided:

> "Where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff."

No case has been cited or discovered which holds that the condemning party can recover any part of the compensation paid to the owner, in the absence of a statute expressly or by necessary implication authorizing such recovery.

In Pyle v. Woods, 18 Idaho, 674, 111 Pac. 746, the statute under consideration gave both parties the right to have the question of compensation determined by a jury, with the proviso that the condemning party might apply for the appointment of commissioners to assess such compensation, and that after the making of such assessment the plaintiff might have possession upon payment of the sum so assessed. The plaintiff caused the assessment to be made, paid the amount thereof into court, took possession of the property, and then sought to have defendant's damages fixed by a jury. In granting a writ prohibiting the court from proceeding with the trial the Supreme Court said:

> "After the assessment of damages by the commissioners the company was not obliged to pay the award if it was dissatisfied with the amount assessed but might have gone before the court and a jury and had the damages assessed in the usual way. The payment of the award made by the commissioners was wholly voluntary on the part of the plaintiff. * * * It would be trifling with justice and the rights of property owners to allow a company, endowed with the powers of eminent domain, to come into court, procure the appointment of commissioners, pay the award made into the court, take possession of the defendant's property, and thereafter put the defendant to the annoyance and expense of a trial before the court and jury when the defendant is already willing to accept the award which has been made and upon which plaintiff has taken possession of his property."

In Helm & N. W. R. Co. v. Turner, 89 Miss. 334, 42 South. 377, it was held that the plaintiff waived its right of appeal by payment of the award and entry into possession under a statute which provided:

> "Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon the land of such defendant so condemned, and to appropriate the same to the public use defined in the application."

Under statutes of other states authorizing a condemning party to take possession upon payment of the award and providing that the plaintiff shall be required to pay any additional sum awarded the defendant upon a second hearing, but making no provision for a recovery by the plaintiff in the event of a diminished second award, it has been held that by payment and entry into possession the plaintiff waives the right of appeal. Mayor, etc., of Jersey City v. Hamilton, 70 N. J. Law, 48, 56 Atl. 670; Oregon Electric Ry. Co. v. Terwilliger, 51 Or. 107, 93 Pac. 334, 930; City of Portland v. Schmid, 82 Or. 465, 161 Pac. 560; City of Spokane v. Cowles, 67 Wash. 539, 121 Pac. 463. The foregoing decisions are all in harmony with what is said in Los Angeles, etc., Ry. Co. v. Rumpp, supra, and that case must be held to be controlling here.

The appeal is dismissed.

We concur: HART, J.; PLUMMER, J.

(66 Cal. App. 275)

WILLSON v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY, et al. (Civ. 4624.)

(District Court of Appeal, Second District, Division 1, California. March 20, 1924. Hearing Denied by Supreme Court May 19, 1924.)

1. Witnesses 🔑184(1)—Generally no absolute privilege to decline to reveal trade secrets.

Generally, while there is no absolute privilege to decline to reveal a so-called trade secret, yet, unless rights of innocent persons are dependent on their disclosure, property right of possessor should be protected.

2. Explosives 🔑8—Complaint held to authorize evidence of composition of flare.

In action for injuries from explosion of flare, manufactured by defendant, allegation of complaint that it was highly and dangerously explosive made determination of its explosiveness a material element, and evidence of its composition was relevant.

3. Witnesses 🔑21—Refusal to disclose composition of flare causing injury held contempt.

As chemical composition of flare was material to right of action of person injured from explosion thereof, right of manufacturer to protection of his trade secret yields to superior right of plaintiff, and refusal of defendant, called as plaintiff's witness, under Code Civ. Proc. § 2055, to disclose composition, was contempt.

Writ of review by W. H. Willson against the Superior Court of the State of California, in and for the County of Los Angeles, and another. Writ discharged.

Dudley Robinson, of Los Angeles, for petitioner.

Arthur Wright, of Los Angeles, for respondents.

HOUSER, J. Certiorari. The purpose of the proceeding before this court is to determine the legality of a judgment of contempt and an order of commitment, arising out of the refusal of the person adjudged guilty of the contempt to answer certain questions propounded to him as a witness.

The witness was the defendant in the action. He was the proprietor of a business engaged in the manufacture and sale of fireworks. As a part of such enterprise he prepared and sold an article known as an "actinic flare," which was particularly useful in taking photographs in the moving picture business, and which, because of its efficiency and its comparative cheapness, was in great demand, and from the sale and manufacture of which the defendant derived a very considerable profit. The process of its manufacture was a secret known only to the defendant. The article was made in the form of a tube, at one end of which was a wooden handle, suitable either for holding in one's hand or for attaching by means of a nail to a wooden post or pole or other object. In the other end of the tube was a fuse to be used for lighting the flare. Upon the flare was a printed statement in the following words:

> "Two Minutes Actinic Flares. Should always be burned horizontally and held at arm's length. They start with a slow flame, but soon burst into a fierce flare. If it is desired to burn them from a post or elevation, drive a ten-penny nail into post; the nail head will pass into the hole in handle. Handle carefully; don't hammer or drive nails in them. If damaged they will not burn steadily."

It appears that the defendant sold several flares to a moving picture concern, and that one of its employees was injured by reason of the fact that one of the flares exploded in the hand of the employee after the flare had been ignited in the ordinary and customary manner of its use. The employee brought an action against defendant for damages, and among the allegations of the complaint, either as originally filed, or as amended on the trial, are charges to the effect that the flare was of a "dangerous and explosive character"; that the flare "contained chemicals which were or might easily become explosive"; that the plaintiff was not familiar with the constituency or proportions which constituted the burning substance of said flare, "but alleges the same was well known to defendant, and that they are highly explosive"; also that when the chemical substance of the flare becomes powdered or loose the flare "becomes highly and dangerously explosive."

By far the greater part of the foregoing allegations were contained in the amendment to the complaint which was filed after practically all the evidence in behalf of plaintiff had been introduced on the trial; and, although the record does not disclose that any answer was interposed thereto, the parties and the court thereafter, when the question was asked to which objection was made and which question and answer are hereinafter set out, treated the matter as though an answer had been filed by defendant denying each of such allegations. Counsel for defendant offered to stipulate that under certain circumstances, such as if in the manufacture of the flare the formula were departed from, or if the flare were cracked or bruised or "beaten about the head," the flare might explode; but refused to stipulate to the chemical constituents of the flare, or what were the respective proportions of its several parts or substances, or that the flare was inherently dangerous.

On the trial, under the provisions of section 2055 of the Code of Civil Procedure, the defendant was called as a witness, not for himself, but on behalf of the plaintiff, and was thus being "examined by the adverse party as if under cross-examination." He was asked the following question:

> "By Mr. Wright: Q. Mr. Willson, what are the chemical constituents of that flare? And by that I mean what is the flare made up of? What are the chemicals or substances or drugs of which it is made, and what are their respective proportions?"

Defendant's counsel interposed an objection to the question that it was—

> "incompetent, irrelevant, and immaterial, and calling for a privileged matter, a secret process or trade secret; and, further, upon the ground that the disclosure of the trade secret is not necessary to the decision of this case, or in the interests of justice."

On advice of counsel, defendant declined and refused to answer the question which had been propounded to him. The court adjudged him guilty of contempt of court for such refusal, and the defendant was thereupon committed to the county jail of Los Angeles county until he should answer the said question.

The question of the jurisdiction of the trial court to so adjudge defendant guilty of a contempt of the court and to order him committed by reason thereof is the only matter suggested for determination herein.

[1] The general trend of authority, as recognized by text-writers and by courts alike, is to the effect that, while there is no absolute privilege (such as may be present where certain confidential relationships exist) to decline to reveal a so-called trade secret, yet, unless the rights of innocent persons are dependent upon their disclosure, the property right of the possessor of such trade secret should be protected. Mr. Wigmore, in his work on Evidence, vol. 4, § 2212, lays down the principle that ordinarily there ought to be a recognition by the courts of such a privilege. His conclusions, so far as affects the facts of this case, are contained within his statement that—

> "No privilege of secrecy should be recognized if the rights of possibly innocent persons depend essentially or chiefly for their ascertainment upon the disclosure in question."

The policy of the law is unquestionably that of fostering and protecting trade secrets, as is shown by the laws affecting their registration, and, unless the interests of justice imperatively demand their disclosure, a disregard of valuable property rights arising from enforced disclosure, whether by means of contempt proceedings or otherwise, approaches at least the confiscation of private property. 40 Cyc. 2532; Jones on Evidence, vol. 5, § 892; Cyclopedia of Evidence, vol. 14, p. 663.

[2] It is important to determine, first, whether the allegations of the complaint were sufficient to authorize the reception of such evidence. Reverting to those allegations, it will be noticed that there are many expressions to the effect that the chemical constituency of the flare was "highly and dangerously explosive." The meaning of such language is apparent. There can be no misunderstanding that the thought thereby sought to be conveyed is that the substance of which the flare is composed is explosive in the same sense that gunpowder or dynamite is explosive. In plain and forceful language the defendant is placed on notice of just what plaintiff claims is one of the properties of the substance which defendant sold for plaintiff's use, without any alleged adequate warning as to its dangerous qualities. Should the ingredients of the flare, taken either separately or in any combination of its various parts, however prepared or however treated, be shown to be entirely harmless from an explosive standpoint, the case of the employee would present an entirely different aspect than though the formula for the manufacture of the flare were to present a chemical condition which, under circumstances as portrayed by the evidence, would certainly result in an explosion of very great force. The position of the injured employee with reference to the chemical composition of the flare is not one either of idle curiosity, or yet one of an interest from the standpoint of a business competitor or a rival. The case of the injured employee may of necessity require the showing which he has attempted to make. The result of the trial may depend absolutely upon the ability of the plaintiff to demonstrate the inherently dangerous qualities of the substance of which the flare is composed. His interest in knowing the chemical composition of the flare may be vital to his case, in that, in order to sustain his cause, he may be obliged to convince the trial court that the substance of the flare, at least in the condition it was at the time it was used, whether arising from rough physical usage, resulting in the tube and its contents being cracked or powdered, or from some other cause, was "highly and dangerously explosive." It would, therefore, become not merely incidental to plaintiff's cause of action, but would be the very crux of the matter. Far from being collateral, it would then present the paramount issue of the case. To say the least, the determination of the explosiveness of the flare is a material element of the action, and the offered evidence is unquestionably relevant thereto.

[3] While it may be of great pecuniary importance to the owner of a trade secret, because of the revenue or profit derived by him from the manufacture and the sale of the product dependent thereon, that the formula for its production remain undisclosed, it may also well be of greater comparative consequence to one injured by or through its use that the secret be divulged in order that the rights of the injured person may be adequately protected. The right of the manufacturer to the protection of his trade secret ought to yield to the superior right of an innocent person who has suffered injury through no fault of his own, but assumedly through the negligence of the manufacturer. It would, indeed, be a dangerous principle, and one inimical to the standards of justice, to hold that the right of an injured innocent person to redress should be withheld solely because the person causing the injury and responsible therefor was in possession of certain facts, however consequential to his private interests, without the disclosure of which such right could not be determined or enforced, and thus, in effect, uphold the wrongdoer in his wrongdoing. No man is entitled to be protected in his proper right to a trade secret where, by the exercise of such right, he has wrought an injury to another and the disclosure of such secret is indispensable to the ascertainment of the truth and the ultimate determination of the civil rights of the parties.

If it be assumed that the article called an "actinic flare," instead of being composed of the various substances making up its composition, actually was composed of a substance known to the general public as gunpowder, and that the injured employee had no notice of its dangerous qualities other than such notice as was here given, it could not be doubted that the injured employee would be entitled to prove that the actinic flare was of a "dangerous and explosive character"; or that when its chemical substance was powdered or loose the flare thereupon became "highly and dangerously explosive." Such being the case, there being evidence that an explosion occurred through which the employee received an injury, his right to show, if he can, the inherently dangerous qualities of the substance causing the explosion and the pertinency of such evidence is apparent.

It follows that the writ should be discharged. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

66 Cal. App. 363

HUNT v. SUTTER-BUTTE CANAL CO.

(Civ. 2709.)

(District Court of Appeal, Third District, California. March 27, 1924.)

1. Appeal and error ⟹1033(9)—Defendant held without complaint as to verdict not excessive, in less amount than prayed for.

In action for damages from overflow waters from defendant's canal, where evidence showed that loss exceeded damages awarded, defendant cannot complain that award was less than claimed.

2. Waters and water courses ⟹263—Finding of negligent obstruction of irrigation canal sustained.

Evidence *held* to justify jury's conclusion that obstruction in irrigation canal was negligently left therein, causing water to rise, back up, and break over sides, and inundate and foul plaintiff's land during cropping year.

3. Appeal and error ⟹1052(8)—Evidence showing proper construction of canal, in action for negligent obstruction, not reviewed.

Where evidence justified verdict that negligent obstruction of canal caused water to rise and overflow plaintiff's land, evidence showing proper construction of canal was immaterial and will not be reviewed.

4. Waters and water courses ⟹262—Care required in construction and operation of irrigation system.

Where right of way for canal is granted, defendant is held to usual and ordinary manner of construction of its irrigation system and is not insurer nor liable for breaks in system from unprecedented floods, but is liable for negligent operation.

5. Appeal and error ⟹882(12)—Legal effect and language of requested instructions being practically identical, neither party can complain thereof.

Where legal effect and language of instruction given at plaintiff's request was almost identical with instruction given at defendant's request, neither party can complain thereof.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by A. P. Hunt against the Sutter-Butte Canal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Ingram, of Gridley, and W. H. Carlin, of Marysville, for appellant.

James T. Matlock, of Red Bluff, and G. F. Jones, of Oroville, for respondent.

PLUMMER, J. By this action the plaintiff sought judgment against the defendant in the sum of $14,250 on account of damages alleged to have been suffered by him to certain crops growing and being in the county of Butte in the year 1920, and the fouling of the lands then and there leased by him so as to materially diminish their productivity during the year 1921. The action was tried before a jury. Plaintiff had judgment in the sum of $1,900, and the defendant appeals.

The facts set forth in the pleadings and the transcript show that the plaintiff held, under a lease, certain lands situated in the county of Butte, upon 130 acres of which he was growing and cultivating rice; that during the year 1920 he had produced thereon a crop of considerable value; that this crop was partly harvested and standing upon the leased premises in the month of November of that year; that during said month the lands on which said crop of rice was then and there being were inundated by water escaping from a canal belonging to the defendant and appellant in this action. The allegations in the complaint material to be considered in this action are found in paragraph 6 thereof and in subdivision e of paragraph 7. Those allegations are as follows:

"That the said defendant negligently and carelessly maintained and operated said canal and weirs and the waters therein by boards being left in a weir, near where the Biggs road crosses the canal, thereby causing the waters to rise and back up and break out and overflow and seep through, and as herein set forth, and that because of such negligent and careless maintaining and operating of said canal and weirs and the waters therein, by defendant, water escaped from said canal and seeped through and over and ran through the side of the canal during the latter part of the cropping season of 1920, and continued to do so for some time thereafter, and said defendant negligently and carelessly allowed said water to flow to and upon the said lands of plaintiff herein."

"That by reason of the overflow and seepage of said water from said canal, as hereinbefore alleged and set forth, plaintiff was compelled to perform extra services and incur extra expense in cleaning and clearing up the land so overflowed, and refilling holes cut by the water, and was thereby further damaged in the sum of $650."

Other allegations appear in the complaint setting forth in the aggregate the amount of damages alleged to have been suffered by the plaintiff for and on account of the waters escaping from the canal belonging to the defendant. The lands held under lease by the plaintiff belonged to Mrs. Mattie A. Looney, who, prior to the execution of the lease to the plaintiff of the lands inundated, had executed to the defendant a deed for a right of way 60 feet in width running through said leased lands for the purpose of constructing and operating an irrigating ditch or canal. This ditch or canal had been constructed by the defendant and was under its control and was being operated by it at the time of the injury complained of. The principal ground urged by the appellant herein for reversal is that the verdict of the jury is not sustained by the evidence; a minor objection is made as to certain instructions given by the court to the jury. In behalf of the appellant's contention that the verdict of the jury is not sustained by the evidence, the appellant sets forth in detail the testimony of a number of witnesses familiar with the building of canals and irrigating ditches all going to the effect that the canal or irrigating ditch in question was properly constructed, that it was built in the usual manner of ditches in that section of the country, and that precautions usually taken in building such ditches for purposes of irrigation had been taken in this instance. We do not find anything in the transcript or in the reply made by respondent which seriously questions any of the foregoing propositions relating to the construction of the ditch further than the testimony of one witness that the rainfall which occurred during the period in controversy was not other than that which might be anticipated as likely to occur every few years in that locality.

[1] The plaintiff calls our attention to the fact that the jury awarded damages in the sum of only $1,900, whereas the plaintiff in his complaint had sought to recover the sum of $14,250, and argues from this that there is nothing in the case upon which the jury could have predicated such a judgment. In this particular, however, none of the testimony is called to our attention, but we have examined the transcript and find that some 130 acres of rice were inundated by the waters referred to; that the loss was considerably in excess of the amount of damages awarded by the jury; and, also, that the testimony covered such questions as the profitable market value of the crop, the cost of harvesting and the various items of expenditure attendant thereupon, the question of the lessened yield for the one year involved, the extra cost of preparing the land for cultivation and various items necessitating considerable calculation on the part of the jury to arrive at an accurate estimate of the total loss suffered by the plaintiff, and, as the damages awarded are not complained of as being excessive, we do not very well see how the defendant can complain of a verdict simply because it is less in amount than the sum claimed by the plaintiff. So long as the damages awarded are not excessive, the smaller the amount awarded, the less cause the losing party has to complain.

[2] The gravamen of the complaint of plaintiff is found in paragraph 6, which we have heretofore quoted. It is in the allegation of leaving boards in a certain weir in the canal in question thereby causing the waters to rise, back up, break out, and overflow the leased lands held and operated by the plaintiff to the destruction of his crops; the digging out of holes therein and fouling the land so as to make it more difficult for future use. The testimony of the witnesses Scott, Bernard, and Coffey shows that the waters flooding the lands leased and held by the plaintiff came from a break in the canal above the weir thus referred to. The witness Scott testified that he was on the ranch occupied and farmed by the plaintiff in the month of November, 1920, about the 15th of November, or as nearly as he can recall; that at that time he found the canal broken and water running in the fields; that he visited the weir referred to in the complaint, and he found a man taking boards out of the weir. The witness Coffey fixes the date of the break as the 16th or 17th of November, 1920. The difference in the fixing of the dates of these witnesses is called to our attention, but it is the instance itself and not the date that usually fixes itself in the memory of the witness, and consequently but little importance could be attached to this difference in the time. The witness Scott says the 15th of November as nearly as he can recall, but his testimony shows that the water was backed up and that it was running over the bank of the canal at the place fixed as the break by the other witnesses. All three of the witnesses referred to furnish sufficient testimony to justify the jury in coming to the conclusion that the crops belonging to the plaintiff were flooded by the waters going through the break above the weir mentioned in plaintiff's complaint. The canal appears, as stated by respondent, to have been "built for a number of miles across fairly level farming land," and, consequently, any obstruction therein would cause the waters flowing in the canal to back up for a considerable distance.

[3] The witness Scott states that he was there at the time the boards were being removed from the weir which obstructed the flow of the water in the canal, and that by reason of the boards left in the same the waters therein had been backed up to such an extent that it was overflowing its banks. The jury had a right to believe this testimony and had a right to act thereon and to conclude that the obstruction in the canal had been negligently left therein. Under such circumstances, the fact that the canal was constructed in the most approved manner would become wholly immaterial. If it is in the negligent operation of the canal that injury ensues, the manner in which it was built or constructed by the defendant would not relieve it from liability. This being true, we do not see the necessity for reviewing either the testimony introduced for the purpose of establishing the proper construction of the canal or the argument of the appellant based thereon, because we would not be justified in disturbing the verdict of the jury based upon testimony tending to show its negligent operation.

[4] The law applicable to this case is also so well settled that we need only to state its principles. The right of way having been granted, the defendant is held only to the

usual and ordinary course and manner of construction of its irrigating systems and is not an insurer; that a canal company is not liable for breaks occurring in its system occasioned by unprecedented and extraordinary floods which in the usual and ordinary course of events are not to be anticipated, but that its legal obligations are to anticipate such heavy rainfalls as are usual or do frequently occur in the vicinity or section of the state where its canal system is located; that a canal company is liable for all damages occasioned by the negligent operation of its irrigating system irrespective of whether a right of way has or has not been granted for the construction of its canals or irrigating ditches through the premises involved. In other words, the granting of a right of way releases the defendant from such damages as are usually and ordinarily attendant upon the building and operation of canals and irrigating ditches. Sternes v. Sutter-Butte Canal Co. (Cal. App.) 216 Pac. 66.

Upon the method of ascertaining damages the court instructed the jury according to the rule laid down in Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779.

[5] Objection is made by appellant to instruction No. 12, given at the request of the plaintiff, in that it does not direct the jury to find from a preponderance of the evidence, and also that the reference to the damages done the leased land is erroneous as it might possibly refer to the ownership of the land. The instruction is as follows:

> "You are instructed that if you find the defendant, Sutter-Butte Canal Company, negligently and carelessly maintained and operated its canal and weirs and the water flowing in said canal in such a manner as to damage plaintiff's rice crop, or the land leased by him, he is entitled to recover such damage, and the amount thereof is to be determined by you from the instructions on the measure of damages, which I have heretofore read to you."

Instruction No. 13, asked for by the plaintiff and given by the court, refers to the same subject, and includes the word "preponderance," omitted in instruction No. 12 above set forth. It also refers to the land and elaborates upon the damages which may be considered, to wit, the fouling of the land, causing it to be overgrown with wild grass and tules by reason of the flowing, etc., and the extra expense of cleaning and clearing the land and refilling the holes made therein by the flood waters.

Instruction No. 10, given by the court at the request of defendant, eliminates the question of error, if any, committed by the court in giving plaintiff's instruction No. 12, so far as it relates to the land. The instruction, given at the request of the defendant, reads:

> "I further instruct you that if you should find from the evidence that plaintiff had suffered damage from the flooding of his land and crops in the years 1920," etc.

It thus appears that the defendant asked the court to give an instruction in almost the identical language of which it now complains. The court also, at the request of defendant, instructed the jury as follows:

> "I instruct you that the burden rests upon the plaintiff to prove by a preponderance of the evidence every material allegation necessary to establish his case, and, if he fails so to do, your verdict must be in favor of the defendant."

Instruction No. 8, given by the court at the request of the defendant, also refers to the crops and land in the same manner as does the instruction No. 12 given by the court at the request of the plaintiff. The legal effect being the same and the language almost identical in the instruction given at the request of the plaintiff and the instructions given at the request of the defendant, we do not very well see how any cause of complaint arises in favor of either party.

We find no further question calling for consideration upon this appeal.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 207

DINSMORE et al. v. RENFROE et al.
(Civ. 4730.)

(District Court of Appeal, First District, Division 2, California. March 15, 1924. Hearing Denied by Supreme Court May 12, 1924.)

1. Appeal and error ⚿933(2)—Notice of entry of judgment presumed as of a date to support subsequent proceedings.

Notice of entry of judgment is presumed as of a date which will support subsequent proceedings and orders of trial court, in absence of a showing to contrary.

2. New trial ⚿138—Time for serving motion for new trial depends on service of notice of entry of judgment.

Under Code Civ. Proc. § 659, time for serving notice of motion for new trial is dependent upon service of notice of judgment entry.

3. Appeal and error ⚿345(1)—Notice of appeal held filed in sufficient time.

Where notice of intention to move for a new trial was filed on Nov. 17, 1922, and presumably within 10 days after notice of entry of judgment, and motion for new trial was overruled on Feb. 9, 1923, and time for filing appeal was extended 30 days from that date, notice of appeal filed on March 2, 1923, was not too late.

4. Appeal and error ⚿1071(1)—Conflict between jury's finding in equity and court's finding held not prejudicial.

That in equity, special findings of jury as adopted by court include implied findings which are at variance with express findings of court is not cause for reversal where, upon adopted findings of jury alone, which are ones most favorable to appellant, judgment is proper.

5. Trial ⚿398—Adoption by court of special findings of jury does not necessarily include implied findings.

Where court, though not bound to do so, adopts findings of jury in answer to special interrogatories, it must not be considered as having adopted any possible implied findings at variance with its own express findings.

6. Tenancy in common ⚿50—License by one cotenant held defense to action by other tenants for trespass.

Where defendants constructed a road on property under a license granted them by one of cotenant owners, they were not answerable as trespassers to other cotenants.

7. Trial ⚿398—Court's findings held not inconsistent with jury's implied findings.

Trial court's additional findings that two cotenant owners should have made inquiry as to road construction on their land by defendants under license by another cotenant were not inconsistent with jury's implied findings that such co-owners had no actual knowledge of construction.

8. Tenancy in common ⚿50—License by cotenant to build road held irrevocable by defendants' expenditure.

License to defendants to build road, granted by one of co-owners, became irrevocable by defendants' expenditure of hundreds of dollars in reliance thereon.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by John S. Dinsmore and others against Arthur Renfroe and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Puter & Quinn, of Eureka, for appellants.
Pierce H. Ryan, of Eureka, for respondents.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against them in an action in which they sought an injunction against the defendants to prevent them from passing over a road which said defendants had constructed at their own cost and expense over the land of plaintiffs. Plaintiffs also asked for $200, alleging damages for trespass upon the land of plaintiffs in the building of said road.

[1-3] At the outset it is necessary to consider, briefly, respondents' contention that the appeal was filed too late and should be dismissed. The record discloses that a jury answered several special interrogatories at the request of the court, but did not render a verdict. The court then made its findings and judgment, which judgment, in favor of the defendants, was entered on October 31, 1922. There is nothing to indicate when the notice of entry of judgment was served upon the plaintiffs, and in the absence of such a showing the presumption is of a date which will support the subsequent proceedings and orders of the trial court. The time for serving notice of motion for a new trial is made dependent upon the service of notice of the entry of judgment. Code Civ. Proc. § 659; Bates v. Ransome Crummey Co., 42 Cal. App. 702, 184 Pac. 39. The notice of intention to move for a new trial was filed on November 17, 1922, and it will be presumed that this was within ten days after notice of entry of judgment. The motion for a new trial was determined adversely to plaintiffs on February 9, 1923. At that time, prior to August, 1923, the trial court had three months within which to determine this motion, so its order was made in good time. The time for the filing of the appeal was extended 30 days after the date of the order upon the motion for a new trial. The notice of appeal was filed on March 2, 1923, which was within that time. We think, therefore, that there is no merit in the position that the appeal should be dismissed.

The appeal comes to us upon the judgment roll alone. Special interrogatories were submitted by the court to the jury, in answer to which the jury found that the plaintiff William (W. J. C.) Dinsmore had granted to defendants permission to build the road in controversy; that the plaintiff William Dinsmore had knowledge of the construction of the road as it was being built, and that plaintiffs' property had not been damaged by the construction of the road. The court made the further findings that on March 10, 1921, plaintiffs were the owners of the land described in the complaint, and that on said date defendants had a certain easement in said lands, to wit, a right of way over, along, and across a certain road or trail extending in a general northerly and southerly direction across said land, and that plaintiffs' ownership was subject to defendants' said easement; that on said date and prior thereto plaintiffs were in possession of said lands, but their possession was subject to said easements. It was also found that in the spring or summer of 1921 the defendants entered upon the land of plaintiffs and constructed a road running north and south, terminating at the county road on the south of said land, but that said entry was not without the consent or permission of plaintiffs nor against their will in violation of any request that they keep off of said land, as alleged in the complaint, but, on the contrary, that said entry and the construction of said road by defendants was pursuant to the express authority, permission, and license so to do granted to defendants by plaintiffs; that before the commencement of the construction of said road said plaintiffs W. J. C. Dinsmore and John S. Dinsmore expressly gave and granted to defendants authority and permission to construct and use said road, and told defendants to build such road at such place as they (the said defendants) desired, which permission and authority have never been revoked; that pursuant to said authority and permission defendants did construct and build said road; that the construction thereof cost defendants many hundreds of dollars in material and labor, and that the construction thereof was with the actual knowledge of plaintiffs W. J. C. Dinsmore, John S. Dinsmore, and Trustum R. Dinsmore, and that plaintiffs W. J. C. Dinsmore and John S. Dinsmore passed over said road while it was being constructed, and saw defendants working thereon, and that plaintiffs W. J. C. Dinsmore, John S. Dinsmore, and Trustum R. Dinsmore heard defendants blasting at said construction work, and that said plaintiff W. J. C. Dinsmore offered to loan to defendants a scraper to be used in said construction work, and that a portion of said road does pass, and while construction work was in progress did pass, within sight of plaintiffs' residence, and that ever since its completion it has been used with the knowledge of all of plaintiffs, by defendants and by the general public, and that none of the plaintiffs ever protested or objected to its construction or its use by the defendants or by the public until the commencement of this action.

The trial court concluded from these findings that the defendants had been granted a license to build said road and to pass over the same, and that such license had become irrevocable by reason of the expenditure of considerable money by the defendants in reliance thereon; that plaintiffs had not been damaged by the construction of said road, and were not entitled to recover a money judgment, nor to be awarded an injunction against the defendants.

Appellants complain that the findings are inconsistent in that the jury found that William (W. J. C.) Dinsmore had granted permission to the defendants to build the road and had actual knowledge of its construction, while the court found that not only William Dinsmore but also John S. Dinsmore granted permission to build the road, and that these two plaintiffs, as well as Trustum R. Dinsmore, had actual knowledge of the construction of the road.

[4, 5] Respondents reply by pointing out that the entire case was not submitted to the jury, but merely special interrogatories; that the court adopted the jury's answers to these interrogatories, in so far as they went, and then added court findings; that the court was not bound to accept the special findings of the jury, and in doing so must not be considered as having adopted any possible implied findings of the jury at variance with express findings of the court. If this view, which we think is a proper one, be adopted, we have a situation where the court adopted a finding that one of the plaintiffs, William Dinsmore, gave defendants permission to construct the road and had actual knowledge of its construction, and added other and further findings not in conflict therewith, and to the effect that another plaintiff also granted this permission, and that two plaintiffs other than William Dinsmore had actual knowledge of the construction of the road by defendants. However, if we should construe the adopted findings of the jury as appellants insist we should do, as including implied findings that all plaintiffs except William Dinsmore did not grant permission to build the road and did not have actual knowledge of its construction, we think the judgment should not be reversed because of the conflict between these implied findings and the further findings added by the court. Under this view of the matter, the findings of the court go further than those of the jury, but upon the adopted findings of the jury alone, which are the ones most favorable to the appellants, we think the judgment was proper.

[6] The action was one to enjoin a trespass and recover damages therefor, and the question presented is whether one entering upon the common lands of a cotenancy with the permission of one of the cotenants is a trespasser.

The authorities cited by appellants holding that one cotenant cannot grant an easement that will be binding upon the interests of his co-owners have no bearing in this case, for the reason that the defendants do not claim an easement, but merely a license, which has now become irrevocable, as shall be discussed hereinafter. There is a clear distinction between the two. Pinheiro v. Bettencourt, 17 Cal. App. 111, 119, 118 Pac. 941; 17 R. C. L. § 80, p. 566 et seq. As to the power of one cotenant to grant a license which will absolve the licensee, in the exercise thereof, of the charge of trespass made by the other cotenants, it was said in the case of Ord v. Chester, 18 Cal. 77, 80:

> "Those findings present the simple question whether a party put in possession or allowed to occupy a portion of premises by one tenant in common can be sued as a trespasser by another tenant in common, without notice to quit or [some] other act showing a termination of this license or tenancy. We have no doubt that one tenant in common may occupy the common premises, and as little that he may permit another person to occupy a part of them; and it is impossible for us to see how that tenant in common could sue such person, so lawfully entering or occupying, as a trespasser, or how his cotenant could maintain such suit. Having entered, or being in possession by lawful right, he cannot, so long as his relation to

the owners is unchanged, be turned into a trespasser, and held liable in costs and damages for doing what he was lawfully authorized by those owners or one of them to do."

In the case of Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 Pac. 45, it was said:

"The uncontradicted evidence shows that the defendant was in possession of the property with the consent of said Chay Yune [one of the co-owners]. All that the plaintiff was entitled to, therefore, was to be let into possession with the defendant—to enjoy his moiety. Freeman on Cotenancy and Partition, §§ 180. 220; Pickard v. Perley, 45 N. H. 191, 76 Am. Dec. 153; Ord v. Chester, 18 Cal. 80.

"One tenant in common may, 'by either lease or license, * * * confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor or licensor himself might have used or occupied it if such lease or license had not been granted. If either cotenant expel such licensee or lessee, he is guilty of a trespass. If the lessee has the exclusive possession of the premises, he is not liable to any one but his lessor for the rent, unless the other cotenants attempt to enter and he resists or forbids their entry, or unless, being in possession with them, he ousts or excludes some or all of them.' Freeman on Cotenancy and Partition, § 253. There is no evidence tending to show that the defendant ever refused to allow the plaintiff to enjoy the use of the premises with him."

The foregoing decisions are in harmony with those of other states. In the case of Buchanan v. Jencks, 38 R. I. 443, 96 Atl. 307, 2 A. L. R. 987, the plaintiffs were co-owners with one Thayer in a parcel of land. Thayer sold the standing timber and wood upon said land to one Aldrich, and authorized him to cut and remove the same. Aldrich conveyed his rights to the defendant Jencks, who proceeded to cut the timber and remove the same, which resulted in an action for damages by the owners of the land, other than Thayer. The court said:

"It seems to us desirable to determine, in the first instance, whether or not Barton W. Jencks, through the several transfers before mentioned, acquired a right to enter upon this lot and cut wood and timber. It will not be disputed that one cotenant by an entry upon the common property does not ipso facto become a trespasser. He may become a trespasser, as some of the authorities hold, if his entry is accompanied by acts which amount to an ouster of his cotenants or is followed by destruction of the common property. Enoch Thayer, as a tenant in common of this wood lot, had the right to enter upon the same without becoming a trespasser and he had the right to cut timber and wood there, provided his entry did not amount as before suggested to an ouster of his cotenants or involve the destruction of common property. * * * We see no reason why a cotenant in the enjoyment of his rights as such cannot authorize another to do whatever he might lawfully do himself. A contrary view, if followed to its logical conclusion, would restrict a cotenant's enjoyment of the common property to the sphere of his own personal activities and would deprive him of the aid of others whom he might desire or need to employ. A cotenant has the right to divest himself of his entire interest in the common estate and thus bring into association with his former cotenants one who had theretofore been a stranger to the title, and this he can do independently and without the consent of the other interests. This being so, it would seem unreasonable to say that a cotenant could not authorize another to go upon the common land and do anything that he might do himself. We think therefore that in this case we must apply the same principles to the consideration of the acts of the defendant, Jencks, which we might have applied to Thayer, the cotenant, had he, in person, committed the acts of which the plaintiffs now complain."

In the last-cited case the court says further:

"We do not find anything in the evidence showing an ouster of the plaintiffs. So far as appears they were in no way prevented by the defendant or by Thayer from entering upon the premises and cutting and removing timber and wood had they seen fit to do so, and we do not think that the sale, cutting, and removal of matured timber and wood amounts to a destruction of the property which the law contemplates. * * *

"The gist of the count is that the defendant broke and entered the close of the plaintiffs. But a cotenant cannot be said to be guilty of a trespass quare clausum fregit for the reason that he has, in common with his cotenants, a right to enter upon the premises, and such entry does not constitute a trespass. Neither could the defendant be guilty of trespass in entering the close because he entered upon the authority of Thayer, who was a cotenant with the plaintiffs."

[7] We think it is beyond dispute from the foregoing authorities that the defendants are not answerable as trespassers to the cotenants of William Dinsmore, because of their acts under the license granted them by said William Dinsmore.

Upon the question of the revocability of the license, it is to be recalled that the trial court found that the construction of the road in controversy cost the defendants many hundreds of dollars in material and labor, and that plaintiffs W. J. C. Dinsmore and John S. Dinsmore passed over said road while it was being constructed, and saw defendants working thereon, and that plaintiffs W. J. C. Dinsmore, John S. Dinsmore, and Trustum R. Dinsmore heard defendants blasting at said construction work, and that said plaintiff W. J. C. Dinsmore offered to loan to defendants a scraper to be used in said construction work, and that a portion of said road passes within sight of the plaintiffs' residence. These latter findings are to be reconciled, if possible, with the implied finding of the jury that John S. and Trustrum R. Dinsmore did not have actual knowledge of the construction of the road. They may be construed so as to be harmonious, for the court found facts from which it is fair to say that John S. and Trustum R. Dinsmore should have made inquiry as to the construction of the road by defendants, which is not inconsistent with the implied finding of the jury that these plaintiffs had no actual knowledge of such construction. However, the question of whether or not all the plaintiffs had actual or only constructive knowledge of the building of the road becomes immaterial, as the judgment need not be based upon the doctrine of estoppel.

[8] The defendants built the road under a license from William Dinsmore, one of the co-owners of the land, which license had never been revoked until defendants had spent hundreds of dollars in reliance thereon. It has now become irrevocable because of this expenditure by the defendants. 17 R. C. L. § 90, p. 578 et seq.; Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; Grimshaw v. Belcher, 88 Cal. 217, 26 Pac. 84, 22 Am. St. Rep. 298; Stoner v. Zucker, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; Miller & Lux v. Kern Land Co., 154 Cal. 785, 99 Pac. 179.

The motion to dismiss the appeal is denied. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

66 Cal. App. 357

JACKSON v. OTIS et al. (Civ. 4736.)

(District Court of Appeal, First District, Division 2, California. March 27, 1924.)

Municipal corporations ⟹187—Retired policeman not prohibited from drawing pension because elected constable.

A retired policeman of city of Alameda is entitled to draw his pension, notwithstanding election to and occupation of office of constable, under Ordinance No. 97, § 7, though he was subject to be called upon by pension board to perform duties.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Charles L. Jackson against Frank Otis and others, as and comprising the Board of Police Pension Fund Commissioners of the City of Alameda, and others. Judgment for defendants, and the plaintiff appeals. Affirmed.

Clarence De Lancey, for appellant.

L. R. Weinmann and Wm. J. Locke, City Atty., both of Alameda, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him following his failure to amend his complaint after a demurrer to the same had been sustained by the court. The plaintiff sues as a resident and taxpayer of Alameda county to restrain the payment of a police pension to defendant Charles E. Keyes. The individual members of the board of police pension fund commissioners of the city of Alameda and the city treasurer are joined as defendants.

Briefly stated, the demurrer raised the following question of law: Is defendant Keyes, after having been retired from the Alameda police department and placed on the pension list, prohibited from drawing his pension because of his election to and occupation of the office of constable, and is the said board prohibited from paying this pension which it desires to pay? The appellant states the question, in essence, as being whether or not the two offices, i. e., retired member of the police force upon pension and constable are incompatible within the decisions interpreting the common law, admitting that if the two are not incompatible, as that term is used in said decisions, the demurrer was properly sustained.

A copy of Ordinance No. 97 (new series) of the city of Alameda was annexed to the complaint. It is by virtue of the provisions of this ordinance that the defendant Keyes has been receiving his pension. It provides, among other things:

> "Section 7. Any person retired for disability under this ordinance may be summoned before the board herein provided for at any time hereafter, and shall submit himself thereto for examination as to his fitness for duty, and shall abide the decision of such board with reference thereto, and all the members of the police force who may be retired under the provisions of this ordinance shall report to the chief of police on the first Mondays of April, July, October and January, of each year; and in cases of emergency may be assigned to and shall perform such duty as said chief of police may direct and such person shall have no claim against the city for payment for such duty so performed."

The appellant cites authorities from other jurisdictions. None of them present the precise legal situation with which we are dealing here, and although they might be somewhat helpful if we were without authority in this state upon the question, our appellate court has heretofore considered a situation very closely analogous to that presented in the instant case and our Supreme Court has approved the decision by denying a petition for a hearing of the case. Reed v. Schon, 2 Cal. App. 55, 83 Pac. 77. In said case the defendant was an officer in the United States army and was retired with the rank of captain. As such retired officer he was subject to be assigned to duty at the Soldiers' Home, if necessary, and he was also subject to be detailed for service with the militia of the several states or in time of war to be employed in active duty other than the command of troops. He was elected mayor of San Diego, and plaintiff brought an action to have him declared ineligible on the same general grounds involved in the instant case. Upon appeal, it was said:

> "It also seems clear to us that, under the provisions of the statute cited, the position of the defendant is a mere sinecure, without any duties attached to it; and hence that it cannot properly be called an office. It is true that a retired officer may be detailed to perform the duties of the several offices or employments specified in the statutory provisions that have been cited, such as an officer at a soldiers' home, or as a professor, or in connection with the militia of the state, or in the military service in time of war; but these are mere offices or employments to which he may be appointed; and until this happens no service can be required of him. Nor can the mere fact that he is subject to the remote contingency of being thus employed be regarded as such a duty as is contemplated in the definition."

In the instant case, by the terms of the ordinance attached to the amended complaint, defendant Keyes was "retired from further service from such police department, and from the date of such order the service of such person in such police department shall cease." It is true, likewise, that under the terms of said ordinance Keyes might some time in the future be called upon for certain duties, but there is no allegation that he has ever been called for such duties, and it also appears from the ordinance in question that even after call for duty the board has the power to excuse Keyes from the performance of the same.

Our conclusion is in harmony with the general principle set forth in the case of Pratt v. Rosenthal, 181 Cal. 158, 183 Pac. 542, that—

> "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible."

It is also in accord with the equities of the situation, for, as has been said in the case of O'Dea v. Cook, 176 Cal. 659, 169 Pac. 366:

> "A pension such as this law contemplates is not a gratuity or a gift. If it were, all of the provisions pertaining to it would be void under the Constitution of the state. (Article IV, § 31; Taylor v. Mott, 123 Cal. 497 [56 Pac. 256].) A pension is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation. (United States v. Teller, 107 U. S. 64, 27 L. Ed. 352, 2 Sup. Ct. Rep. 39; Mahon v. Board of Education, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107; State v. Love, 89 Neb. 149, Ann. Cas. 1912C, 542, 34 L. R. A. [N. S.] 607, 131 N. W. 196.) But where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself. (Hammitt v. Gaynor, 144 N. Y. Supp. 123; State v. Love, supra; People v. Abbott, 274 Ill. 380, 113 N. E. 696.) * * *
>
> "It is a firmly established principle of judicial construction that pension statutes serving a beneficial purpose are to be liberally construed. (Walton v. Cotton, 60 U. S. 355, 15 L. Ed. 658; Hanscom v. Malden, etc., Gas Light Co., 220 Mass. 1, Ann. Cas. 1917A, 145, 107 N. E. 426.)"

The judgment is affirmed.

We concur: NOURSE, J; STURTEVANT, J.

(66 Cal. App. 284)

GREEN v. SHULMAN. (Civ. 3926.)

(District Court of Appeal, Second District, Division 2, California. March 20, 1924. Rehearing Denied April 16, 1924. Hearing Denied by Supreme Court May 19, 1924.)

1. Landlord and tenant 🔑78(2)—Complaint held not to state cause of action for failure to deliver lease to assignee to whom assignment was delivered.

A complaint, alleging a sale by defendant to plaintiff of a stock of goods, and an assignment of a lease of a storeroom, and seeking damages for failure to deliver lease, *held* not to state cause of action; the assignment being executed when delivered, and plaintiff's rights the same as if lease had been delivered.

2. Pleading 🔑52(1)—Separate causes of action held improperly joined in single statement.

A cause of action for failure to deliver a lease after its assignment and for rent the assignee was deceived into paying to assignor after assignment, if capable of being joined in the same action, *held* improperly joined in a single statement.

3. Landlord and tenant 🔑79(2)—Cause of action for lessee's refusal to deliver lease to assignee because of lack of lessor's consent held not to state cause of action.

An alleged cause of action for rent paid by the assignee of a lease to the assignor and lessee, based on the assignor's failure to deliver the lease because of the lessor's refusal to consent to the transfer thereof, *held* insufficient, because of its failure to allege necessity of lessor's consent to transfer.

4. Trial 🔑396(1)—Finding in action against lessee for failure to deliver lease to assignee held not to meet issues.

In action for damages for lessee's failure to deliver lease to assignee, thus preventing sale of same by assignee, finding that plaintiff was inconvenienced and prevented from making any negotiations, because of failure to deliver and annoyed by demands of defendant and landlord for rent, *held* not to meet issue that defendant prevented sale or that his acts caused plaintiff to lose a sale.

Appeal from Superior Court, Los Angeles County; E. A. Luce, Judge.

Action by Max Green against Max Shulman. From judgment for plaintiff, defendant appeals. Reversed.

Harry G. Sadicoff, of Los Angeles, for appellant.

J. W. Satterwhite, of Los Angeles, for respondent.

WORKS, J. It is alleged in the complaint in this action that plaintiff and defendant entered into a certain agreement, evidenced by a written bill of sale, by which defendant sold to plaintiff a certain stock of goods and store fixtures, and assigned to him a lease of the storeroom in which the articles were contained; that defendant failed and refused. without reason to deliver the lease to plaintiff, "thereby preventing plaintiff from making a sale and transfer of said property and lease, and did cause plaintiff on or about February 1, 1921, to lose a sale to a purchaser of said property and lease, thereby causing plaintiff damage to and in the sum of $1,000"; that on a day named defendant fraudulently made to plaintiff the false and untrue statement that he, the defendant, "could not deliver the said original lease because his landlord would not consent to a transfer thereof"; that plaintiff relied upon the untrue statement "and he was deceived thereby into paying to defendant the sum of $35 rent for the premises * * * for the month of February, 1921"; that defendant was not entitled to the rent, nor was it due him, "and his collection thereof from plaintiff was fraudulent, to plaintiff's further damage in the sum of $35"; and that plaintiff was thereafter compelled "to again pay said rent for said month of February to the landlord and owner of said building, under threat of losing the possession thereof and forfeiting said lease." The prayer was for judgment for damages for $1,035. The answer consists wholly of denials. Plaintiff had judgment for $250 and defendant appeals.

[1] The complaint fails to state a cause of action. Each item of damages is claimed upon the theory that appellant was bound to make delivery of the lease. Such was not his contract. The assignment made transfer to respondent of the entire title of appellant under the lease, and the assignment became executed the moment it was delivered. 3 Cal. Jur. tit. Assignments, § 21. Therefore, not only did appellant not agree to make physical transfer of the lease, but respondent's rights under the assignment were as complete without the possession of the instrument assigned as they would have been with it.

[2] The complaint was demurred to on the ground that it attempts to allege two causes of action without separate statement. This point is good. We do not decide that the joinder would have been proper even if the two causes had been separately stated.

[3] The second alleged cause of action, the one for damages for $35, is insufficient, for the reason that it fails to allege that the lessor's consent was necessary to an assignment of the lease. This point is not made by appellant, but we do not hesitate to mention it, as the points which are presented by him necessitate a reversal of the judgment.

[4] The trial court failed to find upon the issue tendered by the complaint as a basis for the claim for damages in the sum of $1,000. As to that item of damages the court found only "that by reason of the failure of defendant to deliver said lease to plaintiff, he, the said plaintiff, was greatly inconvenienced and prevented from making or entering into any negotiations for the sale of said store and said lease thereon mentioned in the contract aforesaid, and from properly conducting said store, and was annoyed and harassed by both the demands of said defendant and the landlord for the payment of the rent on said premises for the same month under said lease, and plaintiff was compelled to sell out sooner than he otherwise would have, had be been given said lease by said defendant, and the same had not been withheld from him by said defendant." This finding did not meet the issue, as it is not a finding that respondent was "prevented" by the acts of appellant from making a sale, or that those acts caused respondent to "lose a sale" to a particular person.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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193 Cal. 564

MADRUGA v. SUPERIOR COURT OF SAN LUIS OBISPO COUNTY et al.
(S. F. 11127.)

(Supreme Court of California. May 10, 1924.)

Executors and administrators ⊂⊃226—Notice to creditors held insufficient in specification of place where claims to be made.

Under Code Civ. Proc. § 1490, requiring notice to creditors to file claims against decedent in office of clerk of court or exhibit them to the executor or administrator at place of residence or business specified in notice, "provided, said residence or place of business shall be in the county," a notice to creditors specifying a place of business not located in the county in which the proceedings were pending *held* insufficient.

In Bank.

Petition by Balvina G. Madruga, as executrix, etc., for a writ of mandate to the Superior Court of San Luis Obispo County, Honorable T. A. Norton, Judge thereof. Writ denied.

Shaeffer & Airola, of Santa Maria, for petitioner.

PER CURIAM. This is a petition for a writ of mandate to compel the respondent superior court to make and enter a finding and decree of due publication of notice to creditors in a probate proceeding pending before it. Section 1490 of the Code of Civil Procedure provides for the publication of a notice to creditors "requiring all persons having claims against said decedent to file them, with the necessary vouchers, in the office of the clerk of the court from which the letters were issued, or to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business to be specified in the notice; provided, said residence or place of business shall be in the county in which said proceeding is had." Petitioner published for the specified length of time a notice to creditors which required all persons having claims against the decedent to file them, with the necessary vouchers, in the office of the clerk of the court from which the letters were issued, or to exhibit them, with the necessary vouchers, to the executrix at a place of business specified in the notice which was not in the county in which the proceeding was pending. Upon this showing the respondent court refused to enter a decree of due publication, and we are of the opinion that such refusal was proper.

Petitioner insists that the designation in her notice of place of business at which claims might be presented outside of the county should be disregarded as surplusage, and that the legal effect of her notice should be deemed to be such as to require all creditors of that estate to present their claims at the office of the county clerk. We are not prepared to agree that a disregard of the plain language of the statute in such a material particular may be thus disregarded or ignored. Suppose that a creditor should bring suit upon a claim which had been presented only at the place so designated outside of the county and which had been disallowed by the executrix, would he be entitled to recover thereon, supposing it to be an otherwise valid claim? It may well be that under such circumstances the executrix would be estopped to set up the defense that the claim had not been presented in the manner required by law, but we are not prepared at this time to say that the heirs and legatees would be so estopped. Petitioner contends that the purpose and effect of the Code section is to give to the executor or administrator a right of election to choose either of the two places specified therein and thus to compel all creditors to present their claims at the place so designated, to the exclusion of any other place, and in support of this contention she argues that if the section be construed as giving the right of election to the creditors to present their claims at either of the two places specified in the Code it would be impossible for an executor who had no residence or place of business within the county to comply with its terms. In Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375, it was held that an administrator in his notice to creditors may designate the office of

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes his attorney as his place of business for the presentation of claims, although he does not reside there and although he transacts his own ordinary business at a different place within the same county. It would seem to follow from this that an executor or administrator who had no residence or place of business within the county could fully comply with the requirements of the Code section by selecting some appropriate office or other place of business within the county and designate the same in his notice to creditors as his place of business for the presentation of claims. However, we are not required to determine this question for the purposes of this case. We are not called upon to assume that the executrix, petitioner herein, has no residence or place of business within the county in which this proceeding is pending. She has not so alleged in her petition, and we are entitled to assume that she has stated the case in support of her petition as strongly as the facts will justify. So assuming, we must conclude that she has in fact a residence or place of business or both within the county in which this proceeding is pending. This is, in truth, the situation, as was conceded by her counsel at the hearing hereof. This being the situation, we are convinced that the respondent court was justified in refusing to enter a decree of due publication of notice to creditors herein.

The petition is denied, and the order to show cause discharged.

193 Cal. 538

SEGARINI v. BARGAGLIOTTI. (S. F. 11118.)

(Supreme Court of California. May 8, 1924.)

1. Appeal and error 🔑479(2)—Supersedeas not granted as matter of right.

Appellant is not entitled to supersedeas as a matter of right, but the Supreme Court may in exercise of sound discretion grant writ on such terms as will be just and adequately protect respondent's rights.

2. Appeal and error 🔑479(1)—Facts held to justify writ.

Where respondent excepted to sufficiency of appellant's sureties and appellant served notice they would justify on date specified but sureties failed to appear because of serious illness in family of one of them, supersedeas should be granted to preserve status quo until final determination of action.

In Bank.

Action by Giovanni Segarini against Francisca Bargagliotti. Judgment for plaintiff, and defendant appeals and petitions for writ of supersedeas. Writ granted.

Wm. F. Herron, of San Francisco, for petitioner.

Wm. R. Lowery, of San Francisco, for respondent.

PER CURIAM. This is a petition for a writ of supersedeas. The appellant within due time perfected his appeal and filed an undertaking upon appeal with two sureties in the amount fixed by the court, $2,500. Thereafter, the respondent having excepted to the sufficiency of the sureties, appellant served notice that they would justify before the court on a date therein specified. The sureties failed to appear and justify on that date because of a serious illness in the family of one of them, whereupon appellant applied to this court for a writ of supersedeas.

[1, 2] Under the rule stated in Nonpareil Manufacturing Co. v. McCartney, 143 Cal. 1, 76 Pac. 653, the appellant is not entitled to this writ as a matter of right, but we may properly, in the exercise of a sound discretion, grant him the writ upon such terms as will be just and will adequately protect the rights of the respondent. We conclude that, under the circumstances, the writ should be so granted in order to preserve the status quo until the final determination of the action.

It is ordered that upon the filing by the petitioner with the clerk of this court, within 20 days, of a good and sufficient undertaking upon appeal in the sum of $2,500, conditioned as required by law, and which shall have been first approved by a judge of the superior court, in and for the county of San Francisco, at a hearing upon 10 days' notice to the respondent, a writ shall issue as prayed for herein.

It is further ordered that in the meantime, during said period of 20 days, the execution of that portion of the judgment referred to in the petition herein be stayed.

193 Cal. 539

SWIM v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11016.)

(Supreme Court of California. May 8, 1924.)

1. Mandamus 🔑168(2)—Allegations of affidavit in opposition to motion to dismiss appeal taken as true in mandamus to compel dismissal.

In reviewing by mandamus superior court's action in refusing to dismiss, under Code Civ. Proc. § 981a, as added by St. 1923, p. 755, an appeal from the justice's court because not brought to trial within year after filing, allegations of affidavit by appellant in opposition to motion must be taken as true.

2. Justices of the peace 🔑166(2)—Oral stipulation insufficient under statute to prevent dismissal of appeal.

Verbal stipulation extending time for bringing to trial in superior court appeal from justice's court is insufficient to defeat motion to dismiss, as authorized by Code Civ. Proc. § 981a, as added by St. 1923, p. 755, if appeal not brought to trial within year or written stipulation for longer time filed.

3. Justices of the peace 🔑166(2)—Appellant held not entitled to assert estoppel of appellee to insist on dismissal of appeal.

Assuming that an appellee in the superior court on appeal from the justice's court might be estopped to insist on dismissal of appeal for failure to bring to trial within year, as authorized by Code Civ. Proc. § 981a, as added by St. 1923, p. 755, where promise inducing invalid oral agreement for longer time within which to bring case to trial was insufficient consideration for appellee's promise of extension, *held* appellant was not in position to assert such promise of extension as basis of estoppel.

4. Mandamus 🔑172—Writ of mandate to lower court held warranted, though petition was in effect for writ of review.

Where the prayer of a petition for a writ of mandate was in effect for a writ of review, but where the court had the complete record of the case below before it, *held*, that the relief warranted by the record should be given and the writ of mandate allowed.

In Bank.

Petition by Meurice Swim for a writ of mandate, to be directed to the Superior Court for the City and County of San Francisco and Thomas F. Graham, one of the Judges thereof. Writ granted.

J. E. Manning, of San Francisco, for petitioner.

S. L. Mash, of San Francisco, for respondents.

MYERS, C. J. The petition herein is entitled "Petition for a Writ of Mandate," but the prayer thereof is, in substance, for a writ of review. The writ which was issued by us at petitioner's request was in effect a writ of review, though entitled writ of mandate, and in response to it the record of the lower court has been certified to us. The facts are as follows: The petitioner herein recovered a judgment in the justices' court of the city and county of San Francisco, January 16, 1922, against one S. L. Mash, defendant, amounting to $92.93. The defendant perfected an appeal to the superior court of the city and county of San Francisco which was filed therein February 15, 1922. On January 25, 1924, nearly two years thereafter, after due notice given, the petitioner moved the latter court to dismiss said appeal on the ground that the appellant had failed to bring such appeal to trial within one year of the date of filing thereof in the superior court. This motion was based upon section 981a of the Code of Civil Procedure, a new section added thereto in 1923 (Stats. 1923, p. 755), which provides as follows:

> "No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken; provided, however, that in any appeal pending when this section takes effect, a judgment or dismissal shall not be entered under the direction hereof sooner than January first, 1924; and provided, further, that any superior court may, by existing rule or by rule hereafter to be enacted, provide for dismissal of such appeal within a time less than one year."

The motion was suported by the affidavit of the plaintiff to the effect that he had not entered into any written or other stipulation extending the time for bringing such appeal on for trial, and that no such stipulation had been filed with the clerk of said superior court. Thereupon the defendant, appellant herein, served and filed a counter motion to set said case for trial, supporting the same by an affidavit, the material portions of which are as follows:

> "That on or about the 15th day of April, 1922, made an agreement with the plaintiff, Meurice Swim, attorney in propria persona, wherein it was agreed that no further legal proceedings be taken on the part of the plaintiff Meurice Swim, and the defendant S. L. Mash, herein, and that the defendant S. L. Mash, endeavor to see the defendant Ralph Phillips who had contracted the debt, and for whom the services so rendered and performed for the indebtedness claimed by the plaintiff, and for whose use and benefit said services had been performed. He, the said Ralph Phillips, having before confessed judgment for the same, and thereby agreeing to pay the same if given an opportunity to do so.
>
> "In line with the above mentioned and described agreement the said defendant S. L. Mash saw the said defendant Ralph Phillips, and he agreed to pay off the said bill at the rate of $2.50 per week, and the said defendant so informed the said plaintiff and attorney propria persona herein and the said plaintiff informed the said defendant S. L. Mash that the said terms of the agreement so made by the said Ralph Phillips was satisfactory, and that he, the said plaintiff, would take up the matter with the said Ralph Phillips one of the defendants herein.
>
> "There on, this defendant S. L. Mash was led to believe that the said account and debt had been paid by the said defendant Ralph Phillips, and in line with above agreement by the defendant S. L. Mash with the plaintiff Meurice Swim, the above cause of action was not set for trial by the defendant S. L. Mash."

[1, 2] Petitioner's motion to dismiss said appeal came on regularly for hearing in said

superior court, and was by said court denied. Thereupon petitioner filed in this court the petition herein. The facts alleged in defendant's affidavit above quoted amount to nothing more than an assertion that a verbal stipulation was entered into by and between the parties to the effect that further proceedings in the action should be indefinitely postponed. All of these alleged facts were contradicted in a counter affidavit filed by the plaintiff in said action, but for the purposes hereof the allegations of defendant's affidavit must be taken as true. In the face of the plain and unambiguous language used in the code section above quoted, clearly evidencing the legislative intent to require a written stipulation filed with the clerk of the superior court for the purpose of extending the time for bringing the case to trial, we cannot say that a verbal stipulation should be permitted to answer the same purpose.

[3, 4] The situation thus presented is substantially analogous to that which was before this court in the recent cases reported under the title of Miller & Lux v. Superior Court, 219 Pac. 1006. We are of the opinion that under the rule and reasoning of that case it was the duty of the respondent court to grant petitioner's motion for a dismissal of the appeal. Evidently that case was not called to the attention of the respondent judge, as it has not been cited in either of the briefs herein. Assuming, without deciding, that the appellant might be permitted to invoke the doctrine of estoppel as against the plain language of the code section as the basis for a contention that the respondent had waived his right to insist upon a dismissal pursuant thereto, we are satisfied that said defense is not available to him herein. He must be assumed to have entered into the agreement with the plaintiff with the knowledge of the statutory provision which required nothing less than a written stipulation to protect him from the liability to a dismissal. He is chargeable also with knowledge of the fact that the promise of the said Phillips was not a legally sufficient consideration to support the agreement of the plaintiff to take no further proceedings, for the reason that Phillips promised nothing more than that which he was then legally obligated to do. Civ. Code, § 1605. Moreover, if the said promise on the part of Phillips had been performed, the judgment would have been fully satisfied thereby within a period of 27 weeks; thus leaving to the appellant, in the event of the nonperformance thereof, an ample margin of time thereafter within which to protect his own rights by bringing his appeal to trial. Notwithstanding this, appellant sat idly by for nearly 100 weeks thereafter without making any effort to ascertain whether or not the judgment had in fact been paid. As was noted above, the prayer of the petition herein is, in effect, for what amounts to a writ of review. But we now have before us the petition, the answer, and the complete record in the case below in so far as relates to the point involved herein. Under these circumstances there is no reason why we should not give such relief as the record so presented will warrant. Traffic Sales Co. v. Justices' Court (Cal. Sup.) 220 Pac. 306; Van Hoosear v. Railroad Comm., 189 Cal. 228, 236, 207 Pac. 903.

We are of the opinion that the order made by the respondent court denying petitioner's motion to dismiss the appeal should be annulled, and that a writ of mandate should issue requiring the respondent court to make and enter an order in said action dismissing said appeal. It is so ordered.

We concur: LENNON, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

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193 Cal. 562

CULLINAN et al. v. MERCANTILE TRUST CO. OF CALIFORNIA et al.
(S. F. 11123.)

(Supreme Court of California. May 9, 1924.)

1. Appeal and error ⚷151(2)—Petitioners held entitled to appeal from judgment against them, though it required nothing of them.

Where judgment was entered against several codefendants in action to recover trust fund, petitioners, as two of such codefendants, were interested in judgment and aggrieved thereby and were entitled to appeal from it, notwithstanding judgment required nothing of them.

2. Appeal and error ⚷485(2)—Appeal by some defendants held not to stay execution of portion of judgment directed against nonappealing defendant.

Perfection of appeal by petitioners from judgment entered against them and a trust company as codefendants *held* not to stay execution of that portion of judgment directed against trust company which did not appeal.

3. Appeal and error ⚷479(1)—Writ of supersedeas to stay execution against nonappealing defendant denied where denial worked no prejudice.

Petitioners as sole appellants from judgment directed against them and others *held* not entitled to writ of supersedeas to stay execution of that portion of judgment directed against others, where rights involved in petitioners' appeal were not in danger of being lost or prejudiced if execution was not stayed.

In Bank.

Action by E. Cullinan and others against the Mercantile Trust Company of California and others. Judgment against all defendants, and defendant Adelaide McColgan, as administratrix, etc., and another, as sole appellants, petition for writ of supersedeas. Writ denied.

Alfred J. Harwood and Geo. B. Keane, both of San Francisco, for appellants.

PER CURIAM. This is a petition for a writ of supersedeas. Plaintiffs herein brought an action in the court below against the defendant trust company as the holder of certain funds under an express trust, the terms of which are defined in a judgment which has become final, and joined therein as codefendants certain individuals who were beneficiaries under said trust. Plaintiffs had judgment against the defendants in the court below which provided for the payment to the plaintiffs by the trust company of the sum of $5,724.89 payable only out of the funds in its hands or which should come into its hands under said trust. The trust company did not appeal from said judgment, but petitioners herein, who are two of the individual defendants named therein as beneficiaries under the trust, have perfected an appeal to this court.

[1, 2] The judgment as rendered required nothing of these petitioners, but they are, nevertheless, parties interested therein and aggrieved thereby and are entitled to appeal therefrom. They contend herein that the perfection of their appeal operates as a statutory supersedeas against the entire judgment, including the portion thereof requiring the payment of the fund by the trust company to the plaintiff. In this they are mistaken. Their appeal does not stay the execution of that portion of the judgment which is directed at the trust company, which has not appealed. Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617; Halsted v. First Savings Bank, 173 Cal. 605, 608, 160 Pac. 1075.

[3] This point having been ruled against them, petitioners then asked for the writ as a matter of grace in the exercise of the discretion vested in this court. There is no doubt that the power to grant this relief is vested in this court where the circumstances are such as to invoke its exercise. Halsted v. First Savings Bank, supra; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 Pac. 653.

We are of the opinion that the circumstances of the instant case are not such as to call for the granting of the relief prayed for herein. Petitioners are the beneficiaries of but a fraction of the fund involved in the judgment. It is conceded that both the plaintiff and the trust company are solvent and financially responsible. No facts are suggested from which it would appear that any of the rights involved in this appeal are in danger of being lost or prejudiced if the execution is not stayed.

The application is denied, and the order to show cause discharged.

193 Cal. 512

PEOPLE v. WILSON. (Cr. 2641.)

(Supreme Court of California. May 2, 1924.)

1. Criminal law ⚷195(1)—Plea of jeopardy not available, unless second prosecution is for same offense in law and in fact.

A plea of once in jeopardy is not available to a defendant, unless second prosecution is for same offense in law and in fact as that for which first prosecution was instituted.

2. Criminal law ⚷200(1) — Manslaughter charge not defeated by plea of once in jeopardy for trial of misdemeanor resulting in victim's death.

A charge of manslaughter could not be defeated by plea of once in jeopardy, based on trial of a misdemeanor charge, for a violation of Motor Vehicle Act, § 20, which offense had later resulted in injured victim's death.

3. Homicide ⚷34, 62—When killing by striking with automobile is punishable as manslaughter stated.

In a prosecution for manslaughter, under Pen. Code, § 192, subd. 2, for striking decedent with an automobile, defendant might have been convicted of "involuntary manslaughter arising out of the commission of an unlawful act not amounting to a felony," if decedent's death was due to defendant's violation of Motor Vehicle Act, §§ 20, 22, or, irrespective of such statute, might have been convicted of manslaughter, if defendant was driving without due caution and circumspection and decedent's death was produced thereby.

4. Homicide ⚷34—When want of due caution and circumspection amounts to criminal negligence stated.

When a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which one of ordinary prudence would use under such circumstances, and death of another results, his act or neglect is criminal act against person so killed, even though his negligence did not amount to reckless disregard of human life.

5. Homicide ⚷250—Evidence held to sustain conviction.

Evidence *held* to sustain conviction for manslaughter in striking decedent with an automobile.

6. Criminal law ⚷829(12)—Instruction on degree of proof in prosecution for manslaughter held not reversible error.

Error could not be predicated of an instruction on a degree of proof in prosecution for manslaughter which was obviously erroneous, where the inaccuracy seemingly occurred in transcription rather than as actually given to the jury, and other correct instructions on degree of proof were given.

7. Homicide ⚷340(2)—Giving of instruction on murder in manslaughter prosecution held not prejudicial.

In a prosecution for manslaughter for striking decedent with an automobile, an instruction on murder was not prejudicial, where it was limited merely to pointing out distinction between manslaughter and murder.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Herman Wilson was convicted of manslaughter, and he appeals. Affirmed.

Carl Westerfeld and Robert D. Duke, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

RICHARDS, J. This appeal is from a judgment of conviction of the defendant upon a charge of manslaughter, which consisted in the killing of one Agnes Johnson on Van Ness avenue, near its intersection with Sutter street, in the city and county of San Francisco, shortly after midnight on the morning of October 21, 1922, through the striking of the deceased by the defendant's automobile while it was being driven by him along said avenue. Upon his trial for the alleged crime the defendant, in addition to his plea of not guilty, pleaded that he had been once in jeopardy, and in support of said plea offered in evidence a misdemeanor complaint charging a violation of section 20 of the Motor Vehicle Act (St. 1915, p. 406, as amended by St. 1917, p. 400), filed on the morning of October 21, 1922, shortly after the collision, and while the victim thereof was still alive. He also offered evidence showing that he was brought to trial upon said charge, that witnesses in support thereof were sworn and testified, and that the cause was continued until January 26, 1923, for the taking of further testimony. In the meantime the said Agnes Johnson died, whereupon the defendant was charged with the crime of manslaughter and held to answer upon said charge, and the misdemeanor charge was, on February 13, 1923, dismissed. The defendant's offered evidence of the aforesaid proceedings upon the misdemeanor charge in support of his plea of once in jeopardy was, upon motion of the district attorney, stricken out, and the trial court advised the jury that it should, upon the defendant's plea of "once in jeopardy," return a verdict for the people. The jury obeyed this instruction, and in addition thereto returned a verdict finding the defendant guilty of manslaughter.

[1, 2] His first contention upon this appeal is that the trial court was in error in striking out his offered evidence in support of his plea of "once in jeopardy," and in its direction to the jury to return a verdict against him upon his said plea. There is no merit in this contention. In order that a plea of once in jeopardy may be available to a defendant, the second prosecution must be for the same offense, both in law and fact, as that for which the first prosecution was instituted. 7 Cal. Jur. 955, and cases cited. The law upon this subject is well settled in its application to cases where the defendant has committed an act of violence which in its immediate result amounts to a misdemeanor, but which in its after consequences upon the victim of the violent act becomes, through the death of that victim, murder or manslaughter. In such an event the second prosecution is not for the same offense as the first, and the reason for this is, as is well stated in Wharton on Criminal Pleading and Practice (9th Ed.) § 476:

> "That as at the time of conviction of assault there could have been no conviction of the homicide the prosecution of the homicide is not barred by the conviction of the assault."

See, also, 1 Bishop, New Criminal Law, § 1059, and cases cited.

In the case of People v. Defoor, 100 Cal. 150, 34 Pac. 642, this court, while upholding the plea of once in jeopardy under the facts of that case, which did not involve the death of the injured person, nevertheless recognized the foregoing rule as applicable to cases of homicide, notwithstanding a previous trial and conviction of the defendant for the assault which subsequently resulted in the death of the injured person. In none of the cases cited by the appellant in support of his contention as to his plea of "once in jeopardy" does the element of death, which is the essential basis of the charge of manslaughter, appear to be present; nor upon principle do we think a case can be conceived wherein a charge of murder or manslaughter could be defeated by a plea of once in jeopardy, based upon a mere misdemeanor charge, trial, or conviction of the assault or offense which had later resulted in the death of the injured victim. It was therefore not error in the trial court to strike out the defendant's offered evidence in that regard, or to direct the jury to find against the defendant upon his aforesaid plea.

[3] The next contention of the defendant is that the evidence was insufficient to justify the conviction of the defendant upon the charge of manslaughter. The particular portion of section 192 of the Penal Code upon which this prosecution is predicated is that embraced in subdivision 2 of said section, in which involuntary manslaughter is defined as the unlawful killing of a human being without malice "in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection." It is an admitted fact in this case that the death of the decedent, Agnes Johnson, was caused by the fact that she was struck by the defendant's automobile while it was being driven by himself along one of

the much-traveled public streets of San Francisco, upon which the decedent was rightfully standing or walking at the time of the collision, which resulted in her death. Under the general charge of manslaughter embraced in the information, the defendant was subject to conviction under either of the two clauses contained in the foregoing definition of the crime of involuntary manslaughter; that is to say, he might have been convicted of the offense of involuntary manslaughter arising out of the commission of an unlawful act not amounting to a felony; as, for example, through the violation of the provisions of section 22 of the Motor Vehicle Act, which reads, in part, as follows:

> "Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property."

Under section 20 of said Motor Vehicle Act any person violating its provisions is guilty of a misdemeanor. If, therefore, upon the evidence in this case the jury would have been justified in finding that immediately prior to and at the time of the collision which proximately caused the injury to and subsequent death of the decedent, the defendant herein was not operating or driving his motor vehicle upon and along said Van Ness avenue in a careful and prudent manner, or that he was operating or driving his said automobile thereon at a rate of speed greater than was reasonable and proper, having regard for the traffic and use of that particular highway, and so as to endanger the life or limb of any person, and if the jury would have been further justified by the evidence in finding that the injury to the decedent with her consequent death was proximately due to the defendant's violation of the Motor Vehicle Act in any of the foregoing regards, they could properly have found the defendant guilty of involuntary manslaughter arising out of the commission of an unlawful act not amounting to a felony; or, on the other hand, if the jury, regardless of any alleged or proven violation on the part of the defendant of the foregoing provisions of the Motor Vehicle Act, had been justified by the evidence in finding that the defendant in the operation and driving of his motor vehicle at said time and place was not violating any provision of the Motor Vehicle Act, or committing any other unlawful act not amounting to a felony, but that in the operation and driving of his motor vehicle at said time and place lawfully he was acting without due caution and circumspection, and that the injury to and death of the decedent was produced thereby, they might still find the defendant guilty of manslaughter under the concluding clause of subdivision 2 of said section 192 of the Penal Code.

The question as to what want of due caution and circumspection amounts to criminal negligence has been variously decided by the courts of this as well as other jurisdictions. In the case of People v. Seiler the District Court of Appeal for the First District, Second Division, said:

> "If one performs an act in a manner not forbidden by statute, but in a wanton, reckless, or culpable manner, and thereby kills another, he may be convicted under the definition of manslaughter as secondly defined."

And in a further effort to define criminal negligence that court, in the same case, said that:

> "Criminal negligence consists in the commission of a lawful act, but in a culpable, reckless manner." People v. Seiler, 57 Cal. App. 195, 207 Pac. 396.

In denying the petition for rehearing in said cause this court undertook to limit the scope of the definition of criminal negligence as above given and in so doing said:

> "The statute (Pen. Code, § 192, subd. 2) defines involuntary manslaughter of this specific character as the unlawful killing of a human being, involuntarily, but 'in the commission of a lawful act which might produce death * * * without due caution and circumspection.' In order to constitute this kind of manslaughter the act may be lawful, but it must be one which might produce death, and which does produce death, and it must be committed without due caution and circumspection. The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. But the word 'culpable' is not an apt description of the idea intended to be conveyed by the words 'due caution and circumspection.' On this subject see note II to the case of Johnson v. State (1902) 61 L. R. A. 277."

[4] The proper rule deducible from the cases cited in the note above referred to would seem to be this: That when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life. Johnson v. State, supra, and notes; Reg. v. Doherty, 16 Cox's Crim. Law Cases, 306; Morris v. State, 35 Tex. Cr. R. 313, 33 S. W. 539.

[5] It is the contention of the appellant that the evidence in this case is insufficient

to bring the defendant within the rule above stated. This contention requires a brief review of the evidence in the case. The defendant was by occupation a mariner, a deck officer on steamer and ocean ships. When ashore he lived with Capt. Christensen and his family at 1477 Jackson street in the city of San Francisco. He was the owner of an automobile which he had been driving for about three months and prior to that time had owned or driven another machine for about six months. On the evening of October 20, 1922, several relatives of Capt. Christensen had a social gathering at his home, which the defendant with the others attended. When the party broke up near midnight the defendant proceeded to take a young lady, a niece of Mrs. Christensen, to her home in his automobile, and they proceeded to drive down Jackson street to Van Ness avenue and thence southerly toward Market street. The accident in question occurred at a point on the westerly side of Van Ness avenue, about 40 feet northerly from its intersection with the northerly line of Sutter street. A double track municipal street car line occupies the center of Van Ness avenue and cars pass and repass frequently thereon, those going southerly stopping to take on or discharge passengers just before reaching the intersection at Sutter street and at such distance therefrom that the rear end of the south-bound car would be at about the point on the avenue where the accident in question occurred. There is no designated safety station at this point, but persons about to take such cars are accustomed to stand in the open street near said track and at or near said point of stoppage. There is also a double track line of cars on Sutter street upon which cars ran frequently up to and for some time after midnight.

There were a number of persons standing or walking at or near the intersection of these two streets just before and at the time the accident occurred, and who observed it and testified as to the defendant's approach to the scene. It must be conceded that the larger number of these witnesses testified that the defendant as he approached the point of the accident was traveling along the westerly side of Van Ness avenue at a speed variously estimated at from 15 to 25 miles an hour. There was one witness, however, who testified that the speed with which the defendant's car approached the point of the accident was about 35 miles an hour, and that as he came within the witness' vision he veered his machine toward the car tracks and drove close to the west track up to the point of impact. This witness testified to certain other matters as to which there is a very radical difference between his testimony, and that of most or all of the other witnesses and which casts a degree of doubt or incredibility upon his entire testimony, but in certain quite material respects he is supported by other witnesses in the case, and even by the testimony of the defendant himself; as, for example, several witnesses testified that the defendant was driving his car quite close to the westerly car track as he approached the scene and at such a distance therefrom as to be likely to strike a person standing in the street awaiting the approaching street car. The defendant himself admitted that at other intersections of cross streets with the avenue on which street cars ran he had turned his machine onto the car tracks to avoid the bumps in crossing. There is no evidence showing that the defendant veered his car away from the tracks or slackened his speed as he approached this particular intersection or that he took any other precautions, either to give warning of his approach or to avoid the possibility of impact with persons who might be standing at the accustomed place on the street awaiting the opportunity to board the approaching street car. That such street car was approaching that intersection, coming southerly on the avenue, and but a short distance behind the defendant's machine at the moment of his impact with the decedent, is testified to by several witnesses, including the conductor upon said street car; while the defendant, who was a witness in his own behalf, nowhere denied knowledge of the proximity of such approaching street car.

The evidence discloses without material conflict that the lights of the defendant's car were lit, and while it is in evidence that the night was dark, the fact, as testified to by the defendant, that he did not see the deceased woman until the instant before the impact, may well have been taken by the jury as some evidence at least of a want of circumspection on the defendant's part in approaching a spot where persons were wont to be, and were entitled to be, and might reasonably be expected to be, when a street car was making its approach. The defendant, in offering an explanation of the accident, testified that the woman suddenly stepped in front of his car, too late for him to avoid striking her; but as to this he is not very strongly supported by the other witnesses, and the jury may well have declined to accept this explanation, particularly in view of the fact that the stricken woman, in her dying declaration, stated that she was standing beside the car tracks and as close to the track as she could, so as to give automobiles as much chance to pass as possible, and that she had observed the lights of the approaching machine while it was some distance away, and that it came right at her, and that she would not have been struck if it had turned to the right. We think the foregoing evidence was sufficient to justify the verdict of the jury finding the defendant guilty of manslaughter.

[6] The appellant also complains of certain instructions which are claimed to be erroneous. One of these was the defendant's own proposed instruction, which, as proposed, read:

> "The court instructs you that it is not sufficient that the facts coincide with, account for, and therefore render probable the hypothesis of guilt asserted by the prosecution. But they must exclude to a moral certainty and beyond all reasonable doubt, every other hypothesis but the single one of guilt, or the jury must find the defendant *not* guilty."

The court gave this instruction in the identical form in which it was requested, except that, as appears from the clerk's transcript, the word "not," just before the final word "guilty," was omitted. The appellant rightly states that the instruction as it thus appears to have been given is "obviously erroneous," but is so obviously erroneous, considering the whole context of the instruction, that it seems almost inconceivable, either that it should have been given in the form in which it appears, or that it should have been taken by the jury in the introverted sense which the omission of the word "not" gives to it. It would seem to have been a patent inaccuracy, more probable to have occurred in transcription than in the instruction as actually and orally given to the jury. Besides, there were other correct instructions touching the matter of the degree to which the jury must be satisfied as to the defendant's guilt before they could find him guilty; and, this being so, we cannot conceive that the jury was misled by the patent inaccuracy in this instruction.

[7] The defendant also insists that the instruction upon the subject of murder should not have been given and cites some cases upon the error of giving inapplicable instructions. In the instant case, however, the trial court, in quoting the provisions of the Penal Code treating of the subject of homicide, expressly stated to the jury that:

> "The giving of the instruction on murder is for no other purpose than that you may understand hereafter the instructions that will be given upon manslaughter and that you may see the distinctive features between the two offenses."

Under such a limitation as to the purpose of the instructions on murder, we cannot conclude that the rights of the defendant were in any wise prejudiced thereby.

No other errors being urged, the judgment is affirmed.

We concur: MYERS, C. J.; WASTE, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.

(66 Cal. App. 319)

GRAFTON et ux. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4693.)

(District Court of Appeal, Second District, Division 2, California. March 25, 1924.)

1. Justices of the peace 🔑140—Statute providing for dismissal of appeals inapplicable to appeal set for trial when statute enacted.

Code Civ. Proc. § 981a, as added by St. 1923, p. 755, providing for dismissal of appeals from justice courts, where appellant fails to bring appeal to trial within one year from filing thereof, or before specified date in case of pending appeal, is inapplicable to an appeal from a justice court which had been set for trial when statute was enacted, in view of section 1049.

2. Justices of the peace 🔑140—Statute held retroactive, as requiring appeals already taken to be brought to trial within one year.

Code Civ. Proc. § 981a, as added by St. 1923, p. 755, providing for dismissal of appeals from justice courts, where appellant fails to bring appeal to trial within one year after filing, is retroactive, in that it requires appeals, taken before enactment of statute, to be brought to trial within one year from filing.

Application for writ of mandamus by Alfred K. Grafton and wife against the Superior Court of the State of California in and for the County of Los Angeles and others. Writ granted.

Weber & Crawford, of Santa Monica, for petitioners.

Anderson & Anderson, of Los Angeles, for respondents.

CRAIG, J. One Lizzie A. James having recovered judgment against the petitioners herein in the justice's court of Venice township, they perfected an appeal to the superior court of Los Angeles county on October 28, 1922, and on April 17, 1923, the case was on motion of the plaintiffs set for trial in the superior court on January 31, 1924. After the date when the cause was set for trial, and on June 14, 1923, the following section was added to the Code of Civil Procedure as No. 981a (Stats. 1923, p. 755):

> "No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken: Provided, however,

that in any appeal pending when this section takes effect, a judgment or dismissal shall not be entered under the direction hereof sooner than January first, 1924; and provided, further, that any superior court may, by existing rule or by rule hereafter to be enacted, provide for dismissal of such appeal within a time less than one year."

On January 8, 1924, petitioner was served by opposing counsel with notice of motion to dismiss said appeal, upon the ground that the same had not been set for trial within one year from the date of its filing in the superior court, and on January 18, 1924, this motion was granted. Petitioner thereafter sought, in this court, an alternative writ of mandate, which was issued, and it is here contended that the superior court, without authority, applied retroactively the provisions of the section last quoted in dismissing the appeal, and in refusing to hear the same on the date set for trial thereof; that petitioner is advised upon a full and fair statement of the case to his counsel that he has a good and meritorious defense, and that the court below would by such dismissal deprive him of a vested right.

[1] It could not successfully be contended that the Legislature could by enactment, or by appeal, legally wipe out a pending cause of action or deny to a plaintiff the right to have tried and determined a case which had been set for trial, if the complaint therein stated a cause of action under laws existing at the time it was filed. It has repeatedly been held that under such circumstances the plaintiff would have a vested right which could not be destroyed by legislation taking effect during the pendency of his suit. Section 1049 of the Code of Civil Procedure provides that:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

It is insisted that petitioner upon filing his appeal did nothing more, from October 28th until April 17th; but, as was said in Kraker v. Superior Court, 15 Cal. App. 651, 115 Pac. 663, when the defendant appeals a justice court case on questions both of law and fact, the plaintiff is the actor in the superior court, as he was in the justice's court, and it is his duty to bring the case on for trial, no duty in that respect devolving upon the defendant, though he is the appealing party. It may be that under the provisions of the new statute under which this dismissal was ordered, the rule just stated has been altered; but that is a matter which we are not required to determine upon this occasion, since the trial date had been fixed prior to the taking effect of the statute.

In Lewis v. Penn. R. R. Co., 220 Pa. 317, 69 Atl. 821, 18 L. R. A. (N. S.) 279, 13 Ann. Cas. 1142, it was said:

> "If the law of the case at the time when it became complete is such an inherent element in it that a plaintiff may claim it as a vested right, on what possible ground can it be held that a defendant has no vested right with respect to an exemption or defense? The authorities make no such distinction. * * * 'There is a vested right in an accrued cause of action, in a defense to a cause of action, even in the statute of limitations when the bar has attached, by which an action for a debt is barred.' Sutherland on Stat. Const. § 480."

Such is the only logical conclusion that can in justice be recognized, and it is the foundation for the rule announced in Caulfield v. Doe, 45 Cal. 221, 223, that "when, in pending actions, proceedings have been taken prior to the taking effect of the Code of Civil Procedure, the sufficiency of such proceedings must be determined by the law in force at the time, and by no other rule," and in Vanderbilt v. All Persons, etc., 163 Cal. 507, 513, 126 Pac. 158, 161, that "retroaction is never allowed to a statute unless required by express legislative mandate or unavoidable implication." See, also, State Commission in Lunacy v. Welch, 20 Cal. App. 624, 129 Pac. 974.

[2] In so far as it requires that appeals taken before the enactment of the statute must be brought to trial within one year from the date of the filing of the appeal, the statute under consideration by its express terms must be held to be retroactive; but to give it effect in this regard, the language of the statute does not require that its retroactive application be extended to include cases which had not merely been appealed but had progressed to the point of having been set for trial when the statute took effect. This law declares itself to be retroactive only as governing cases appealed; it does not go beyond that and take in those set for trial, and we are not disposed to adopt a construction unnecessarily extending the scope of the statute retroactively, since such an interpretation would work an apparent injustice and at the same time violate well-established principles of statutory construction.

Petitioner and respondent base their arguments upon questions as to the constitutionality of a statute which might effect the dismissal of an action upon facts as here presented, and the effect of several months' delay in having the instant case set for trial. But, aside from these considerations, we think that since the case at bar was definitely set down upon the calendar to take its course among cases ready and awaiting their turn before the court before the statute became effective, it does not come within the purview of the statute.

The writ of mandate will therefore be issued accordingly.

We concur: FINLAYSON, P. J.; WORKS, J.

66 Cal. App. 334

DEVCCHIO v. RICKETTS et al. (Civ. 2731.)

(District Court of Appeal, Third District, California. March 25, 1924.)

1. **Municipal corporations 🔑705(4)—Warning equipment of motor vehicle held insufficient.**

That truck striking pedestrian from rear was loaded with empty cans, which made considerable noise, and was equipped with lights, *held* insufficient compliance with requirement of Motor Vehicle Act 1915, § 12, then in force, that driver sound horn or give other signal of vehicle's approach.

2. **Municipal corporations 🔑705(10)—Pedestrian using street instead of sidewalk not negligent.**

Pedestrian may use street at all points, subject to exercise of due care, governed by actual use of highway, and is not negligent, as matter of law, in walking in street instead of on sidewalk.

3. **Municipal corporations 🔑705(10)—Pedestrian not negligent in failing to look behind.**

Pedestrian in street is not negligent as matter of law in failing to look behind him and discover approaching truck.

4. **Municipal corporations 🔑705(2)—Care required of automobile driver approaching pedestrian.**

Driver of automobile on public highway, in exercise of reasonable precaution, must make certain that pedestrians in front of him are aware of car's approach, that car is at such distance from pedestrian as to avoid running over him in his sudden panic on discovering approach, and that the car is under such control that it may be promptly stopped.

5. **Municipal corporations 🔑706(7)—Pedestrian struck by truck held not negligent as matter of law.**

Pedestrian walking to work with turned-up overcoat collar at about 6:30 of cold, foggy morning, along used street on sides of which were footpath and 10-foot strip of grass, when struck from rear by truck, driver of which had ample space to pass on left, could have seen pedestrian before striking him, if truck had been equipped with proper lights and had been traveling at proper speed, by keeping proper lookout, and gave no signal of approach, *held* not negligent as matter of law.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by R. Devcchio against Bertram A. Ricketts and another, doing business under firm name of Ricketts & Barr. Judgment for defendants, and plaintiff appeals. Reversed.

Fee & Ring and George W. Raburn, all of Madera, for appellant.

Joseph Barcroft and David P. Barcroft, both of Madera, for respondents.

PLUMMER, J. Plaintiff instituted this action for the recovery of damages on account of personal injuries and loss of time suffered by reason of having been run into by an automobile driven by an employé of the defendants. The defendants had judgment and the plaintiff appeals.

It appears from the pleadings and transcript in this case that on or about 6:30 a. m. on the 10th day of January, 1922, while the plaintiff was walking along a certain street in the city of Madera known as Yosemite avenue in the direction of Pine street on the way to his employment, he was run into by an auto truck belonging to the defendants, then being driven by an employé named Adams; that this truck was traveling in the same direction with the plaintiff and ran into him from the rear; that no horn or bell was sounded to indicate the approach of the auto truck, but that the truck was loaded with some eight or ten empty milk cans; that the morning was more or less foggy and consequently more or less dark; that the plaintiff was walking a little to the right of the center line of said street; that there was no sidewalk along either side of said street; but that on the left-hand side there was a footpath, on the right-hand side a strip of grass some 10 feet in width; that between the place where the plaintiff was walking and the left-hand side of the street there was a distance of some 25 or 30 feet of open and unobstructed way; that it further appears that the plaintiff was wearing an overcoat and had the collar turned up. The plaintiff was quite seriously injured, but the extent thereof is not found by the court. It also appears from the transcript that Adams, the employé of the defendants, who appears to have been out of the state at the time of the trial and whose testimony was not taken, did not see the plaintiff until he had run into him. This appears from the testimony of one of the defendants brought out by the examination of the defendants' counsel.

Upon this state of the facts the court made, among others, the following findings:

"(4) That it is not true that plaintiff was not warned of the approach of said truck in any manner, but it is true that said Adams did not prior to said collision sound horn or bell; but in this connection the court finds that said truck was filled with large empty milk cans and that the noise made by said truck and cans was audible to persons of ordinary hearing for a distance of several blocks, and plaintiff could easily have heard said truck had his hearing not been cut off and interfered with by his said overcoat which covered his ears.

"(7) That upon the morning of said collision and at the time and place of the occurrence thereof there was a fog which rendered it impossible for a person in charge of a motor vehicle to see a great distance ahead; that there was a footpath paralleling the road at the time and place where said collision occurred for the use, convenience and safety of pedestrians; that on the other side of said road was an open space where a pedestrian might travel in safety, all of which facts were well known to plaintiff. The court finds that the plaintiff, had he exercised ordinary care and precaution, would have walked on said footpath on said morning, and the court further finds that in the exercise of reasonable care and precaution plaintiff would not have covered his ears with his overcoat in such fashion as to cut off, impair, and interfere with his hearing."

Founded upon these findings, the court drew the following conclusion:

"(1) That said defendant and neither of them, neither through themselves or through their agents, have not been guilty of any recklessness, carelessness, or negligence in this cause, but plaintiff by reason of the facts found as aforesaid was reckless, careless and negligent, and the collision complained of in plaintiff's complaint was due to the recklessness, carelessness and negligence of said plaintiff, and not otherwise."

It will be observed that the court bases its decision upon this fact that the plaintiff was walking on the traveled portion of the highway instead of on the footpath paralleling the road; that in the exercise of ordinary care and precaution he would have walked on the footpath on said morning; and that the plaintiff should not have raised his coat collar so as to cover his ears and so interfere with his hearing. These facts seem to be based also upon the further facts that it was a foggy morning, which rendered it impossible for a person in charge of motor vehicles to see a great distance ahead.

[1] The court also bases its conclusion in part upon the fact that the truck was loaded with empty milk cans which doubtless made considerable noise.

The court finds, however, that no horn was blown or signal given by the driver of the truck of his approach. The mere fact that the truck was loaded with empty cans is not sufficient and was not sufficient to comply with the law in giving notice, as the Motor Vehicle Act read at the time of the injury complained of. Section 12 of the Motor Vehicle Act, approved May 10, 1915 (St. 1915, p. 405), which was in force on the 10th day of January, 1922, specified that:

"Every motor vehicle shall be equipped with a bell, gong, horn, whistle, or other device in good working order, capable of emitting an abrupt sound adequate in quality and volume to give warning of the approach of such vehicle to pedestrians. * * * Every person operating a motor vehicle shall sound said bell, gong, horn, whistle or other device whenever necessary as a warning of danger. * * *"

The fact, if it is a fact, that the car was equipped with lights or that the truck was loaded with milk cans, is not sufficient to comply with the statutes, as appears from the case of Woodhead v. Wilkinson, 181 Cal. 599, 185 Pac. 851, 10 A. L. R. 291. The court in that case said:

"Admittedly, plaintiff saw the glare from his headlight and knew that a car was coming up from behind; therefore (so defendant argues) there was no use for an alarm and the laws of California do not require the sounding of a horn unless one means to pass another person or vehicle, and defendant, being about to stop, was not under the rule. The mere fact that plaintiff could see the glare of defendant's headlights was not enough. True, it apprised her of his approach, but not of the fact that he was leaving the paved portion of the road and running partly to the north thereof. She was justified in assuming (as she says she did) that he was following the usual custom of drivers. Lawyer v. Los Angeles Pac. Co., 161 Cal. 53 [118 Pac. 237]. He was under the necessity of sounding a warning 'whenever necessary.' Stats. 1915, p. 405, § 12. That plaintiff had a right to be there cannot be denied (Raymond v. Hill, 168 Cal. 473, 143 Pac. 743), and defendant was not absolved from the duty of giving her fair warning of his approach, if the circumstances made such warning necessary, merely because she could see the glare of his headlights. He was under the rule of section 20 (a) of the law of 1915, then in effect, which declares that: 'The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians.'"

The holding of this case is not affected or modified by the case of Zechiel v. Los Angeles Gas, etc., Corp., 183 Cal. 777, 192 Pac. 720, in which the court used the following language:

"If the movement and noise of the machine were sufficient to give the plaintiff notice of his danger, no obligation rested on the defendant to give further warning and his failure to do so was not actionable negligence. * * *"

The facts of that case show its inapplicability here. There the injured person was coasting down a side street at right angles and was not visible to the defendant or rather to the driver of the truck, belonging to the defendant, as he started to back the truck. He was not approaching any individual from the rear; there was no one in front of him in the direction in which he was traveling or moving; and he was not charged with the duty resting upon the defendant under the provisions of section 12 of the act above quoted and which applied to automobiles at that time approaching any one from the rear.

In drawing its conclusions the learned trial court appears to have been of the opinion that it was negligence for the plaintiff to be walking upon the highway in question. There is no showing that it was a much-traveled street, the testimony of the plaintiff being all the testimony called to our attention on that subject, and that is to the effect that he had never seen an automobile on that street at that time of the day, and that he was accustomed daily to use that street in going to his place of employment.

[2, 3] So far as the state of California is concerned, the right of pedestrians or foot passengers to use the streets has not been modified. The rule in this state is clearly set forth in 3 California Jurisprudence, 870, § 100, as follows:

> "As to foot passengers, the old common-law freedom of use of the king's highway has not been modified in California by statutory enactment, and it still remains the law that foot passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, to be governed by the use of the highway actually made. * * * A pedestrian, struck and injured by an automobile while he is walking in the center of a street, is not negligent as a matter of law in merely being where he was instead of walking along the sidewalk."

On page 884 of the same volume appears the following statement of the law:

> "A pedestrian is under no absolute legal obligation to look out for automobiles coming from behind, his duty, at most, being for the jury to determine. And so it has been held, where both pedestrians and vehicles were rightfully using the left-hand side of the highway, * * * the pedestrians, while keeping a reasonable outlook ahead, are under no legal obligation to look back to discover danger."

In other words, a pedestrian is not guilty of contributory negligence, as a matter of law, because of failure to look behind him and discover an approaching car which may heedlessly run him down. These statements of the law are abundantly supported by the citation of authorities given in the footnotes to the sections cited. See, also, Raymond v. Hill, 168 Cal. 473, 143 Pac. 743, where the same rules of law are set forth. In the opinion deciding that case the following argument is used which is applicable here:

> "Upon the part of the foot passengers we have the unconsciousness of such approach, with absolute inability to inflict injury and a measurable inability to avoid the infliction of injury. While both parties are charged only with the exercise of the same degree of care, it is manifest that the amount of that care by law exacted of the driver of the motor vehicle is far greater than the amount exacted of the foot passengers. Of the driver of a vehicle under such circumstances, the law in terms requires that he shall not only give reasonable warning of his approach, but 'use every reasonable precaution to insure safety.' * * * In the exercise of 'every reasonable precaution' which the law enjoins, it is well within the spirit of the law to say that the driver of an automobile approaching pedestrians, and particularly women, must have his car under such control as that it may be promptly stopped. The sounding of the horn and the noise occasioned by the muffler cut-out are each and both well enough in their way, but they do not embrace and conclude all of the duties of the driver of the automobile."

In Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358, the law in relation to the use of highways by pedestrians is stated as follows:

> "The fact that a pedestrian who is injured by an automobile is walking on the left-hand side of the highway does not, of itself, constitute contributory negligence. A pedestrian has the right to use all parts of a road or street, being chargeable with the exercise of a reasonable degree of care to be determined under all the circumstances."

[4] The rule of reasonable precaution which the law enjoins upon a driver of an automobile upon a public highway includes the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle; that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach; and, finally, that the vehicle is under such control as that it may be stopped promptly.

In the case of Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L. R. A. (N. S.) 989, Ann. Cas. 1916E, 656, and elaborately annotated, we find the following statement of the law applicable herein:

> "A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained."

[5] The plaintiff in this case was where he had a right to be. The testimony shows that there was plenty of room for the driver of the automobile truck to have passed him on the left-hand side. The time of day when the injury occurred was such that the law required the truck to be equipped with lights sufficient to enable the driver to perceive the person of others who might lawfully be using the same highway. The statement of the driver shows that he did not see the plaintiff until he had run him down. Had the car been equipped with proper lights, had he been traveling at such a rate of speed as the law requires under the circumstances to safeguard the rights of others and had he been keeping a proper lookout ahead, as the law requires, he would have discovered the presence of the plaintiff. A failure in any of these respects constitutes negligence.

The testimony in this case, as well as the findings of the court, show that the plaintiff, at the time of the injury complained of, was where he had a legal right to be; there is nothing in the testimony nor in the findings of the court which shows that the plaintiff varied his movements or suddenly crossed the path of the oncoming automobile; the plaintiff was traveling in the same direction as the automobile and was under no legal compulsion to be continually looking around to ascertain if any one was about to run him down; the testimony shows and the finding of the court is that no warning signal was given by the driver of the approaching auto truck. The testimony also shows that there was plenty of space on the highway for the truck to have passed the plaintiff without danger of collision. These facts certainly make out a prima facie case and cast upon the defendants the burden of showing that the driver of the truck was complying with the law and taking all precautions which the circumstances of the case required in order that his use of the highway might not be to the injury of any one who was lawfully thereon. The only showing made by the defendants was that the plaintiff was protecting himself from the cold at that early morning hour. Among other things, as we have said, the trial court found as follows:

> "The court finds that the plaintiff, had he exercised ordinary care and precaution, would have walked on said path on said morning. * * *"

And the conclusion of law was drawn that he was negligent in so doing. In support of this finding and conclusion, the respondents argue as follows:

> "Moreover his negligence did not end here, but in disregard of his own safety he was walking in the road although there was a well-defined footpath paralleling this road on one side and a clear space on the other side of the road, in either of which places he might have pursued his course with safety."

All of this is true. If the plaintiff had been somewhere else, the truck belonging to the defendants would not have run him down, but that is very far from constituting negligence on the part of the plaintiff or excuse from liability on the part of the defendants. We do not very well see how negligence on the part of the plaintiff can be predicated upon a statement of facts or finding of facts which show that the plaintiff was in a position where he had a right to be and where he had a right to conclude that no one would do him injury simply because he might have been elsewhere and thus escape being run down by an automobile truck driven by one who admits that he did not see the plaintiff until the collision had occurred.

We think that the findings are not supported by the evidence and that the judgment is not supported by the findings. It is therefore ordered that the judgment of the trial court be and the same is hereby reversed.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 287

PEOPLE v. COX et al. (Cr. 722.)

(District Court of Appeal, Third District, California. March 21, 1924. Hearing Denied by Supreme Court May 19, 1924.)

1. Constitutional law 🔑90—Right of press or of free speech is not curtailed by act limiting constitutional change to peaceable means.

As long as the power of constitutional change is subject to the prerogative of a majority of the people, and may be advocated by any one, right of press or of free speech is not curtailed or abridged by an act limiting exercise of effort to make such changes to peaceable means.

2. Constitutional law 🔑90—Change of government may not be advocated by destruction of property or imperiling lives of those not agreeing to change.

While one may freely state his reasons why change in government is desirable, he has no license to advocate destruction or to incite others to destroy property or imperil lives of those who do not agree to such changes.

3. Criminal law 🔑1159(5)—Whether teachings of I. W. W. were being promulgated or had been eliminated held for jury, and not reviewable.

In a prosecution for criminal syndicalism, whether teachings incorporated in literature of the I. W. W. were still being promulgated, or whether all literature as to sabotage and its advocacy had been eliminated, was for jury, and not for court of appeal, where there was testimony sufficient, if believed, to support verdict.

4. Criminal law 🔑1172(7) — Defendant not harmed by instruction requiring knowledge of membership.

In a prosecution for criminal syndicalism, if knowledge of membership in prohibited organization may not be properly read into Criminal Syndicalism Act, § 2, subd. 4, to make a member amenable to penalties prescribed, defendants were not harmed, where question of essential knowledge by defendants of their membership was presented in court's instructions as a prerequisite to conviction.

5. Criminal law 🔑1170½(5)—Refusal to permit cross-examination as to whether witness had been confined in institution for mentally afflicted held not reversible error.

Refusal to permit cross-examination of a witness as to whether he had been confined in an institution for the mentally afflicted was not reversible error, where he was permitted to state facts showing himself to be of reprehensible character.

6. Insurrection and sedition 🔑2—Whether defendants organized society held immaterial if membership and criminal character of organization shown.

In a prosecution for criminal syndicalism, it was immaterial that defendants had not organized or assisted in organizing a society of the character prohibited by statute, if defendant's membership in such organization was established, and its criminal character shown.

7. Criminal law 🔑695(2)—Admission of exhibits against general objection held not erroneous.

In a prosecution for criminal syndicalism, admission of exhibits, seized at meeting place, was not erroneous, where objection was general in form, and did not call attention to fact that signatures to exhibits were not properly authenticated, as they were admissible to show transaction of business and its character.

8. Criminal law 🔑1168(2)—Failure to limit admissibility of exhibits in prosecution for criminal syndicalism held harmless error.

In a prosecution for criminal syndicalism, failure to limit admissibility of exhibits, seized at meeting place of I. W. W., to showing transaction of business and its character, *held* harmless error, in view of other evidence of defendants' membership and admission thereof as to two of them.

9. Insurrection and sedition 🔑2 — Evidence held to sustain finding of membership.

In a prosecution for criminal syndicalism, evidence *held* sufficient to sustain finding of a defendant's membership in the I. W. W.

10. Insurrection and sedition 🔑2 — Evidence held not to sustain conviction.

In a prosecution for criminal syndicalism, evidence of a defendant's membership in I. W. W. *held* insufficient to sustain conviction.

11. Criminal law 🔑450—Exclusion of opinions and conclusions of persons, not members of organization, as to its purposes held not erroneous.

In a prosecution for criminal syndicalism, exclusion of opinions and conclusions of persons, not members of an organization, as to its purposes and patriotism was not erroneous, since it is what organization does that stamps its character, and not what others may think about it.

Appeal from Superior Court, Humboldt County; Percy S. King, Judge.

Lauri Mammi and others were convicted of criminal syndicalism, and they appeal. Reversed as to Lauri Mammi, and affirmed as to other defendants.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendants and appellants were jointly tried and convicted of the crime of criminal syndicalism upon an information in the following words and figures, to wit:

"The said defendants, * * * on or about the 26th day of December, A. D., nineteen hundred and twenty-two, at and in the county of Humboldt and state of California, did then and there willfully, unlawfully and feloniously organize and assist in organizing, and each was then and there, and did knowingly become then and there a member of an organization, society group and assemblage of persons, to wit, The Industrial Workers of the World, then and there organized and assembled to advocate, teach, aid and abet criminal syndicalism contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

The defendants' motion for a new trial being denied, an appeal was taken therefrom and from the judgment of conviction to this court. At the trial the defendants appeared in person and not by counsel.

The information, as set forth, shows that the defendants were charged under subdivision 4 of section 2 of the act of the Legislature, approved April 30, 1919 (St. 1919, p. 281), defining criminal syndicalism and sabotage, etc.

[1] The usual constitutional objections to the act in question are again presented for consideration, but, as these questions have all been determined by the many cases decided by this court and by the Supreme Court of the state, it does not seem to us that it is necessary to again recite the same further than to state that the fundamental principle upon which government is established is the right of self-preservation against every form of illegal or violent assault. A constitutional government contains within itself the method, the manner, and the power of constitutional change, and that change is always subject to the will, wish, and prerogative of the majority of the people exercising the right of suffrage in a legal and constitutional manner. So long as these methods of procedure are open and may be advocated by any one, it cannot with consistency be urged that the right of the press or of free speech is either curtailed or abridged by an act which limits the exercise of the effort to make such changes as may be desired by peaceable means.

[2] Free speech and license are not convertible terms. One may freely state his reasons why a change in government is desirable, but he has no license by reason thereof to advocate the destruction of or take steps to incite others to destroy the property or imperil the lives of those who do not agree to such changes. One method is lawful, the other is not, because it strikes at the basis of all government, and denies the right of self-preservation. This does not presuppose the continuance of the existing order, but it does presuppose that the existing order, condition, and structure of society shall be changed only by peaceable means, and that violence and destruction have no place in human government. We find nothing in the Constitution of this state nor in the Constitution of the United States which denies the right of the state to protect itself from violent assaults whether directed from within or from without.

Though denominated a contest between labor and capital, this case exhibits nothing different from those that have preceded it which, as we have said, are all founded upon an act of the Legislature which seeks to enforce the right of the state to exist. We think this to be the fundamental basis of the law and a sufficient answer to the constitutional questions urged on this appeal.

[3] This case is also replete with exhibits of pamphlets, documents, and literature of the kind and character introduced, considered, and held sufficient to authorize a jury in determining the question of the unlawful purposes, teachings, and practices of the I. W. W., and it would serve no useful purpose to again set them forth. There is testimony that the teachings incorporated in the literature referred to are still being promulgated. There is also testimony that all literature as to sabotage and its advocacy have been eliminated. These matters were questions for the jury to determine and not for this court, so long as there is sufficient testimony, if believed by the jury, to sustain the verdict. Omitting all reference to sabotage, or assuming that the organization has eliminated that word from its literature, there are still other matters proper to be considered by the jury. The preamble and constitution of the order were admitted in evidence, and, while we have said that the preamble, in and of itself, does not import violence, yet there is one paragraph, when read in connection with other literature in which "direct action" is advocated, may be considered upon the question of the continued unlawful purposes of the organization. That paragraph is as follows:

> "Instead of the conservative motto, 'A fair day's wage for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'"

If the direct action or the taking possession of the farms and the factories of the country is to be other than that of returning a full equivalent in value for the property taken, the unlawful character of the organization, as it existed at the time of the trial of this cause, could be considered by the jury as established.

[4] The appellants also again raise the question of scienter or essential knowledge. While the word "knowingly" does not precede the word "is," in subdivision 4 of the act referred to, we are of the opinion that the subdivision has the same meaning as though it were worded in the manner contended for by the appellants. It does not mean that any one who was elected an honorary member without his knowledge or consent of any organization or assemblage to advocate or teach criminal syndicalism would be amenable to the penalties prescribed in the act, but it does apply to one who voluntarily and by action on his part has become and is a member of such an organization. Under such circumstances knowledge is imputed and would exist in fact just as much as though it were specifically set forth and denominated in the act of the Legislature condemning such organization. The learned trial court took this view, and instructed the jury as favorably as could be asked by the appellants as follows:

> "If you find from the evidence, beyond a reasonable doubt, that the Industrial Workers of the World is an organization, society, group, or assemblage of persons organized to advocate, teach, or aid and abet criminal syndicalism, and that the defendants knowingly became members of said Industrial Workers of the World at the time and place set forth in the information, then you should return a verdict of guilty of the crime charged in the information."

Also:

> "In order to convict the defendants you must be convinced beyond reasonable doubt that the defendants *knowingly belonged* to an organization which in its nature was a criminal conspiracy to change industrial control and government by *unlawful* and criminal methods." (The italics are ours.)

The words "knowingly belonged" referred to a previous period of time, and impart the same meaning as "is," as that word is used in the statutes. The fact that the defendants knew of their membership in the organization was given to the jury as an indispensable prerequisite to a verdict of conviction. Upon the question of organization and becoming members the trial court instructed the jury as follows:

> "If you find from the evidence beyond a reasonable doubt that the Industrial Workers of the World was at the time and place mentioned in the information, an organization, society, group, or assemblage of persons organized or assembled to advise, teach, or aid and abet criminal syndicalism, and that the said defendants did at said time and place, willfully, unlawfully, knowingly, and feloniously organize, or assist in organizing, or did knowingly become members of such organization, then your verdict should be guilty as charged in the information herein."

Other instructions covering practically the same grounds and couched in the same language were also given, showing that the question of essential knowledge on the part of the defendants was distinctly and clearly presented to the jury as prerequisite to conviction. Whether our interpretation of the statute as requiring knowledge is or is not correct, it appears that the interpretation contended for by the appellants was accepted and followed by the trial court, and, therefore, upon this ground no injury has been inflicted, should it be finally held that knowledge of membership may not properly be read into the statute.

[5] Much space and consideration is given in the appellants' briefs to the testimony of the witness Townsend, and also to the ruling

of the trial court in sustaining objections to questions asked by the defendant as to whether the witness had or had not spent some period of his life in an institution for the care of the mentally afflicted. This court has held that such testimony is admissible, not that it tends to degrade the witness, but that it does bear upon his credibility and the weight and the consideration to be given to it by the jury, but for the same reasons that we gave in the case of People v. La Rue (Cal. App.) 216 Pac. 627, we hold such error not sufficient to authorize a reversal of the verdict herein. The witness was allowed to and did state sufficient to show himself to have been one of the most reprehensible characters thinkable. He stated on the witness stand that he had never told the truth before in his life. He admitted participation in numberless atrocious offenses. It is unfortunate that any one confessedly guilty of so many despicable crimes must be used as a witness; but competency and character are separate and distinct terms. A witness may be competent and yet of such unspeakably degraded character as to be unworthy of belief, hence his testimony is admissible, and may be considered by the jury and given such weight as they may deem it entitled to under all the circumstances. It is not for the court to close the door of reformation and say that a witness, who has never told the truth up to a certain period of time, may not thereafter mend his ways and speak words conformable to the facts. The jury is the judge of the credibility of witnesses, and whatever views we may entertain of such a witness it is not for the court to deny the jury the right to pass upon the testimony of such a witness, or pronounce him in law incompetent and exclude him from the witness stand. It may be that, if the I. W. W. organization is a criminal conspiracy in its essential fundamental principles, doctrines, and advocacies no other kind or character of testimony or no other kind or character of witnesses may be had from its membership.

[6] Objection is also made to the admission of certain testimony consisting of papers and documents found in one of the rooms of the building known as 1211 Summer street in the city of Eureka and used as a meeting place of the I. W. W.'s. Objection is also made that there is no sufficient testimony showing the membership of Frank Cox and Lauri Mammi. The point is also made that there is no testimony showing that the defendants organized or assisted in organizing any local branch of the I. W. W.'s or any such association or organization. If membership is established and the criminal character of the organization shown, then, and in that case, it becomes immaterial whether the testimony is or is not sufficient to show that the defendants organized or assisted in organizing a society having for its purpose the promulgation of teaching the acts proscribed by the statute. The defendants Cox, McGrath, and Kuilman were arrested at 1211 Summer street in the hall used by the association. The testimony of the sheriff shows that at the time of the arrest there was an assemblage of some thirty persons; that a meeting was apparently in progress; that the defendant Cox was seated at a table taking minutes; that in an adjoining room was a great mass of literature including stub books, memoranda, delegates' blanks, and secretaries' financial blanks. Some of these blanks were filled out with the amounts of money received, the purposes for which the money was expended with the names of the defendants appearing as signed thereto. The stub books purported to be memoranda of moneys received from different members. A sample of each will suffice. One stub reads as follows:

"Industrial Workers of the World Jan. 20, 1923, $9.10. Received from Frank Cox the sum of nine dollars and ten cents for propaganda fund. [Signed] Mike Donivan."

Another entitled:

"Member's Record. Delegate's and Branch Secretary's Financial Report Blank. Industrial Union No. 120 of the I. W. W. Date 10—2—22.

Initiation fees	$ 8 00
Due stamps	12 50
Gen. Org. stamps	4 00
Gen. defense and relief stamps	3 00
C. case	50
100 workers	3 00
Literature 100 Sol.	3 00
Il Proletario	90
Russ paper	60"

Then follows a list of disbursements, at the bottom of which appears:

"Delegate or Branch Sec'y Frank Cox. Del. No. H–1640."

On the reverse side:

"Report of amount collected and of whom. I. U. No. 120 under the date 9—28 Oscar Horka card number 767180 Oct. Dec. Dues $1.50. Initiated by Union 120 month 9 date 18 year 21. The 9th month 29th day. Robert Whiteside. Card No. 723452. Sept.–Dec. dues, $2.00. Assessments $1.50. Initiated by Union 120. Month 7 day 1 year 22. A. Kent. Card No. X20123 Dec. Dues, 50c. Assessments 50c. Date 5—24—22."

There are several reports of this kind containing a list of the names of more than 20 persons purporting to be members, and of dues and assessments received therefrom. These stub books and reports were all found at the place occupied by the defendants at the time of their arrest. The fact that a meeting was being held is apparently undisputed. This is shown by the cross-examination of the witness, Sheriff Arthur A. Ross, conducted by the defendant Frank Cox. Upon the offer of the district attorney of the exhibit just referred to the defendant McGrath, apparently speaking for all of the defendants, made the following objection:

> "We wish to offer an objection against the introduction of these exhibits on the ground that the proper foundation has not been laid; nothing here to show there is any such an organization as the Industrial Workers of the World, no testimony to show there is such an organization existing; and there is no testimony to show just how that organization operates; nor shown that it has books or that it issues any membership books, or how it operates, whether by credentials or letters. It would seem testimony along that line should be given by some one familiar with its methods before any evidence of that kind is introduced. Those cards and credentials may have been issued by some (the transcript shows the word 'outcase' but must mean outside or some similar term) organization of the I. W. W., and the seal placed on the credentials. No evidence of a seal if they used a seal. There is no seal impression on those credentials and papers."

[7, 8] It must be admitted that for certain purposes there was no foundation laid for the introduction of the exhibits just referred to, but, as the objection was general in form, and does not call attention to the fact that the signatures to the papers were not properly authenticated, and, if admissible for any purpose, the rule announced in People v. Collins, 48 Cal. 277, applies. It is there held that where "evidence which is competent only for a particular purpose is admitted generally, and the counsel for the defendant fails to ask the court to limit the evidence to the purpose for which it was competent, or to ask a charge to the jury to that effect, the defendant can not afterwards complain that the testimony was inadmissible for some other purpose." This testimony was admissible in connection with what we have heretofore stated showing the presence of the three defendants, the fact that one of them was apparently taking minutes of the meeting, to show that the I. W. W. or whatever the assemblage was that was using 1211 Summer street was transacting business and also the kind and character of business that was being transacted. That it would not be sufficient to predicate a finding of membership therein or that the defendants were doing anything wrong may be admitted. So far as the defendants are concerned, for reasons hereinafter stated, the testimony is harmless, even though considered generally instead of limited specifically to the purposes for which it was admissible, and which doubtless would have been the case had the court's attention been called to the fact that the signatures were not properly authenticated. To constitute proof by way of an admission of the recitals contained in the exhibits the signatures thereto should have been authenticated in the manner provided by section 1940, Code of Civil Procedure. The exhibits being considered show only membership and transaction of business if taken at the full face value, which, as to two of the defendants, McGrath and Kuilman, is admitted.

Prior to the admission of this testimony, over the objection of the defendants, it appears that similar testimony had been introduced without any objection whatever, as appears from the following:

> "The bearer, fellow worker C. F. McGrath, has been duly appointed as delegate for all Industrial Unions of the I. W. W. and is authorized to collect dues and initiate new members. Dues are 50c per month. The initiation fee is $2.00. Dated this 26th day of November, 1922, signed by the General Sec'y-Treas. of the I. W. W. and Chairman of the G. E. B., who have been authorized to place the seal upon these credentials. The credential expires Mch. 31, 1923. [Signed] John Grady, General Sec'y-Treas. Rob't E. Daly, Chairman G. E. B. Issued by the Industrial Union No. 120."

Across the end appears:

> "Card No. 829978. Name C. F. McGrath."

Upon the line beneath:

> "Delegate's Signature and Card Number."

On the inside of the folder appears this entry. Under the head of date appears:

> "11—26—22. From Frank Cox Supply Clerk. Supplies received. Due Bks. $60.00. Due stamps $350.00. Assessments G. O. $100. G. D. 138."

On the bottom of the inside of the folder appears:

> "Name of delegate C. F. McGrath. Card No. 828878. Credential No. H 1417. Issued by Del. H 1640. Date, 11—26—22."

This exhibit was taken from the person of the defendant McGrath, and, together with 26 other exhibits covering the activities of the I. W. W. to the same purport as the ones objected to, were admitted in evidence without any objection whatever.

[9] We come now to the question of the testimony as to the membership of the defendant Cox. As we have stated, the defendant Cox, together with the defendants McGrath and Kuilman, were arrested at Normana Hall, 1211 Summer street, the place from which in an adjoining room a large number of exhibits, to which we have referred, were taken. At the time of his arrest the defendant Cox was seated at a table. Upon being searched, the following exhibits were taken from his person:

> "Lumber Workers' Industrial Union No. 120, I. W. W.
>
> "1001 West Madison Street, Chicago, Ill.
>
> "December 19, 1923.
>
> "Frank Cox, Box 91, Eureka, Cal.—Fellow Worker: We received your letter of the 14th. I. U. 310 has sent your five of the new credentials. I. U. 120 is figuring on putting the new credentials on the field the first of January.

> We will send you some about that time. It is necessary for all the delegates to obtain the amount of supplies transferred from the old credentials to the new credentials in order to keep the accounts straight.
>
> "With best wishes, yours for industrial solidarity, William Bryan, Chairman O. C."

Also the seal of the Industrial Workers of the World. Around the outside of seal, but within its circle, is "Industrial Workers of the World, March 12th, 1917, Chicago, Illinois."

Also a booklet entitled as follows:

> "'An injury to one is an injury to all.' Preamble and Constitution of the Industrial Workers of the World. Organized July 7, 1905. General Administration: 1001 West Madison Street, Chicago, Illinois, U. S. A. As Adopted 1905 and Amended by Conventions and Ratified by Referendum Votes, 1906, 1907, 1908, 1910, 1911, 1912, 1913, 1914, 1916, 1919, 1920, 1921."

There also was taken from the person of the defendant Frank Cox Exhibit No. 27, being a typewritten sheet of paper purporting to contain the minutes of the meeting of the I. W. W. organization held on December 17th, at Eureka, Cal., by the members of the organization, and is as follows:

> "Meeting called to order 1 p. m. Dec. 17th, at Eureka, California. By traveling Del. 24 members present. Gus Louis elected chairman. Harry Williams, Rec. Sec'y."

At the bottom appears the seal of the Industrial Workers of the World, around the outer edge of which appears the following:

> "Industrial Workers of the World. Eureka Branch, Eureka, California."

And then the signature:

> 'Frank Cox, Supply Clerk."

The membership card taken from the room referred to bearing the name of Frank Cox was also admitted. This card was admitted after the general objection to which we have adverted. The card reads as follows:

> "I. W. W. headquarters in Eureka on the 23d day of January of this year," and on the fifth page of the book or card appears the name, "Frank Cox, initiated by # 573 D. Murray, M. J. M. W. I. Union No. 573. November 3, 1919. Department General Construction. Industry G. C.," with the printed signature of Thomas Whitehead, "Gen'l Sec'y-Treas. Gen. No. 748461." On the following page appears the following: "Transfer record month Nov. date 7 year 20. From Union No. 310 to Union No. 570. April 7—22. From Union No. 310 to Union No. 120. July 20—22 from Union No. 120 to Union No. 130. Sept. 17—22. From Union No. 130 to Union No. 120."

On other pages appear other data of transfers and canceled stamps of various denominations. The cross-examination of Sheriff Ross by the defendant Cox also brings facts material to be considered by the jury in determining his membership in the Industrial Workers of the World. We glean from the cross-examination the following upon this point:

> "Q. Mr. Ross, you and Deputy Sheriff Mr. Long arrested Mr. Grath and I and another party in Normana Hall? A. We did. Q. Some time in December was it not, Mr. Ross, I mean about the month of January 6th, or somewhere around there? A. I am not certain of the date. Q. About what time was it when you came in, Mr. Ross? A. Oh, it was after 1 o'clock, some time between 1 and 3, if I remember rightly. Q. How did you gain admittance to Normana Hall, Mr. Ross? A. Walked in the door. Q. Walked in; was there any guard in the door? A. I think there was some one at the door, yes. Q. Do you recall seeing me in the hall that time, Mr. Ross? A. Yes. Q. What was I doing? A. You were at a table, I believe. Q. Was any one at the table with me, Mr. Ross? A. I think there was a man by the name of Williams. Q. Now, Mr. Ross, did you take the minutes of that meeting? A. I think I did, yes. Q. Do you know where they are at the present time? A. No, I can't say right now; they may be—I think they are in the possession of the district attorney, or they may be in my possession. I think they were used at the preliminary examination. I know they were given to me by you. Q. Mr. Cox: I want to get those minutes that you took away from us. Q. Did you take them away from the meeting—from the justice court? A. I think those minutes were all used at the preliminary examination. Mr. Cox: * * * If the court please, I would like to have the district attorney or the sheriff, I don't know which, to produce the minutes of the meeting held in Normana Hall here December 26, 1922. The Court: Is that the date of the arrest? Mr. Cox: Yes, sir."

Further questioning about the minutes brought out the following answers:

> "The minutes of that meeting was in tablet. I know that I took the tablet and pinned it right through down the back through the writing and put the balance of the literature or whatever in the minutes there, and put it all together in the tablet."

These minutes were not produced, and do not appear in the transcript. All these facts and circumstances, we think, sufficient to justify the jury in coming to the conclusion that the defendant Frank Cox was a member of the organization known as the Industrial Workers of the World.

[10] As to the membership of the defendant Lauri Mammi, the testimony is strikingly slight. We are cited by the respondent to the following, being papers seized at Normana Hall and which lacked the authentication as hereinbefore stated. These papers are as follows:

> "Receipt 20, issued to Lauri Mammi December 24, 1922, at Eureka, Calif., by Frank Cox, $2.50."
>
> "Application card taken out at Eureka, California, December 20, 1922. Name, Abel Mar-

tin. Card No. 233757. Initiated by Union No. 800 Aug. 15, 1918. [Signed] Lauri Mammi H-1402."

"Application. Name Ida Palo at Eureka, Cal., Dec. 23, 1922, and the application signed by Lauri Mammi H-1402."

Also the following questions and answers and statements in the testimony of McMillan as to papers obtained at Normana Hall.

"Q. Where did you get that, also from the same place? A. Yes. Q. From where, the headquarters in Eureka? A. Yes. Mr. McGrath. We want it understood that the credential was taken from Lauri Mammi. The Court: The papers were taken from the headquarters at 1211 Summer street."

We are referred to this as an admission of Mammi of credentials. It is apparent from what the court said that the reporter's transcript is in error, and that McGrath intended to say, "We want it understood that the credential was not taken from Lauri Mammi," as it is evident is was not taken from his person, whatever the paper may have been. Outside of the reference given to us by the respondent we have found another exhibit of like import. It reads:

"Industrial Workers of the World. Union No. 120 Jan. 20, 1923. To Lauri Mammi. Del. No. H-1402. From Mike Donivan Del. No. H-1442. 5 membership cards. $10. Total $10."

There may be other reference or other receipts of like import in the transcript relating to the defendant Mammi, but we have not discovered them, but none of the exhibits to which we have referred were authenticated in the manner required by law to make their contents prima facie evidence of the matters therein stated, but, assuming that the receipts of the papers to which we have just referred to constitute prima facie evidence of everything therein stated, it does not prove membership in any organization whatever. At best it would only show dealings with and for the organization. This fact would be true of any one who rented Normana Hall to local Union No. 120 of the I. W. W. at Eureka, Cal., but that would not constitute proof of membership. No card was found upon the defendant Mammi, no card was found at the headquarters of the I. W. W., and the defendant Mammi was not arrested there, and was not participating in the meeting which was being held at the time of the arrest of the other defendants and the seizure of the literature contained in an adjoining room to the hall in which the meeting was being held. The transcript does show that some literature relating to the I. W. W., whether for or against does not appear, was found upon the defendant Mammi, but this literature was not introduced in evidence, and therefore we know nothing of its nature or effect. From the fact that the name Lauri Mammi appeared upon the papers to which we have referred the jury doubtless assumed that the defendant Mammi was a member of the organization. This assumption may be in accordance with the facts, but assumption is not waranted in criminal cases. There must be proof of facts from which the jury may deduce or draw its conclusion and render its verdict. In other words, the jury had no right to assume a fact, even though such assumptiton is correct, in the absence of legal proof of such fact. The jury having found generally that the defendants were guilty as charged, if any of the elements constituting the offense are sufficiently proven, it is immaterial that the testimony as to other offenses is insufficient. We have shown that the testimony warranted the conclusion of the jury that the defendants Cox, McGrath, and Kuilman were members of the organization, and it necessarily follows that whether they were organizing or assisting in organizing, as charged, becomes unimportant, and hence whether the word "organization," as used in the statute, is correctly interpreted in the case of People v. Thurman (Cal. App.) 216 Pac. 394, is of no importance, so far as this cause is concerned.

[11] Complaint is also made by the appellants of the ruling of the court in excluding certain writings and pamphlets purporting to be the opinions and conclusions of persons not members of the organization as to its purposes, motives, aims. its loyalty, and its patriotism. The inadmissibility of such testimony is so clearly apparent that we do not need to give the ruling of the court thereon any extended consideration. It is what the organization does as an organization that stamps its character, and not what others may think about it. There were some other objections of minor importance as to the admissibility of testimony as to where some of the witnesses may have stated opinions and conclusions more or less interspersed with other testimony as to facts. These we have examined, but do not find in them anything of a reversible nature and so are not set forth herein.

The judgment and order of the trial court as to the defendants Cox, McGrath, and Kuilman are affirmed, and as to the defendant Lauri Mammi the judgment is reversed.

We concur: FINCH, P. J.; HART, J.

66 Cal. App. 426

TOURNY et al. v. BRYAN et al.
(Civ. 2683.)

(District Court of Appeal, Third District, California. April 1, 1924. Hearing Denied by Supreme Court May 29, 1924.)

1. Appeal and error 🔑1011(1)—Court's finding of fact on conflicting evidence conclusive.

Court's finding, based on conflicting evidence, that a bank, as beneficiary under a deed of trust executed by defendants as security for a promissory note, did not grant a further extension of time of payment after a certain date, *held* conclusive against defendants.

2. Mortgages 🔑409—Delay of 52 days from default in payment of installment of interest held not waiver of option to declare principal due.

Holder of note secured by deed of trust had a reasonable time in which to elect to declare principal due for failure to pay interest when due, and in waiting 52 days from such default before making such election it could not be held to have waived its option.

3. Mortgages 🔑319(3) — Evidence held to support finding as to reason holder of note did not credit payment.

Evidence *held* to support finding that failure of holder of note, secured by deed of trust, after defendant's default in payment of interest, to credit remittance thereafter made, was due to the fact that it was then intending to commence foreclosure.

4. Appeal and error 🔑870(4)—Attack on order appointing receiver held collateral attack, and appellate court could not review order.

Where defendants appealed from a judgment directing a foreclosure of deed of trust executed by them, but did not, as permitted by Code Civ. Proc. § 963, appeal from the order appointing a receiver, the attack on the order was collateral, and the appellate court, in view of section 956, could not review the order.

5. Mortgages 🔑469—Allegations in petition for appointment of receiver held sufficient as against collateral attack.

Allegations in petition for appointment of receiver of property, covered by deed of trust, *held* sufficient on collateral attack on order, to sustain order of appointment under Code Civ. Proc. § 564.

6. Mortgages 🔑469—Mortgagors held to acquiesce in appointment of receiver.

Mortgagors who did not ask the court to vacate order appointing receiver or in any manner question its regularity, or receiver's authority, prior to trial, 4 years after receiver's appointment, *held* to have acquiesced in the appointment.

Appeal from Superior Court, Yuba County; Eugene McDaniel, Judge.

Suit by George Tourny and another as trustees against Louis A. Bryan and another. From a judgment for plaintiffs, and from an order settling the account of a receiver, defendants appeal. Affirmed.

William E. Davies, of Marysville, and Russell W. Cantrell, of San Francisco, for appellants.

W. H. Carlin, of Marysville, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondents.

FINCH, P. J. The defendants have appealed from the judgment entered against them herein, adjudging the amount due from them on their promissory note, and directing the plaintiffs, as trustees under defendants' deed of trust, given to secure such indebtedness, to sell the property therein described for the purpose of satisfying the indebtedness. They also gave notice of appeal "from the order and decree * * * settling the account of the receiver herein." The pleadings, findings, and decree cover nearly 700 folios, and, by reason of their length, it is necessary to state the issues material to the questions raised by the appeal in a somewhat disconnected manner.

August 28, 1916, the defendants executed their promissory note to the German Savings & Loan Society, hereinafter called the bank, for $90,000, payable 3½ years after date, with interest at 7 per cent. per annum, payable semiannually, and if not so paid to be added to the principal. The note provided that—

> "In case said interest, or any part thereof, is not paid with 10 days after the same becomes due, the whole of said principal sum shall forthwith become due and payable, at the election of the holder of this note."

At the same time and as a part of the same transaction, the defendants executed and delivered to plaintiffs the aforesaid deed of trust, conveying to the latter 1,728 acres of land and 1,729 shares of stock of the Hallwood Irrigation Company. The deed of trust provided that the defendants should pay "all taxes and assessments and all other charges and incumbrances which now are or shall hereafter be * * * a lien upon the said premises"; that in default thereof the bank might make such payments, and that the deed of trust should stand as security for the repayment, on demand, of any amounts so paid. The trustees were authorized to sell the property on defendants' default "in the payment of the said promissory note, or the principal or interest or any part thereof," or in the payment of any other moneys agreed to be paid by them, to obtain the aid and direction of the court in the execution of their trust, "and either by themselves, or by a receiver to be appointed by a court therefor, to enter upon and take possession of the above-granted premises, or any part thereof, * * * and to collect and receive the rents, issues, and profits thereof * * * and to exercise such other powers in respect to said premises as the court in which said suit is pending may direct."

[1] February 24, 1917, defendant L. A. Bryan wrote the bank that he would be unable to pay the first installment of interest at the time it became due, February 28, 1917. The bank, on March 4th, granted an extension of time to June 15, 1917, for the payment of this installment of interest "on condition that you will provide for the payment of the water assessment of $844.50, which will be delinquent on the 16th inst., and which must be taken care of in all events by you by that time, and the receipts for same promptly mailed to us for our inspection." Defendants were unable to pay either the water assessment or the interest within the extension of time given, and the bank granted a further extension to August 28, 1917. The evidence is sharply conflicting as to whether there was any further extension of the time of payment, and the court's finding against defendants is conclusive on this appeal.

September 29, 1917, Bryan mailed money orders to the amount of $250 to the bank with the following direction: "Please pass to the credit of my loan account." This was the first and only tender of payment on the note or for moneys advanced by the bank. The bank received the money orders on the 30th of September, but the amount thereof was not applied to the defendants' indebtedness until November 1st. Plaintiff Tourny, vice president and general manager of the bank, testified:

> "I had a conversation with Mr. Bryan on or about the 1st day of November in respect to the $250 payment mailed by him to the bank. The remittance had been made but had not been applied for the reason that we did not wish to accept an account payment, and we never do when we know there is any question of foreclosing, and I told Mr. Bryan we would return the money, but instead of that he requested us to apply it, and that is why I wrote him this letter. And I told Mr. Bryan that these moneys had not been applied, and he said that, 'notwithstanding the fact that a suit has been commenced, you can credit that on my account,' and it was in accordance with that statement that the payment was then credited to his account."

The complaint herein was filed October 24, 1917. On the same day the court appointed C. L. Smith, a farmer and banker, and apparently a disinterested person, receiver—

> "to go upon the lands and premises in plaintiffs' complaint herein described and to take possession of, receive, hold, and preserve subject to the further orders of this court in the premises, all rents, issues, profits, and crops growing or being thereon and belonging to the said defendants * * * and to do any and all such other acts and things in the premises as may be or become necessary to hold and preserve the said premises, including said rent, issues, profits, and crops referred to in and secured by said trust deed."

The receiver was required to give a bond in the sum of $5,000. The court found upon ample evidence that—

> "The receiver has at no time gone upon said premises except for the purpose of collecting rents, issues, and profits thereof, * * * and at all times the said defendants * * * have remained in possession of said premises and have made and executed all leases in respect to the same."

Bryan testified that about the 1st of November, 1917, Tourny—

> "said if I could pay up the payments of the back interest he would dismiss the suit, and the receiver would be discharged."

The case was not brought to trial until February 7, 1922, and hence it does not appear that any advantage was taken of defendants' necessities by hasty action.

[2, 3] It is contended that the bank waived its option to declare the whole indebtedness due—

> "by waiting until the expiration of 52 days after default in the payment of the second installment of interest thereunder, and after it had received and retained a payment of $250 on account of overdue interest."

The bank had a reasonable time after default in which to exercise such option. It has been held that 59 days is not an unreasonable time in which to make the election. Fletcher v. Dennison, 101 Cal. 292, 35 Pac. 868. See, also, Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620; Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423. "Waiver always rests upon intent." Alden v. Mayfield, 164 Cal. 6, 127 Pac. 45; Wienke v. Smith, 179 Cal. 220, 176 Pac. 42. The court found that "the bank did not actually credit said $250 received by it on the 30th day of September, 1917, for the reason that it then intended to request the commencement of legal proceedings on said deed of trust." It cannot be said that the evidence does not support such finding.

[4] Appellants urge that the receiver was the agent of the plaintiffs and that therefore they are liable for the alleged mismanagement of the property by him as set up by the defendants. As before stated, the court found on sufficient evidence that the receiver did not take over the management of the property further than to collect the rents thereof, and there is no claim of mismanagement in the collection and application of the rents, but had there been mismanagement on the part of the receiver, respondents would not be liable therefor. In support of their contention, appellants cite Atlantic Trust Co. v Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155. In that case the court said:

> "Whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the

property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In Booth v. Clark, 17 How. 322, 331, 15 L. Ed. 164, 167, it is said: 'A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. * * * He is appointed in behalf of all parties, and not of the complainant or of the defendant only. * * * It is the court itself which has the care of the property in dispute.' "

It was held that the party procuring the appointment of a receiver does not become responsible for his management of property intrusted to him as such, except under special circumstances, such as an unauthorized appointment, citing Ephraim v. Pacific Bank, 129 Cal. 589, 592, 62 Pac. 177, 178, where it is said that if the receiver—

> "has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses."

Appellants, however, contend that the appointment of the receiver was unauthorized, and that therefore the respondents are answerable for his conduct in the management of the property. In appellants' reply brief it is said:

> "It is elementary that a receiver can be appointed by the court only under the provisions of section 564 of the Code of Civil Procedure, and not by consent of the parties. * * * There appears in the complaint no sufficient allegation * * * to authorize, or justify, the appointment of the receiver."

Baker v. Varney, 129 Cal. 564, 62 Pac. 100, 79 Am. St. Rep. 140, and Bank of Woodland v. Stephens, 144 Cal. 659, 79 Pac. 379, are cited in support of the propositions stated. In the former case, which was an appeal from the judgment, the court said that the receiver was not appointed under section 564—

> "but the authority to appoint a receiver was based entirely upon a stipulation in the mortgage itself. * * * Where a court has no authority under the law to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties. * * * We do not think that the appellant is precluded from making this point upon the ground that it is a collateral attack. Upon the record the order appointing a receiver must be considered as based solely upon the stipulation of the parties in the mortgage, and is therefore void."

In the latter case it is held that an allegation in the complaint that "the mortgaged premises are insufficient to pay and discharge the mortgage debt" states "no more than a conclusion." The court said:

> "Allegations of this character may be sufficient to uphold an order where the attack is collateral, but this cannot be allowed where, as in this case, there is a direct attack upon appeal."

In the instant case the petition for the appointment of a receiver alleges:

> "That there are now standing and growing upon the said lands and premises valuable crops. That the said crops are about to mature, and will thereupon be severed and removed from the said lands and premises by the said Louis A. Bryan and Winifred A. Bryan, or their successors in interest, and unless a receiver be appointed herein, will be discharged from the operation of said deed of trust and become wholly lost to the plaintiffs."

The attack here made is collateral. The order appointing the receiver was appealable. Code Civ. Proc. § 963. No appeal was taken therefrom. On an appeal from a judgment the court is without authority "to review any decision or order from which an appeal might have been taken." Code Civ. Proc. § 956; Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981.

[5, 6] Whatever might be said if the attack were direct, the foregoing allegations in the petition for the appointment of a receiver are certainly sufficient against the collateral attack here made. The defendants did not ask the court to vacate the order of appointment or in any manner question the regularity thereof or the authority of the receiver at any time prior to the trial, which was commenced more than four years after the appointment. Such conduct justifies the inference that they acquiesced in the appointment. First National Bank v. Superior Court, 12 Cal. App. 335, 344, 107 Pac. 322.

The only objection urged to the settlement of the receiver's account is that he did not so manage the property as to produce as great returns as could have been secured. Since the management of the property, other than the collection of rents, of which no complaint is made, was in the hands of the defendants, the objection made to the account is not tenable.

Other grounds urged for a reversal are based upon the erroneous theory that the receiver was the agent of the bank, and, hence, no further consideration need be given them.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; HART, J.

66 Cal. App. 314

PEOPLE v. OAKLEAF et al. (Cr. 1044.)

(District Court of Appeal, Second District, Division 1. California. March 25, 1924.)

1. Criminal law 🔑369(2)—Evidence tending to prove crime alleged is admissible, though proving other crimes.

While defendant in a criminal case cannot be tried for any other offense than that charged in information, evidence tending to prove crime alleged is admissible, though tending to prove commission of other crimes.

2. Criminal law 🔑369(2)—Evidence of defendants' arrest and escape for an offense after commission of robbery held admissible.

Evidence of defendants' arrest for a disturbance in a restaurant shortly after a robbery had been committed and their subsequent escape was admissible in a prosecution for robbery, though tending to show that defendants were guilty of other crimes.

3. Criminal law 🔑341—Cross-examination of defendant as to when he left jail held proper.

Where defendant in a robbery prosecution had testified on direct examination as to meeting his codefendant in county jail, cross-examination as to when he left county jail was proper to establish length of acquaintance with his codefendant.

4. Criminal law 🔑829(1)—Refusal of instructions covered by instructions given held not erroneous.

Refusal of instructions covered by the court's given instructions was not erroneous.

5. Criminal law 🔑814(12)—Refusal of instruction that defendants' reputation was presumed to be good held not erroneous.

Where no evidence was submitted as to defendants' good character for traits involved in robbery charges against them, court did not err in refusing an instruction that their reputation was presumed to be good.

6. Robbery 🔑24(1)—Evidence held to sustain conviction.

In a prosecution for robbery, evidence *held* to sustain conviction.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Roy Oakleaf and Edson Piatt were convicted of robbery, and they appeal. Affirmed.

Frank W. Allender, of Los Angeles, for appellant Oakleaf.

Chas. I. Rosin and Nathan Goldberg, both of Los Angeles, for appellant Piatt.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

CURTIS, J. The defendants are charged jointly in the information with the commission of four robberies, all alleged to have been committed during the night of June 16 and the morning of June 17, 1923. The jury returned a verdict finding the defendant Oakleaf guilty on all four charges, and the defendant Piatt guilty of robbery as charged in count 2 of the information, and not guilty on the other three charges. The defendants have appealed separately from the judgment and from the orders denying their respective motions for a new trial. The defendant Piatt relies upon all the grounds advanced by defendant Oakleaf, and in addition thereto claims that the evidence is not sufficient to support the judgment against him.

[1, 2] We will consider the objections to the judgment which apply to both defendants, and afterwards that which is relied upon by the defendant Piatt only. The defendants, with a man by the name of Carlton, were arrested at about 2 o'clock on the morning of June 17, 1923, after the commission of the four robberies charged in the information. The arrest was made by a police officer of the city of Los Angeles in a restaurant in said city on account of a disturbance which occurred in said restaurant, and in which said defendants participated. The arresting officer, in taking the three prisoners to the police station in his automobile, was attacked by them and severely beaten, after which they all made their escape. Thereafter, the defendants were arrested about 3 o'clock of the same morning at a garage where they were in the act of renting a car from the owner of the garage. The defendants now claim that it was error to admit evidence of the arrest of the defendants on the first occasion, and their subsequent escape from the officer. It is defendants' contention that by the admission of this testimony the court permitted evidence of other crimes to be submitted to the jury, to the prejudice of defendants' rights. While it is universally recognized that a defendant in a criminal case cannot be tried for any other offense than that charged in the information, yet the rule is equally well recognized that evidence which is pertinent to, or tends to prove, the crime alleged, is admissible, even though it tends to prove the commission of other crimes. 8 Cal. Jur. 61; People v. Nakis, 184 Cal. 105, 193 Pac. 92. "Evidence of the conduct of the defendant subsequent to the commission of the alleged offense, which is admissible as tending to show consciousness of guilt, is not rendered inadmissible because it may tend to prove other crimes." 8 Cal. Jur. 72; People v. Mack, 14 Cal. App. 12, 110 Pac. 967. In the present case it was competent to show not only the whereabouts of the defendants immediately subsequent to the commission of the crime with which they were charged, but the fact that they were together with Carlton immediately after the time the crime was committed, and such evidence would not be rendered inadmissible because it might tend to show that they were guilty of other crimes.

Flight, attempts to escape, and assaults upon the officer having the prisoner in charge, made by the latter in his efforts to prevent arrest, or in his endeavor to escape therefrom, are always admissible in evidence as tending to show consciousness of guilt on the part of the prisoner. It is true that the first arrest of the defendants was made in connection with the disturbance in the restaurant. This circumstance, while it might be considered in determining the weight of the evidence complained of, would not render it inadmissible.

[3] There was no error on the part of the court in overruling defendants' objection to a question asked defendant Oakleaf on cross-examination, as to when he left the county jail. He had testified on direct examination that he had a short acquaintance with the defendant Piatt, and on cross-examination, that he had met him in the county jail. It was perfectly proper, therefore, for the prosecution, in an attempt to establish the length of this acquaintance, to ask the question objected to. Furthermore, neither of the defendants was injured by this evidence. Evidence had already been admitted, without objection, that the defendants met in the county jail, and it is not apparent to us how either could be injured by simply permitting the prosecution to show when the defendant Oakleaf left the jail.

[4, 5] We find no error in the ruling of the court in refusing to give certain instructions offered by the defendants. These proposed instructions, with the possible exception of that one relating to the good character of the defendants, were all covered by other instructions given by the court. There was no evidence submitted as to the good character of the defendants for the traits involved in the charges against them. It was not error, therefore, to refuse an instruction requested by the defendants that their reputation was presumed to be good. People v. Conte, 17 Cal. App. 771, 787, 122 Pac. 450, 457.

[6] Referring now to the objection made by the defendant Piatt that the evidence is not sufficient to support the judgment of conviction against him, we find that there is testimony that he and the defendant Oakleaf were together in the early part of the evening of June 16th, and that they were together in the restaurant where they were arrested at about 2 o'clock on the morning of the 17th of June. The testimony further shows that the robbery of which the defendant Piatt was convicted was committed at about 1:30 o'clock of the same morning. The witness Scovel, the victim of said robbery, positively identified Oakleaf as one of the persons participating in said robbery, and when asked whether he saw the defendant Piatt that night, after requesting Piatt to stand up, replied, "Yes, he appears very much like the man that held the gun." When further interrogated by a juror as to why he thought Piatt was one of the men who robbed him, he replied, "Because the features resemble him." In our opinion this evidence was sufficient to support the judgment against the defendant Piatt, notwithstanding the fact that the witness Scovel further stated that if it was a case of life or death he would not want to swear as to the identity of Piatt. Furthermore, as we have already seen, Piatt, along with Oakleaf and Carlton, after their arrest in the restaurant, and while they were being taken in an automobile to the police station, attacked the arresting officer, and after beating him up, all three of the prisoners made their escape from him. While the evidence does not show that the defendant Piatt took the leading part in this attack upon the officer, it does show that he participated therein, and that after the assault, with the other two prisoners, he made his escape from the officer. This evidence of the flight of the defendant Piatt the jury was authorized to consider together with the other evidence against him, and, taking it all together, we think it was clearly sufficient to justify the jury in rendering a verdict of conviction against the defendant Piatt.

The judgment and orders denying the motions for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

(66 Cal. App. 350)

NORTHCUTT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 4698.)

(District Court of Appeal, Second District, Division 2, California. March 26, 1924.)

1. Parent and child ⚷2(4)—Act enjoining interference held inapplicable to proceeding after divorce for custody of minor children.

Former wife's proceeding for custody of children, and to restrain husband from interfering with her custody during hearing, was not authorized by Civ. Code, § 199, authorizing actions for custody, where marital relation had theretofore been dissolved.

2. Injunction ⚷163(1)—Statute requiring service of points and authorities to continue temporary order applies in suit for custody of children.

Code Civ. Proc. § 527, providing that, if party who has obtained temporary restraining order does not serve on opposite party, two days prior to hearing, copy of points and authorities in support of application, order will be dissolved, applies to action to obtain custody of children and restrain interference therewith.

3. Prohibition ⚷3(5)—Mere right of appeal does not bar unless adequate.

Mere right of appeal does not bar right to prohibition; right of appeal must also afford an adequate remedy.

4. Prohibition ⟹3(5)—Right of appeal from restraining order held inadequate remedy.

Right of appeal from temporary restraining order against husband's interference with former wife's custody of minor children *held* not an adequate remedy, and prohibition will issue restraining enforcement of order.

5. Prohibition ⟹3(5)—Not granted against further proceedings in action, because restraining order improperly granted.

Though in wife's action for custody of children awarded to husband by foreign divorce decree, order restraining husband from interfering with wife's custody was improperly granted, where husband has obtained custody by habeas corpus, and enforcement of order is to be prohibited, it would be improper to prohibit further proceedings in the action; remedy by appeal being adequate.

Prohibition by Carlton A. Northcutt against the Superior Court of the State of California, in and for the County of Los Angeles, and another. Peremptory writ granted.

G. P. Adams and W. W. Orme, both of Los Angeles, for petitioner.

Leo V. Youngworth, Harry J. McClean, John L. Richardson, and T. E. Parke, all of Los Angeles, for respondents.

WORKS, J. These are the facts shown, among others, by the petition for a writ of prohibition in this proceeding: One Myrna P. Sprague filed in respondent court her complaint against petitioner, which complaint was later superseded by an amended complaint, filed November 3, 1923. The latter pleading alleges in part that the plaintiff in the action, to whom we shall hereafter refer as the plaintiff, and the petitioner in this proceeding, whom we shall hereafter designate as petitioner, were wife and husband for a number of years prior to August 8, 1919; that during the subsistence of the marriage relation between the plaintiff and petitioner there were born to them two girls and a boy, the girls being, at the time of the filing of the pleading, of the ages, respectively, of 11 and 8, and the boy then being of the age of 5; that on August 8, 1919, a court in a certain county in Wisconsin, in which county the plaintiff and petitioner then resided, rendered its decree of divorce in an action in which petitioner was plaintiff and the plaintiff was defendant; that by the decree the care and custody of the daughters resulting from the marriage was awarded to petitioner and the care and custody of the boy was awarded to the plaintiff; that, except as later alleged in the pleading, the care and custody of the children has remained as by the decree ordered; that all three of the children were, at the date of the filing of the pleading, in the care and custody of the plaintiff; that then and ever since October 1, 1920, the plaintiff resided and has resided in Los Angeles county, Cal., and that all three of the children were, at the date of the filing of the pleading, residing with her at her place of residence therein; that since the granting of the decree of divorce conditions affecting the custody and control of the children have been changed and altered, particularly in certain respects which are set forth; and that the plaintiff is a fit and proper person to have the care and custody of the girls, is the person naturally entitled to their care and custody, and is desirous of caring for them, supplying them with the necessities of life, with a good home and motherly care, and with proper education and maintenance. The amended complaint prays that the temporary custody, and, finally, the permanent custody of the two girls be awarded to the plaintiff. Upon the filing of the amended complaint respondent court made its ex parte order requiring petitioner to show cause why the custody of the girls should not be awarded to the plaintiff during the pendency of the action, and restraining him, pending the hearing under the order to show cause, from interfering with the plaintiff's care, custody, or control of the girls, from removing them from her custody, and from taking them out of the state.

Petitioner, who is now a resident of Colorado, filed in the superior court an answer to the amended complaint of the plaintiff in which, in addition to many denials of allegations of the latter pleading, it is averred, in part, that the boy mentioned above is not the child of petitioner; that petitioner, who is a graduate of the United States Naval Academy, was absent from home in the service of his country during the late World War; that during that absence the plaintiff became infatuated with one Gowling, and that said Gowling was convicted in the federal court of a violation of the Mann Act (U. S. Comp. St. §§ 8812-8819) so-called, for transporting the plaintiff from Nevada to California for immoral purposes; that the conviction was affirmed on appeal by an opinion reported in (C. C. A.) 269 Fed. at page 215; that by the divorce decree rendered by the Wisconsin court it was ordered that the two girls, from July 1 to August 31 of each year, might be left with their maternal grandmother if the latter so desired, during which time the plaintiff "shall be at liberty to there visit and associate with them"; that the plaintiff's present custody of the girls resulted from a violation of the terms of the divorce decree; and that the finding of the Wisconsin court upon which the award of the custody of the girls to petitioner was made was "that the interests of said children demand that their care and custody be given to" petitioner. When the cause came on for hearing under the order to show cause above mentioned, petitioner objected to the hearing upon various grounds, one of which will be mentioned below, and the objection was overruled.

At this juncture in the litigation the petition in the present matter was filed in this court, asking that a writ of prohibition issue to halt further proceedings in the action in the superior court. An alternative writ issued, and upon the return day the respondents interposed a general demurrer to the petition. An answer was also filed, but, except for certain express admissions, it presents nothing but legal conclusions, and it is conceded by respondents that the only question before us is as to the sufficiency of the petition for the writ of prohibition.

[1] It is provided by section 527 of the Code of Civil Procedure, relating to the granting of injunctions, that—

> "When the matter first comes up for hearing the party who obtained the temporary restraining order * * * must have served upon the opposite party at least two days prior to such hearing, * * * a copy of his points and authorities in support of such application; * * * if he shall fail to serve a copy of his * * * points and authorities, as herein required, the court shall dissolve the temporary restraining order."

The petition alleges facts showing that in several respects the plaintiff failed to comply with provisions of section 527 which are not included in the foregoing quotation. It is enough for our present purpose, however, to state that it is also averred that the plaintiff never at any time served upon petitioner any copy of any points or authorities in support of her application for the restraining order which the court made. Respondents contend that section 527 can have no bearing upon the present controversy, for the reason that the action commenced by the plaintiff was instituted pursuant to the provisions of section 199 of the Civil Code. That section reads, in part, "Without application for a divorce, the husband or the wife may bring an action for the exclusive control of the children of the marriage," and provides, in addition, that the court may, during the pendency of such an action make such orders concerning the custody and care of the children involved in it as may be just. If we concede for the purpose of respondents' argument, which we do not decide, that section 527 of the Code of Civil Procedure can have no application to actions brought under section 199 of the Civil Code, we must hasten to assert that the action now under consideration was not commenced pursuant to the terms of that enactment. In the case of petitioner and the plaintiff there has not only been an application for divorce, but a divorce has been granted by a decree which deals fully with the question of the care and custody of their children. Not only so, but petitioner and the plaintiff are not husband and wife. For these reasons section 199 can have no application here. The plaintiff's amended complaint shows, so far as its support for an application for an injunction is concerned, merely a resort to the general jurisdiction of courts of equity to administer that form of relief.

[2] Turning from the claim that section 527 of the Code of Civil Procedure has no application to the action between petitioner and the plaintiff because of the terms of section 199 of the Civil Code, respondents also contend that the former section cannot avail petitioner because of the jealous regard, under the law, with which courts look to the welfare of infants. It is said that, in the present instance, the court will not allow the interference of section 527, because the welfare of the two girls is so transcendently important that any order made with regard to that welfare cannot be affected by a failure of the plaintiff to observe the provisions of the section. Viewed from the standpoint of its appeal to the heart, as well as of its importance to society, the question of the welfare and happiness of children cannot be measured in the same scale with mere questions affecting the disposition of property; and yet the administration of justice in each of these classes of cases must be governed by rules of procedure tending to aid the courts in a performance of their work with a minimum of friction and with a maximum of speed. In many cases affecting property, in which a crying need for injunctive relief was present, restraining orders have been vacated because of a failure to comply with the terms of section 527. Immense loss has thus been occasioned in many instances. Whatever the difference between such cases and cases like this upon social and humanitarian considerations, is there such a difference as to render one class of cases immune from procedural mandates like those found in section 527, while the other is governed by them? Where would be the end of arguments advanced to support the affirmative of such a proposition? What other rules of procedure must fall in the conduct of causes affecting the disposition of the custody of children? For example, are we to determine the welfare of infants under complaints which, for some minor or major reason, fail to state a cause of action? The Legislature has seen fit to make the provisions of section 527 general in their nature. We can see no reason why those provisions are not calculated to aid the administration of justice in the greater number of cases, as well in those in which the welfare of children is involved as in those in which property rights are at stake. Furthermore, we can perceive nothing annexed to our "inherent" right and duty to guard the welfare of children which empowers us to write an ex-

ception into the general terms of section 527. Whether such an exception shall be written is for the Legislature, granting that such a provision would not infringe the constitutional inhibition against special legislation. For us to write it would be a work of judicial lawmaking.

We are of the opinion that section 527 does apply here, that the restraining order issued by respondent court was void, and that it should have been dissolved by the court. Among the objections urged by petitioner against the hearing by respondent court under the order to show cause was the one that section 527 had not been complied with.

[3, 4] It is contended by respondents that prohibition will not lie to prevent the enforcement of the restraining order for the reason that an appeal may be taken therefrom. A mere right of appeal, however, does not bar the right to prohibition. The right of appeal in a given case must also afford an adequate remedy. Havemeyer v. Superior Court, 84 Cal. 327, 397, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101; Koerber v. Superior Court, 57 Cal App. 31, 206 Pac. 496. It is futile to assert that the right of appeal from the restraining order in the present instance would afford such a remedy. If the charges made against the plaintiff in the answer of petitioner are true—and a reading of the opinion reported in 269 Fed. at page 215, is most illuminating on this question—grave consequences might possibly result from the retention of the girls in her custody pending the appeal. Moreover, and even if the probable feeling between the plaintiff and petitioner should not prompt her to poison the minds of the two minors against him, their presence with her for the length of time necessary to dispose of the appeal might well alienate, or at least dull, their affection for him. We can see the possibility of great damage, not only to the rights of petitioner as a parent, but to the welfare of the girls, if they should be allowed to remain with the plaintiff for so long a time. The inadequacy of the right of appeal from the restraining order is to us apparent.

[5] It is evident that a peremptory writ of prohibition must issue against the enforcement of the restraining order. As to the application for the issuance of the writ as against further proceedings in the action as a whole, the situation is quite different. We are informed by counsel that the daughters of petitioner and the plaintiff have been released from the custody of the latter under a writ of habeas corpus issuing out of the superior court, and that they are now in the care and custody of petitioner. Under the circumstances surrounding this communication we must and do regard it as a stipulation to be considered, in making disposition of the present proceeding. The fact that the girls are now in the custody of petitioner, coupled with the fact that our writ of prohibition will issue in the matter of the restraining order, removes all necessity for the issuance of the writ against the action as a whole. In truth, these circumstances make it improper for us so to issue the writ. The two minors being now in the custody of petitioner, and the operation of the injunction against their removal to Colorado, in which state they have heretofore resided, being now removed, all objection to the adequacy of the right of appeal from any judgment rendered against petitioner upon a trial of the action necessarily disappears.

Demurrer overruled. A peremptory writ of prohibition will issue, restraining respondents from making any order for the enforcement of the restraining order made and entered on or about November 3, 1923, or from making any order with reference thereto except to dissolve the same.

We concur: FINLAYSON, P. J.; CRAIG, J.

(66 Cal. App. 261)

SANDBERG v. McGILVRAY-RAYMOND GRANITE CO. et al. (Civ. 2707.)

(District Court of Appeal, Third District, California. March 20, 1924. Rehearing Denied April 19, 1924. Hearing Denied by Supreme Court May 19, 1924.)

1. Negligence ⚷23(2)—Car's injuring child held "attractive nuisance."

Death of a child run over by slowly moving train operated on a spur track to defendant's quarry *held* within doctrine of "attractive nuisance."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Attractive Nuisance.]

2. Railroads ⚷400(11)—Contributory negligence of child held question for jury.

Whether boy 8 years old, killed on railroad tracks, was sufficiently advanced in years and intelligence to be classed as willful trespasser, and could comprehend danger of moving cars as in case of adult, was for jury.

3. Railroads ⚷398(1)—Particular manner of injury to child by cars held immaterial.

Where child was injured while playing on or about defendant's slowly moving train, and would not have been there but for failure of defendant to exercise ordinary care, particular manner of injury or how he happened to be at the place where the accident occurred was unimportant.

4. Trial ⚷296(3) — Instruction eliminating question whether cars attractive to children error, but cured by other instructions.

Elimination from instruction that if child was possessed of judgment too immature to appreciate danger from playing on cars then it was defendant's duty to exercise reasonable care to prevent his so doing, of requirement that cars would attract an ordinarily reasonable boy of decedent's age, and that he was so attracted, *held* erroneous but harmless, in view of other instructions containing such requirement, and evidence which tended to show train was attractive to children.

On Petition for Rehearing.

5. Death 🔑42—Action for death of child maintainable by husband without joining wife.

Under Code Civ. Proc. §§ 376, 377, right of action for death of minor child by wrongful act is given to the marital community, and in view of section 369, it is not necessary to join the wife to enable the husband to recover the pecuniary loss suffered by both.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Henry Sandberg against the McGilvray-Raymond Granite Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

B. M. Aikins and Lindsay & Conley, of Fresno, for appellants.

Fee & Ring and G. W. Raburn, all of Madera, and Gallaher, Simpson & Hays, of Fresno, for respondent.

FINCH, P. J. This appeal is from a judgment in favor of plaintiff for the death of his minor son, alleged to have been caused by the negligence of defendants in the operation of a railroad train. The defendants Whitfield and Beach were the engineer and brakeman respectively, in charge of the train, which was being operated by the defendant corporation. The corporation will be referred to as the defendant.

At the time of the accident the defendant was, and for many years prior thereto had been, engaged in the operation of a granite quarry. It also operated a railroad running from the quarry to the line of the Southern Pacific Company, a distance of between one-half and five-eighths of a mile, usually making one round trip a day. The greater part of this short railroad from the Southern Pacific line up to the quarry is on a grade of about 5½ per cent. The train consisted of a locomotive, called a "dago" by the witnesses, and two flat cars. The defendant's superintendent described the dago as follows:

> "It is a locomotive crane, commonly called a wrecking crane, and it is a machine that weighs about—I think the machine figures 36 tons. It has two cylinders, 8x10 cylinders, which exhaust into the open, and naturally very noisy."

The crane is used to load blocks of granite. The dago cannot be run at a speed exceeding one mile an hour, even on a down grade. It takes more than an hour to make the trip from the Southern Pacific line to the quarry. The cars were of the ordinary type used on broad gauge tracks. The dago was at the head of the train on the down trips and the return trips to the quarry were made by backing the dago, preceded by the empty cars. It was with difficulty that the cars were pushed up the steep grade by the dago. It was the custom to start with 125 pounds of steam and to stop when it dropped to 90 pounds until the pressure could be increased. On so stopping the brakeman would block the car next the dago to prevent the train from running back down the grade.

Near the quarry were the homes of men employed in various capacities by the defendant. Leading from the quarry to a point near the district schoolhouse, on the county road beyond the Southern Pacific line, was a private wagon road near to and generally parallel with defendant's railroad and crossing it at one point. Between the wagon road and defendant's railroad was a footpath. Children going to and from school and other persons were accustomed to walk along the wagon road, the footpath, and defendant's railroad. The brakeman testified that he had frequently seen children along the track, "gong down to school and coming back," and around the cars, and on the cars, and had made "them get off whenever we saw children." Defendant's superintendent testified:

> "There is a part of that track that the public use, and it is an impossibility to keep them off of it. The private road parallels the railroad track. * * * I have seen the track used by people there, both children and adults. * * * If the road happens to be muddy, the people will naturally get up on the embankment where they are out of the mud."

He further stated that he had "seen children playing about that track, and upon it"; that he had been told that children "were down there, probably trying to get on the cars, but not playing on the cars"; that Mr. Krohn, assistant superintendent, "has licked his boy whenever he has found him down there, and I have refrained from telling Mr. Sandberg, because I knew that Mr. Sandberg licked his boy very severely, and knowing the child as well as I did, I felt that I should not tell his father, because it meant quite a licking for the boy"; that he had warned the brakeman and engineer to keep the children off the cars, to "put them off, and warn them off, and keep them off"; and that "everybody knew Jim Beach, and Jim is a man who is very easy going and the fact of the matter is it would have taken Jim Beach and Toughy (the engineer) constantly putting children off the car if they would allow them down there at all." One witness for the plaintiff testified that he had frequently seen children walking along the track and on two occasions saw them on the cars. Another witness testified that she had seen children walking along the track many times, and had many times seen them riding on the cars. A schoolgirl testified that she had seen boys riding on the train on several occasions, some of them on the dago and others on the cars, and that she had seen children playing along the track "pretty often." Another schoolgirl testified that she had seen children playing about the track and cars "pretty nearly every day." A schoolboy testified that he had seen children playing on the track and cars "about five or six times." The plaintiff testified that he did not know and had never been informed that his son played on the track or the cars; that he had told the boy not to go on the track or the cars; that he had seen "lots of other boys walking back and forth the track." Mrs. Sandberg testified that she had never heard of her boy riding on the cars, but had seen him thereon once with other boys and that the brakeman was with them, "but did not tell the boys to get off," and that she said to the brakeman: "Please always keep my child off these cars;" and that she frequently told her boy not to go on the cars.

The plaintiff and his wife and their only child, Sulo, who was of the age of 8 years 8 months and 15 days, lived in one of the cottages near the quarry. Plaintiff was a stonecutter in the quarry, and his wife performed domestic service in the family of defendant's superintendent. Billy Krohn, a boy of about 7 years at the time of the accident, is a son of defendant's assistant superintendent. Sulo and Billy were chums. On the morning of the fatal accident the boys left their homes together to set some ice cream caps which were being given away at a store beyond the schoolhouse. What occurred thereafter must be told piecemeal as gathered from the testimony of a number of witnesses. Billy was not called as a witness by either party. His father and mother were witnesses for the defendant. Beach testified that as the train, the two cars loaded, approached the Southern Pacific line, he saw the two boys trying to climb on the rear car, but that they did not succeed. The engineer testified that the boys were on the dago when it was standing at the Southern Pacific platform, and that he "had to get down and push them off," that Sulo thereupon "told me to go to hell and mind my own business," and that on former occasions Sulo had made similar replies when warned to stay away and had thrown stones at the witness. One witness testified that on the morning of the accident she saw the boys riding down on one of the cars; that later she saw the boys riding back towards the quarry on the dago, and that the engineer was about a foot away from them, but that she did not watch them long. One of the schoolgirls hereinabove mentioned testified that she saw the boys riding down on the cars and saw them again walking about a yard ahead of the train as it was returning towards the quarry. Another witness, a boy of 10 years testified that he saw Sulo and Billy riding on the first car going up the grade; that they threw stones at him from the car "for fun"; that they jumped off the car and on again "a couple of times"; and that the boys were on the car all the way up the hill until the train went around a curve into a cut, in which the accident occurred. The engineer's view of the cars and the track up the grade was obstructed by an upright boiler on the dago and an oil tank on one side thereof and a water tank on the other. The brakeman sat on the front, or downgrade, end of the dago, about 5 feet lower than the engineer, facing down the track. The brakeman testified that neither the engineer nor himself was "in a position to see the track ahead of the flat car," or "whether those boys were on the cars or not." It thus appears that those in charge of the train backed it up the grade without maintaining any more effective lookout in the direction in which it was moving than if they had been blindfolded. When the train was in the aforesaid cut the brakeman left his position on the dago for the purpose of blocking one of the cars, and as he reached the end of the car next the dago he "saw that boy come over from under the axle" of the other car, the "second axle from the end" which was towards the quarry. The car wheel had passed over the boy's right shoulder and right leg, causing injuries from which he died three hours later. The brakeman testified that Billy was about 50 yards up the track, "coming down towards us" at the time of the accident. The engineer testified that Billy was about 25 feet up the track. Sulo was an "exceptionally" bright boy in school. He was making two grades in one year and had just been promoted from the third to the fourth grade.

[1] Appellant contends that Sulo was a trespasser, and that therefore it owed him no duty "except that of not wantonly or willfully injuring him." Under all the foregoing circumstances it might be argued with much plausibility that defendant's act of blindly backing its train up the track in reckless disregard of consequences was wanton. "Wantonness may exist without intent to injure." Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 618, 86 Pac. 738, 903. The case was tried, however, on the theory that the doctrine of the turntable cases, or the attractive nuisance doctrine, is applicable. Appellant urges that the facts of this case do not bring it within that doctrine. Since the doctrine has been approved in some states and repudiated in others, there are numerous cases on both sides of the question. Counsel for the respective parties have cited some 350 of these cases, but it is unnecessary to review any considerable number of them. A few clear definitions of the doctrine will go far towards the solution of the question.

In United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 Sup. Ct. 299, 66 L. Ed. 615, Mr. Justice Clarke said:

> "The courts of our country have sharply divided as to the principles of law applicable to 'attractive nuisance' cases. * * * At the head of one group * * * has stood the Supreme Court of the United States, applying what has been designated as the 'humane' doctrine. Quite distinctly the courts of Massachusetts have stood at the head of the other group, applying what has been designated as a 'hard doctrine'—the 'Draconian doctrine.' * * * In 1873, in Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, this court in a turntable case, in a unanimous decision, strongly approved the doctrine that he who places upon his land, where children of tender years are likely to go, a construction or agency, in its nature attractive, and therefore a temptation to such children, is culpably negligent if he does not take reasonable care to keep them away, or to see that such dangerous thing is so guarded that they will not be injured by it when following the instincts and impulses of childhood, of which all mankind has notice."

In Cahill v. Stone & Co., 153 Cal. 571, 574, 96 Pac. 84, 85 (19 L. R. A. [N. S.] 1094) it is said:

> "One who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the danger into which he thus knowingly allures them."

In Mattson v. Minnesota, etc., R. R. Co., 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, it is said:

> "One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom, even though a trespasser."

In this case the proof is wanting in nothing to bring it within the doctrine as stated in the foregoing definitions. It cannot be held that the jury's implied finding that defendant's train was an attractive instrumentality is unwarranted. Certainly a little boy, accustomed to seeing the train move back and forth daily, would be tempted to steal a ride on the slowly moving cars, with those in charge out of sight, and there being little danger, therefore, of discovery, and, even if discovered, "everybody knew Jim Beach, and Jim is a man who is very easy going." Without any additional expense, the defendant could have stationed its brakeman in a position where the cars and the track ahead would have been under his observation instead of permitting him to sit idly upon the dago while the train was being backed blindly up the grade. Plainly the engineer and brakeman did not exercise ordinary care in their operation of the train.

[2, 3] Whether Sulo was sufficiently advanced in years and intelligence to be classed as a willful trespasser and to foresee and comprehend the danger of going about and upon the moving cars, as in case of an adult person, was a question of fact to be determined by the jury. Cahill v. Stone, supra. Appellant says:

> "There was absolutely no evidence to show how Sulo got under the wheels, or how he happened to be at the place where the accident occurred. * * * No living soul knows whether he was walking, lying, or playing on the track or trying to crawl under the car to ride on the trucks."

This line of argument would have weight in a case of injury to an adult, but can have no application where an immature child has been allured into danger to his injury by the negligence of a defendant. There is ample evidence to justify the inference that the boy was injured while playing upon or about the moving car and that he would not have been there but for the failure of defendant to exercise ordinary care in the discharge of its duty to childhood. Under such circumstances the particular manner in which the accident occurred is deemed unimportant.

Appellant contends that "the doctrine of the attractive nuisance cases does not extend to railroad cars, certainly not when in motion." As applied to ordinary cases this contention may be conceded. In the case of Allred v. Pioneer Truck Co., 179 Cal. 315, 176 Pac. 455, where a boy was injured while trying to climb upon a truck which was being driven forward in the ordinary way, it was contended that the defendant's failure "to place its men in a position where they could at all times inspect all parts of the vehicle it was operating" was negligence. The court said:

> "The proposition advanced, carried to its logical conclusion, would mean that the driver of an automobile or other vehicle whose duty requires him to observe the road along which he is traveling and attend to his motive power, must be Argus-eyed or accompanied by outriders charged with the duty of seeing that small boys do not find lodgment upon the running boards or other parts of the vehicle or approach, a position of danger where they may, as in this case, fall under a wheel. The law does not impose such duty on one lawfully operating a vehicle along a public street."

The facts of the instant case are unlike those in the case cited. The train was not moving forward in the ordinary way, so that the engineer would naturally see any person on or about the track, but was being backed very slowly, the end of the car farthest away being nearly a hundred feet from the positions of the engineer and fireman, neither of whom could see the cars or the track in the direction in which they were going, and the duties of the brakeman, at least, not being such as in any manner to prevent his keeping the cars and track under his observation. These facts are similar, in principle, to those of the case of Skinner v. Knickrehm, 10 Cal. App. 596, 102 Pac. 947, in which a judgment for damages was affirmed. In that case the defendants caused a wagon to be attached to the rear of a very slowly moving house on the public street. The wagon was left unguarded and unattended, and thereby became and was attractive to young children. A child climbed upon the wagon and was thrown therefrom by the jolting thereof and injured. It does not appear to be material whether the attractive instrumentality is stationary or moving, unless the movement thereof be such as to exclude it from the terms of the doctrine. The doctrine was first applied in this state in the case of Barrett v. Southern Pacific Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186, a turntable case. It has since been applied as follows: Cahill v. Stone & Co., supra, a push car left standing on a street car track; Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700, leaving loose guy wire in such position that it could be brought into contact with live wire; Skinner v. Knickrehm, supra, slowly moving wagon, unattended; Faylor v. Great Eastern Q. Min. Co., 45 Cal. App. 194, 187 Pac. 101, leaving open stope in the floors of a mining tunnel.

> "The rule, of course, is not to be confined to turntables, but applies to any attractive and dangerous machinery." Cahill v. Stone & Co., supra; Pierce v. United Gas & Electric Co., supra.

[4] Appellant contends that the court erred in instructing the jury. As to the general objection that the court applied the doctrine of the turntable cases, nothing further need be said. The plaintiff requested the court to instruct the jury as follows:

> "If you find by a fair preponderance of the evidence that Sulo Sandberg, whose age was 8 years 8 months and 15 days when the accident occurred, was possessed of a judgment too immature to appreciate the danger in his climbing, riding, and playing upon said cars, then I charge you that it was the duty of the defendant corporation to have exercised reasonable care to prevent his so doing, *providing that you find that such cars would attract an ordinarily reasonable boy of his age and that Sulo was so attracted thereto.*"

The court struck out the italicized words and gave the proposed instruction as so modified. As so given the instruction is erroneous. It makes the defendant liable whether the cars were attractive to children or not. In the preceding instruction, however, the court had stated that if the defendant "ought reasonably to have anticipated that the operation of the trains operated by it would entice a child of immature years, without appreciating the danger therein, and induce him to climb, ride, or play thereupon, then said corporation must be held to have anticipated that such child would be so attracted," and that, if the jury further found that Sulo was so enticed and did enter upon such cars, and that by the exercise of reasonable care the defendant could have prevented the child from going upon the cars and failed to do so, it was negligent. In a subsequent instruction it is stated that, if the engine and cars were attractive to children, that defendant knew that children frequented the place where they were operated, and that Sulo "was a child of such immature judgment that he did not know the danger of being upon or about said cars, and that he was at the time of the accident attracted to said cars," the child was not negligent. In view of all the instructions given, and the almost conclusive character of the evidence tending to show that the train, as operated, was attractive to children, it is not believed the defendant suffered any prejudice from the instruction of which complaint is made.

It is contended that the court erred in giving the following instruction:

> "If the plaintiff is entitled to recover, his recovery must be based upon the pecuniary loss suffered by himself and wife through the loss of their child. In determining the extent of this loss, you are entitled to consider the detriment suffered by plaintiff and his wife in being deprived of the services, society, comfort, and protection of their son, if any."

The objection urged is that the instruction tells the jury that the husband is entitled to recover for the pecuniary loss suffered by the wife. The proceeds of the judgment is community property, and includes the loss suffered by both the father and mother of the child. Keena v. United Railroads of S. F., 57 Cal. App. 124, 207 Pac. 35. The husband has the management and control of the community property. The instruction was a correct statement of the law.

Most of the instructions given at plaintiff's request are attacked, and it is urged that the court erred in refusing a large number proposed by defendant. It would unduly and unnecessarily lengthen this opinion to discuss them all. They have all been carefully examined, and it is believed that there is no prejudicial error in any ruling of the court relative thereto.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM. [5] In their petition for a rehearing, appellants reargue the question of the right of a husband to recover for the pecuniary loss suffered by his wife by reason of the death of their minor child. Section 376 of the Code of Civil Procedure provides:

> "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a *minor* child, and a guardian for the injury or death of his ward, *when such injury or death is caused by the wrongful act or neglect of another.* * * *"

Section 377 provides:

> "When the death of a person *not being a minor* is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. * * *"

These sections appear in title 3 of part 2 under the heading "Parties to Civil Actions." The various sections under this title relate primarily, though not exclusively, to matters of procedure, as indicated by the heading. Section 11 of the Practice Act was identical in language with the foregoing provisions of section 376 which are not italicized. Stats. 1851, p. 52. In Kramer v. Market St. R. R. Co., 25 Cal. 435, it is said:

> "The eleventh section of the Practice Act * * * does not create a right of action where none existed before, but merely designates the persons by whom an action, for the causes therein mentioned, which then existed or might thereafter be created by statute, should be brought."

There was no right of recovery at common law for the wrongful death of a person. The first substantive law in this state imposing a liability upon a person for wrongfully causing the death of another, and giving a cause of action for damages therefor, was enacted in 1862. Section 1 thereof provided:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." Stats. 1862, p. 447.

In adopting the Codes in 1872, section 11 of the Practice Act was re-enacted verbatim as section 376 of the Code of Civil Procedure and section 377 was enacted in the language quoted herein, except that the italicized words were not included. In 1874 the italicized words appearing in both sections were added thereto. In Benjamin v. Eldridge, 50 Cal. 612, it is said that sections 376 and 377 are substantially a re-enactment of the statute of 1862 and that, under the provisions of section 5 of the Code of Civil Procedure, they must be construed as continuations of that statute, and not as new enactments. In Bond v. United Railroads, 159 Cal. 270, 281, 113 Pac. 366, 370 (48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50), after pointing out the peculiar provisions of section 376, it is said:

> "These anomalies show that section 376 was not carefully or skillfully drawn and suggest that caution is necessary in its construction and application."

The statute of 1862 has never been expressly repealed. Much of the uncertainty pointed out in the Bond Case would be overcome by holding that the statute of 1862 still constitutes the substantive law relative to the subject under discussion, except as repealed by necessary implication, and that sections 376 and 377, in so far as they relate to parties plaintiff, were intended to affect the procedure merely. It is not necessary, however, to so hold in order to affirm the judgment. An examination of the provisions of section 376, viewed in the light of the history of legislation upon the subject-matter embraced therein, discloses a legislative intent to give the marital community a right of action for the death by wrongful act of a minor child. What is recovered in such a case is community property and therefore the husband, who has control of the community property, is authorized to maintain the action. If the community is destroyed by the death or desertion of the husband, then the wife may sue. In Simoneau v. Pacific Electric Ry., 159 Cal. 494, 508, 115 Pac. 320, 327, in considering a case arising under section 377, it is said:

> "It is not intended that the amount recovered shall be divided into integral or proportional parts. The persons entitled do not take as heirs or by succession, but as beneficiaries of the statute; 'the statute being framed upon the theory that the heirs will always constitute the family of the deceased.'"

In Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 410, 194 Pac. 39, 43, after quoting the foregoing language of the Simoneau Case, it is said:

> "The verdict should have been given for a lump sum to all the plaintiffs, including, of course, the damages to each of them."

It may be said, with equal reason, that section 376, in so far as it authorizes the husband to maintain an action for the death of a minor child, is framed upon the theory of the continuance of the marital community and that the husband is the representative thereof for the purpose of maintaining the action. There was no necessity of joining the wife as a party plaintiff.

> "A person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted." Code Civ. Proc. § 369.

The petition is denied.

66 Cal. App. 361

RAGGIO v. RAGGIO. (Civ. 3995.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1924. Rehearing Denied April 25, 1924. Hearing Denied by Supreme Court May 26, 1924.)

1. Divorce ⚷295—Superior court held to have jurisdiction, after final decree, to order allowance for support of minor child, though decree did not refer to it.

Notwithstanding decree granting divorce to husband became final and was silent as to the existence of any child, superior court, on wife's application, *held* to have jurisdiction thereafter under Civ. Code, § 138, to make an order of allowance for support of minor child.

2. Divorce ⚷308—Orders of allowance for support of minor child became final on failure to appeal.

Orders of allowance for support of minor child became final upon failure to appeal therefrom within time prescribed by law.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

After a decree of divorce was granted to Louis Raggio against Hazel Raggio, the Superior Court made special orders of allowance for support of a minor child, and Louis Raggio prayed to have such order set aside. From an order denying relief sought, he appeals. Affirmed.

Marshall A. Stutsman, of Los Angeles, for appellant.

C. A. Stice, of Los Angeles, for respondent.

CONREY, P. J. [1, 2] In May, 1912, in the superior court of Los Angeles county, an interlocutory decree was entered in this action adjudging that the plaintiff was entitled to a divorce from the defendant. The final decree of divorce was entered on December 15, 1913. Down to and including the final judgment the record contained no mention of the existence of any child of the parties to the action. In April, 1918, pursuant to an order to show cause issued at the instance of the defendant, on application for an allowance for the support of an alleged minor child of said parties, both parties appeared before the court by their attorneys and evidence was received. Thereupon the court ordered that, until the further order of the court, plaintiff pay to the defendant the sum of $1 per week for the support of "her minor child." In October, 1920, said parties again appeared before the court pursuant to an order to show cause on an application for increase of said allowance. The parties appeared by attorney and stipulated in open court that said allowance be increased to $10 per month "for the use and benefit of the minor son mentioned in the pleadings." In December, 1921, both parties again appeared before the court personally and by attorney on an application for a further increase of said allowance, and by order of the court said allowance was increased to $20 per month "for the support of their minor son." In February, 1922, the defendant applied to the court to enter an order vacating said orders made subsequent to the entry of the final decree of divorce. Said application or motion, as nearly as we can ascertain from the record, was based upon the ground that the court was without jurisdiction to make any of said orders subsequent to the final judgment, although it further appears that counsel for appellant was seeking to attack the legitimacy of the child. The child was born on the 3d day of November, 1912.

This present appeal is an appeal by the plaintiff from the order by which the court refused to vacate several orders of allowance for the support of said child. If the court had jurisdiction to make those orders, which had become final without any appeal therefrom, it at once becomes clear that there is no merit in this appeal. Section 138 of the Civil Code provides that in actions for divorce the court, during the pendency of the action or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, may make orders such as those here in question. Under this section of the Code it is settled that the court has jurisdiction to make such an order in a divorce action, even after the principal decree has become final, and even though the judgment may have contained no provision on the subject of custody, education, or support of the child or children. Malvich v. Malvich, 51 Cal. App. 303, 196 Pac. 784; Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32; Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42; 9 Cal. Jur. p. 806.

The order is affirmed.

We concur: HOUSER, J.; CURTIS, J.

66 Cal. App. 408

PEOPLE v. VANDERBOGERT. (Cr. 1051.)

(District Court of Appeal, Second District, Division 1. California. March 29, 1924.)

1. Criminal law 🔑1036(1)—Evidence admitted without objection cannot be complained of on appeal.

Evidence admitted without objection cannot be complained of on appeal.

2. Criminal law 🔑1144(14)—May not presume instruction not given at defendant's request and consider objection thereto.

Where record fails to show whether instruction was given by court at its own instance or at request of either party, appellate court cannot presume it was not given at defendant's request and consider objection thereto.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

F. W. Vanderbogert was convicted of rape, and he appeals. Affirmed.

Buel R. Wood, M. G. Phillips, and Cooper, Collings & Shreve, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

CURTIS, J. From a judgment finding the defendant guilty of the crime of rape and from an order denying his motion for a new trial, the defendant has appealed. His main contention is that the evidence is insufficient to support the verdict against him. It is not necessary to review the evidence produced at the trial, for the reason that it is so clearly sufficient that a detailed statement of it would serve no good purpose whatever.

[1] Defendant further contends that much of this evidence was immaterial and that in some instances incompetent evidence was admitted against him. As no objection was made by the defendant to the admission of any of this evidence, he cannot now complain.

[2] No error was committed by the court in instructing the jury upon the defense of an alibi. The testimony of the defendant tended to show that he was in his own room alone at the time he was accused of committing the assault upon the complaining witness and this defense was therefore in effect that of an alibi. Furthermore, as counsel for appellant suggests, the record fails to show whether this instruction was given by the court at its own instance, or at the request of the prosecution, or at the request of the defendant. If given at defendant's request, he, of course, could not complain of the action of the court in giving it, and, as the record fails to show that it was not given at his request, this court cannot presume that it was so given, and therefore, cannot consider any objection thereto.

The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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66 Cal. App. 323

KOEBERLE v. FRIGANZA et al. (Civ. 4203.)

(District Court of Appeal, Second District, Division 2, California. March 25, 1924. Hearing Denied by Supreme Court May 21, 1924.)

1. Witnesses 🔑244—Leading questions properly asked of codefendant called by plaintiff.

A codefendant, in an action for goods sold and delivered, having been sued for the whole amount and denying all liability, if properly called under Civ. Code Proc. § 2055, allowing examination of adverse parties, could be asked leading questions as in any cross-examination, and her hostility or willingness to testify was immaterial, since she was adverse to all other parties.

2. Trial 🔑54(2)—Testimony of codefendant as to amount due held admissible against other defendant.

In an action for goods sold and delivered, uncontradicted testimony of a codefendant, called by plaintiff, as an adverse party under Code Civ. Proc. § 2055, in the absence of the other defendant, but under cross-examination by his counsel, was admissible to prove the amount of indebtedness regardless of section 2055.

3. Principal and agent 🔑133—Creditor electing to extend credit to agent rather than principal cannot hold principal.

A creditor extending credit solely to an agent, knowing who is the principal, and electing to hold the agent rather than the principal, cannot recover from the principal.

4. Principal and agent 🔑170(2)—Facts held to render principal liable on account contracted in agent's name.

Where an actress purchased goods for a production in her own name, requesting plaintiff to charge them to her principal, who lived in another city and had no account there, plaintiff's communication with the principal's office, and the principal's approval of the account, rendered the principal liable.

5. Account stated 🔑5—Facts held to show an account stated between parties.

An acknowledged statement from a creditor to a principal, of goods sold and delivered to an agent, constituted an "account stated" between the parties.

6. Evidence 🔑376(9)—Plaintiff's books of account held admissible on bookkeeper's testimony.

In an action on account, testimony of plaintiff's bookkeepers that plaintiff's books of account contained items as charged from actual sales slips made when each transaction occurred, that the items were the same as appeared on plaintiff's statement to defendant, and testimony of a codefendant that she purchased each item as agent for defendant, rendered the books admissible.

7. Witnesses 🔑255(7)—Examination from a statement of copy of account held proper.

In an action on an account, examination of a codefendant from a statement or copy of the account, showing items of purchase, *held* proper.

8. Principal and agent 🔑195—Findings held not objectionable.

Findings against principal in action against principal and agent for goods sold *held* not objectionable as failing to find facts alleged in each count of the complaint, nor that the agent was not indebted to plaintiff.

9. Pleading 🔑248(6)—Amendment reducing demand to defeat new trial did not create new cause of action.

An amendment reducing the amount demanded for goods sold and on account stated, filed by court's permission, after trial, to defeat a motion for new trial, did not create a new cause of action and was favorable to defendant.

10. Pleading 🔑236(5)—Pending nonsuit motion, discretionary to permit plaintiff to amend.

Pending a motion for nonsuit, it is discretionary to permit plaintiff to amend to conform to the evidence.

11. New trial 🔑162(1)—Trial court may deny conditionally on remittitur by plaintiff.

Trial courts may deny new trials, conditioned on plaintiff remitting part of his judgment.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by William Koeberle against Trixie Friganza, and Alice O'Day, as administratrix of the estate of Thomas O'Day, deceased. Judgment for plaintiff, and administratrix appeals. Affirmed.

Leon E. Morris, of San Francisco, and Henry L. Knoop, of Los Angeles, for appellant.

Constan Jensen and Horace S. Wilson, both of Los Angeles, for respondent.

CRAIG, J. The respondent, as assignee of J. W. Robinson Company, dry goods merchants, instituted this action against the above-named defendants for a balance claimed to be due for merchandise sold and delivered upon an open book account in September and October, 1919, and an account stated was also made the subject of a second count of the complaint, aggregating $2,148.37. The total amount for alleged purchases was $4,083.62, upon which $1,806 had been paid in cash, and defendants were credited with $129.25 for goods returned. Since the trial Thomas O'Day died, and the administratrix of his estate was substituted in his stead during the pendency of this appeal.

It appears that during the year 1919, Thomas O'Day procured from the author, one Elmer Harris, the manuscript for a theatrical production, in which he agreed to star defendant Trixie Friganza at a stipulated salary of $500 per week and 25 per cent. of the profits. O'Day resided in San Francisco, where this contract was entered into and signed by him, while Miss Friganza was to reside and conduct rehearsals at Los Angeles. The decedent did not make any of the alleged purchases in person, and had no charge account at Los Angeles; but defendant Friganza, being known and having credit with merchants in Los Angeles, purchased custumes and materials from the company for herself and members of the cast. Defendant Friganza testified that at the time of making purchases she directed that certain items of the account be sent to her personally at her address in Los Angeles, and that others be sent to Mr. O'Day at San Francisco. All the items were entered by the sales people upon sales slips in the name of Trixie Friganza, certain bills being forwarded to O'Day in the usual course of business. On October 2d, Robinson Company wired O'Day that Miss Friganza was selecting merchandise amounting to $3,000 for the production, that she requested that the same be charged to his account, and asking his approval. To this they received a reply that Mr. O'Day was absent, and the company on October 8th verified both communications by letter. October 22d, O'Day paid by check $1,000 on account, and on November 10th wrote Robinson Company of the fact, and stated:

> "A check will be sent from this office from time to time. Do not bother Miss Friganza about this account, as the account is handled entirely by this office."

He had been advised that the company's books were closed on the 25th day of each month, and wrote them requesting 90 days' credit, which was granted. Subsequently they wrote him that Miss Friganza had requested that an inclosed bill for a negligee be sent him, which had been charged to her personal account, but was used in his production. To this O'Day replied that the account he was handling for Miss Friganza was her personal account, which was being handled through his office, but that if she desired such items settled in the same manner, it was entirely satisfactory to him. On January 13, 1920, a statement was sent him showing a balance of $2,148.37, with the suggestion that it was overdue, to which he replied that Miss Friganza would close January 24th, after which time he would not "represent her," and that he was forwarding the statement to her.

The complaint herein was filed in July, 1920, against both defendants, alleging that said sales were made to them at their personal instance and request, to which the defendant O'Day answered, denying liability in any amount, and defendant Friganza denied that she had purchased merchandise of the value of $4,083.62. She alleged that she had purchased goods exclusive of those returned, reasonably worth $800, for which she had paid. She affirmatively alleged that the remainder "were not sold or delivered to this defendant by said company at her personal instance or request, or an open book account, but were sold and delivered by said J. W. Robinson Company to the defendant Thomas O'Day, this defendant acting in the purchase of said balance of said goods, wares and merchandise solely as the agent for said Thomas O'Day, and that said company well knew that this defendant was acting solely as the agent for said Thomas O'Day in the purchase of said balance of said goods, wares and merchandise, and well knew that said balance of said goods, wares and merchandise were not sold or delivered to this defendant personally."

Upon the trial the plaintiff, after ineffectual efforts to introduce the company's accounts as against defendant O'Day, called defendant Friganza pursuant to the provisions of section 2055 of the Code of Civil Procedure, to which no objection was interposed on behalf of her codefendant until leading questions were propounded, whereupon objection was made by counsel for O'Day that the questions were leading, and that the witness was a willing one as to matters about which she was testifying, and that she was not an "adverse party" within the meaning and intent of that section. His objections were overruled, and the witness testified that O'Day had instructed her in Los Angeles to "go there and order the costumes for the ladies of the company and have the bill sent to me at San Francisco," and that thereafter, at San Francisco, O'Day went over the statement with her, inquiring about various items, and as to whether or not the company had overcharged; that she assured him that the prices were not unreasonable, whereupon he instructed the manager of his company to send a check on account, and stated to the witness: "I don't want you to worry your head about it any further, and it will be paid."

[1, 2] Appellant insists that the trial court erred in permitting the plaintiff to ask defendant Friganza leading questions. This contention is plainly without merit, if the right existed to call her at all. As was said in Estate of Carson, 184 Cal. 437, 447, 194 Pac. 5, 17 A. L. R. 239, section 2055, Code of Civil Procedure, expressly permits just such an examination. The witness' willingness, from defendant O'Day's point of view, to testify in a manner detrimental to him, was not determinative of her status in the case, since she had been sued, like himself, for the whole indebtedness, and had by her answer denied any liability beyond her personal purchases, which she claimed to have paid. Thus she came into court as adverse, both to the plaintiff and to her codefendant. Defendant O'Day did not appear in person to testify, and defendant Friganza's testimony stands uncontradicted, and would have been competent without regard to section 2055, Code of Civil Procedure; she was vigorously cross-examined by his counsel, and the objection raised goes rather to the weight than to the admissibility of the evidence. Estate of McDonald (Cal. Sup.) 215 Pac. 545; Imperial Water Co. v. Imperial Water Dist. (Cal. App.) 217 Pac. 88. Appellant argues that the witness was more properly assuming the position of a joint plaintiff, interested in seeing the case proven against defendant O'Day; but there is nothing in the pleadings or the evidence to indicate any interest of defendant Friganza in the collection of the account. It is always the province of the trial court, and of counsel, to elicit the truth regarding any issue. Had she taken the stand in her own behalf, she would have been subject to cross-examination by the plaintiff. If the facts were as she testified, and they are not denied, she must have denied liability, and this would inevitably have demanded an explanation. Western Investment & Land Co. v. First National Bank of Denver, 64 Colo. 37, 172 Pac. 6, is cited by appellant as holding that a party appearing to the trial court not to be adverse should not be held to be within the statute, but it was there held that although a defendant who had suffered a default judgment to be taken against him might in the discretion of the court have been excluded, it was not error to admit the testimony, especially as the witness was fully cross-examined. Other authorities are cited which hold that a party so called must be an adversary, and not one maintaining the same issue; but they have no applicability to the facts before us. Moore v. May, 117 Wis. 192, 94 N. W. 45, 49, quoted in part by appellant, was an action involving some 209 defendants, members of a farmers' alliance, many of whom had previously dropped out, and certain of 120 defendants who did not answer, but admitted their liability, were called by the plaintiff as "adverse parties," and the trial court denied the answering defendants the right to cross-examine them. One of the vital issues was as to the liability of certain answering defendants who claimed they were not members of the combination, and denied that they had signed certain obligations. It was said by the Supreme Court of Wisconsin that the rulings of the trial court constituted error, and that the witnesses having defaulted, and admittedly authorized the borrowing of the money, it was for their interest to lower their own liability by shouldering some of it upon the others. It is not admitted, but is denied, that Miss Friganza ever purchased or assumed any part of the liability for the items in question, except as agent for O'Day, who had paid a portion thereof and had promised to pay the balance, instructing plaintiff not to look to her therefor. Further, a judgment against O'Day would not necessarily have absolved her from liability which under the pleadings might well have been found to exist jointly with him.

[3, 4] The same witness testified that at some time between the 16th and 19th of September she commenced purchasing for the production, and at the outset she requested of the credit manager that the costumes be charged to her name, inasmuch as Mr. O'Day was a San Francisco man, and had no account with the company, but that the bills should be forwarded to him. It is argued that, credit having been extended solely to the agent, with the knowledge of the existence of the principal, the latter cannot be held. Many authorities are cited to the principle that if a creditor, knowing the principal, elects to charge the agent and look to him as the responsible debtor, he cannot thereafter collect from the former, which is doubtless the law "when the third person knows that he is dealing with an agent and knows who is the principal, and elects to hold the agent rather than the principal." But there is no evidence that plaintiff's assignor at any time did not look to O'Day for collection. There is evidence that when the credit manager noticed the account steadily increasing to an amount in excess of $2,000, he at once communicated with O'Day's office, requesting approval of the same, which was subsequently received. Gosliner v. Grangers' Bank, 124 Cal. 225, 227, 56 Pac. 1029, cited by appellant, expressly recites that there was strong evidence tending to show that the "plaintiff did not believe that the Reeds were purchasing these goods as agents for the bank." Other authorities so cited involve contracts expressly made with the agent, as principal, all of which readily distinguish themselves without needed comment. Defendant Friganza received no bills after O'Day wrote Robinson Company.

[5] It is next insisted that no account was ever stated between Robinson Company and defendant O'Day, but as we have already indicated, on January 13, 1920, a statement in the sum of $2,148.37 was rendered to O'Day, who on January 16th acknowledged its receipt, and on October 10, 1919, an account was stated, for $3,093.37, as found by the trial court.

[6-7] It is contended that the books of account were not authenticated, and that the court erred in admitting them in evidence. Bookkeepers testified that the books contained the items as charged from actual sales slips made at the time of each transaction, that they were the same items as appeared upon the statement rendered Mr. O'Day, and defendant Friganza testified in detail to having purchased each article charged, and to having used all that were not returned in the production of which Mr. O'Day was the owner. Objection was made that counsel for plaintiff was examining Miss Friganza from a statement or copy thereof which had been offered but not received in evidence. The court ruled that the record did not show such to be the fact, and permitted the examination to proceed. However, the witness had been over the entire account with the bookkeeper of plaintiff's assignor, and she testified that she had purchased and received each item upon the date given by counsel for plaintiff. It was subsequently stipulated that the amount shown was due Robinson Company, so that the objection need not seriously be considered, but such examination under the circumstances was proper. Grant v. Dreyfus, 5 Cal. Unrep. 970, 52 Pac. 1074; People v. Lanterman, 9 Cal. App. 674, 100 Pac. 720; Carpenter v. Ashley, 16 Cal. App. 302, 116 Pac. 983.

[8] The findings recite that merchandise worth $4,083.62 was sold to defendant Friganza, of which $3,277.62 was purchased for defendant O'Day; that there had been paid by goods returned, and in cash, $1,129.25; that defendant Friganza had purchased for personal use merchandise worth $806, which she had paid in full. It was further found that on October 10, 1919, an account was stated with defendant O'Day, showing a balance of $3,093.37 due to plaintiff's assignor, of which $1,000 was paid October 22d, and judgment was rendered accordingly. Appellant's contention that the trial court did not find as to facts alleged in each count of the complaint is without merit, as is also the assertion that it failed to find that it was not true that defendant Friganza was indebted to plaintiff.

[9-11] Motion for a new trial was made, and in ruling upon the same the court announced that if the plaintiff felt advised to amend his complaint to conform to the proof by alleging that there was an account stated for $3,093.37, and that $1,000 had been paid thereon, permission would be granted to do so within ten days, and if so filed the motion would be denied. Plaintiff thereafter filed a consent that the balance demanded, $2,148.37, be reduced $55, and an order denying the motion for a new trial was entered. Appellant contends that the amendment so filed created an entirely new cause of action,

but it was obviously the same cause of action for a lesser amount and was favorable to appellant. Laiblin v. San Joaquin Agricultural Corp. (Cal. App.) 213 Pac. 529. Pending a motion for nonsuit it is within the discretion of the trial court to permit the plaintiff to amend his complaint so as to conform to the evidence. Kamm v. Bank of California, 74 Cal. 191, 15 Pac. 765; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; Wise v. Wakefield, 118 Cal. 110, 50 Pac. 310. The right of the trial court to deny a new trial upon condition that plaintiff remit part of a judgment is too firmly established in this state by a long list of decisions to be now questioned. "It would be almost as great a stretch of judicial authority for us to undertake to overthrow this long established practice, as it would be to undertake to dispense with a statute." Davis v. Southern Pacific Co., 98 Cal. 13, 18, 32 Pac. 646; Shaffer v. Arnaelsteen, 54 Cal. App. 719, 729, 202 Pac. 946; Bentley v. Hurlburt, 153 Cal. 796, 803, 96 Pac. 890. In the latter case it was held that the foregoing authorities constitute a complete answer to the contention that to remit an excess did not obviate the error in the original judgment. It nowhere appears that appellant was prejudiced by the entry of such order requiring modification in the absence of counsel, since there was abundant evidence warranting a judgment for the amount finally ascertained.

There are no other points requiring notice.

The judgment and order denying motion for new trial are affirmed.

We concur: FINLAYSON P. J.; WORKS, J.

67 Cal. App. 504

Ex parte GREEN. (Cr. 782.)

(District Court of Appeal, Third District, California. May 27, 1924.)

1. Habeas corpus 🔑3—Appellate court will not interfere with custody of minor, pending superior court's determination of guardian's fitness.

Pending determination of question, in guardianship proceedings in superior court, as to whether mother, petitioning for writ of habeas corpus, is proper person to have care and custody of her minor child, appellate court will not interfere with superior court's jurisdiction with respect to such custody, under Code Civ. Proc. § 1747, where child's welfare can best be safeguarded by leaving her in her present home.

2. Guardian and ward 🔑8—Superior court has jurisdiction of guardianship proceedings if minor is inhabitant of county.

That residence of mother of minor is in another county than that in which guardianship proceedings by another are pending does not deprive superior court of jurisdiction, under Code Civ. Proc. § 1747, with respect to custody of such minor, it being sufficient that latter is "inhabitant" of county.

Application by Beulah Green Footman, for writ of habeas corpus, to obtain custody of Margretta Green, minor. Petition denied, and writ discharged.

Henry C. McPike, of Oakland, for petitioner.

L. G. Scott, of Sebastopol, for respondent.

FINCH, P. J. This is an application for a writ of habeas corpus, prosecuted by Beulah Green Footman to obtain the custody of her daughter, Margretta Green, a minor of the age of 14 years, now in the custody of Gretta Banks, a half-sister of petitioner. Mrs. Banks alleges in her return that she took the custody of the minor when the latter was but a few months old, "with the knowledge, consent, and approval of said Beulah Green Footman, and has ever since had the care, custody, and control of said Margretta Green, and has clothed her, provided her a home and medical attention, and with a musical, religious, and secular education at her own expense"; that, for reasons specifically alleged, petitioner "is not a fit and suitable person to have the care, custody, or control of said Margretta Green; that after attaining the age of 14 years, the minor filed in the superior court of Sonoma county her "petition joining with said Gretta Banks in the prayer that said Gretta Banks be appointed guardian of her person and estate, which cause is now pending in the superior court of Sonoma county, * * * in which said cause said Margretta Green has designated and appointed said Gretta Banks as her guardian, and requested the court to approve the same."

In the year 1920 Mrs. Banks filed in the superior court of Sonoma county her petition, praying that she be appointed guardian of the person and estate of the minor. Mrs. Footman appeared in opposition to the appointment. After a hearing, the court appointed Mrs. Banks guardian of the minor. The order of appointment was reversed by the Supreme Court. In re Green (Cal. Sup.) 221 Pac. 903. The remittitur was filed in the superior court of Sonoma county on the 28th of January, 1924. Thereafter the minor filed her aforesaid request for the appointment of Mrs. Banks as guardian. The cause is now pending in that court.

[1] Respondent contends that the minor, being of the age of 14 years, has the absolute right to nominate her guardian, who, if approved by the court, must be appointed, citing Collins v. Superior Court, 52 Cal. App. 579, 199 Pac. 352, and cases referred to therein. It is unnecessary to pass upon the merits of such contention. The question of whether petitioner herein is a fit and proper person to have the care and custody of the minor is in issue in the guardianship proceeding in the superior court of Sonoma county. Pending the determination of such issue by that court, this court will not interfere, by a writ of habeas corpus, with the custody of the minor. By the provisions of section 1747 of the Code of Civil Procedure, the superior court is vested with authority to make all necessary orders for "the temporary custody of such minor until a hearing can be had" on the petition for letters of guardianship. As said by the Supreme Court:

> "Where, under appropriate proceedings, a parent has been declared a fit and proper custodian of the person of a child, this court has been inflexible in the enforcement of the parental right. * * * But here we are not impelled to put into operation the decree of a court establishing the fitness of a parent for the custody and control of a child." In re Britt, 176 Cal. 177, 181, 167 Pac. 863, 864.

Under the circumstances of this case, the moral fitness of the mother being in issue both herein and in the guardianship proceeding, the welfare of the child is the paramount consideration, and such welfare can be safeguarded best by leaving her in the only home she has ever known, until the superior court determines the fitness of the mother.

[2] The petitioner's residence is in Alameda county. That of respondent is in Sonoma county. Petitioner urges that the mother's residence determines the residence of the minor and that, therefore, the residence of the latter is in Alameda county and that the superior court of Sonoma county has not jurisdiction of the guardianship proceeding. It is sufficient to give the superior court jurisdiction that the minor is an "inhabitant

or resident" of that county. Code Civ. Proc. § 1747; Collins v. Superior Court, supra.

The petition is denied and the writ discharged.

We concur: HART, J.; PLUMMER, J.

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194 Cal. 85

FRESNO COUNTY v. BRIX ESTATE CO.
(S. F. 10810.)

(Supreme Court of California. June 27, 1924.)

1. Agriculture 🔑9—Boards of supervisors invested with discretion as to mode of eradication of ground squirrels.

St. 1917, p. 627, relating to eradication of ground squirrels by county horticultural commissioner, *held* to invest boards of supervisors with power to exercise their discretion as to whether or not they should continue to operate in eradication of these animals under their own procedure adopted under Pol. Code, §§ 4000–4325.

2. Statutes 🔑35½—Action of county board turning over to horticultural commissioner matter of exterminating squirrels before statute went into effect on referendum without effect.

Action of board of supervisors of county turning over to horticultural commissioner, from and after a certain date, matter of extermination of ground squirrels was without any effect where taken before St. 1917, p. 627, went into effect; law still being inchoate by virtue of initiative and referendum amendment (Const. art. 4, § 1, as amended in 1911).

In Bank.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the County of Fresno against the Brix Estate Company. Judgment for defendant, and plaintiff appeals. Affirmed.

George R. Lovejoy, Dist. Atty., and John R. Fitch, Chief Deputy District Atty., both of Fresno, for appellant.

Williams & Fenstermacher, of Fresno, for respondent.

RICHARDS, J. This appeal is from a judgment of the superior court of the county of Fresno rendered in favor of the defendant after an order sustaining its demurrer to the plaintiff's amended complaint, the latter having declined to further amend. The action was one brought by the county of Fresno to establish and enforce a lien against certain property of the defendant, based upon certain expenditures made by the county horticultural commissioner of said county in the course of the eradication of certain ground squirrel pests with which the said lands of said defendant were infested, when said defendant had failed and neglected so to do, after notice requiring such action on its part had been given as required by the terms of the statute under which the said county official was purporting to act. The only question presented upon this appeal is as to whether the complaint sufficiently shows authority in said official to create and in said plaintiff to enforce said lien. In the year 1917 the state Legislature passed an act purporting to amend sections 2322 et seq. of the Political Code relating to the matter of the eradication of certain insect and animal pests injurious to trees and plants, providing for the appointment of a county horticultural commissioner in each of the several counties of the state and prescribing the powers and duties of such officials. Stats. 1917, p. 627. Prior to the enactment of this statute there had been various legislative enactments relating to the prevention of infectious diseases affecting trees, plants, vegetables, vines, and fruits and the eradication of insect pests and noxious weeds also injuriously affecting these productive growths. The earliest of these acts was that adopted in 1881 (Stats. 1881, p. 86) providing for the appointment by boards of supervisors of county horticultural commissioners, three in number, to be known as a "county board of horticultural commissioners," with powers to prevent and eradicate noxious diseases and insect pests from places where fruit trees and their products were grown and kept, to have any places infested with such diseases or pests declared to be public nuisances, to proceed with the abatement of the same, and to impose liens upon the land so infested for expenditures in the course of abating such nuisances and eradicating such pests. This act was amended in 1889 (Stats. 1889, p. 413) and also in 1891 (Stats. 1891, p. 268) in certain particulars, but in which amendments the main features of the original enactment above referred to were preserved. In 1897 these former acts were revised and substantially re-enacted in a new act repealing the former acts, but preserving in the main their features providing for boards of horticultural commissions, for the eradication of fruit, vine, and vegetable diseases and insect pests, and for the creation of liens for expenditures incurred in their eradication. Stats. 1897, p. 244. In the year 1907 the statute of 1897 above referred to was codified in the form of sections 2322 et seq. of the Political Code, but without any material change in its phraseology, but in 1909 these sections of the Political Code were amended in certain material respects, chief among which was the provision substituting a single horticultural commissioner for the former board of three commissioners, and providing that such county commissioner should be appointed by the board of supervisors from a list of qualified persons certified as to their qualifications for such position by a state board of horticultural examiners to be appointed by the governor under the terms of said act. This statute transferred to the county horticultural commissioner the powers formerly exercised by the county board of horticultural commissioners, including the power to eradicate fruit, vine and vegetable insect pests and to create liens for the expense incurred therein, and for the foreclosure of such liens in the name of the county. Thus far in the history of this particular line of legislation no provision had been made therein for the eradication of such animal pests as squirrels and gophers through the action of county horticultural commissioners, but in the year 1917 the foregoing sections of the Political Code were further amended so as to include these animals among the list of pests to be eradicated by the exercise of the powers conferred upon horticultural commissioners under the provisions of said act of 1917. The particular features of said act applicable to the instant case will be hereinafter adverted to. In the meantime another line of legislation had been enacted looking to the destruction of these particular animal pests. By a statute enacted in 1870 (Stats. 1869–70, p. 316) the destruction of ground squirrels and gophers in certain counties of vided for through a bounty law, the funds for which were to be provided by taxation and were to be expended in the payment of the state, including Fresno county, was pro- bounties to those killing or causing to be destroyed these animals. The succeeding Legislature, however, amended this act so as to omit the county of Fresno from the list of counties in which it was to be in force, leaving it operative in certain other of the counties of the state. In the year 1897 this bounty law was superseded by the provisions of subdivision 26 of section 25 of the County Government Act (Stats. 1897, p. 465). By said subdivision of said section boards of supervisors of counties were empowered "to provide for the destruction of gophers, squirrels, other wild animals, noxious weeds and insects injurious to fruit or fruit trees, or vines, or vegetable or plant life." The County Government Act embracing this provision was from time to time amended in other respects, but not in respect to this subdivision thereof, and was finally and in 1907 codified into sections 4000 to 4325 of the Political Code, this particular subdivision being incorporated in hæc verba into subdivision 26 of section 4041 of said Code, where it still exists in its original form. It thus appears that when the statute of 1917 was enacted, and which by its terms added squirrels and gophers to the list of pests which might be eradicated through the exercise of the powers with which the horticultural commissioner was invested, the board of supervisors of Fresno county were already invested with power under subdivision 26 of section 4041 of the Political Code to adopt and enforce ordinances providing for the destruction of squirrels. In fact it affirmatively appears upon the face of the complaint herein that the board of supervisors of Fresno county had already exercised the said powers with which it was thus invested by the adoption and putting in operation of a local county ordinance providing a system of extermination of ground squirrels. It does not, however, appear from said complaint that the system thus adopted and put in operation by the county contemplated or provided for its enforcement through any action or exercise of authority on the part of the horticultural commissioner. On the contrary, the inference to be drawn from certain of the averments of said complaint is that it did not. In point of law such county ordinance could not so provide prior to the going into effect of the statute of 1917 for the reason that the statutes in existence prior to that time defined the powers and duties of the county horticultural commissioner, and these could not be either added to or taken away by a county ordinance. The act of 1917, as we have seen, re-enacted the provisions of sections 2322 and following of the Political Code in the form in which they had existed substantially since their amendment in 1909, with the exception of the incorporation therein of the provision adding ground squirrels and gophers to the list of pests to be eradicated by the county horticultural commissioner under the terms of said act. It thus appears that while the office of county horticultural commissioner had been in being in the county of Fresno for a time several years prior to the year 1917, that official had never, prior to the taking effect of said act, been invested with power to eradicate squirrels under and by virtue of the provisions of section 2322 and following of the Political Code. Having these conditions in mind we may now turn to the particular provisions of the act of 1917 relating to the facts of the instant case as they appear upon the face of plaintiff's amended complaint. The act of 1917 contained the following provision:

> "This act shall in no wise affect any other act or acts providing for the destruction of ground squirrels or applying to the proceedings thereunder but it is intended to and does provide the alternative system of proceedings for the extermination of ground squirrels and gophers referred to in this act; and it shall be within the discretion of the governing body of each county, city and county, city or town herein mentioned to provide for the destruction of ground squirrels whether under the provisions of this act or under the provisions of such other act or acts."

[1] It must be assumed that the Legislature in thus providing had in mind the provisions of such earlier acts of legislation as were still in force, and particularly those provisions of the County Government Act above referred to investing boards of supervisors with the power to provide their own system and procedure for the eradication of insect and vegetable and animal pests, and that it was the intention of the Legislature, expressed in the foregoing provisions in said act of 1917, to invest boards of supervisors with power to exercise their discretion as to

whether they would continue to operate in the eradication of these animal and insect pests under their own procedure adopted under the provisions of the County Government Act, or to adopt and put in operation the procedure for the effectuation of such purpose provided by the act of 1917.

This assumption leads us to the crucial situation presented by the plaintiff's amended pleading in the instant case. The act of 1917 was passed by the Legislature on April 27, 1917, and was approved by the governor on May 17, 1917. The final adjournment of the session of the Legislature of 1917 occurred on said April 27, 1917. The amendment to section 1 of article 4 of the state Constitution adopted in 1911, and known as the "initiative and referendum" amendment thereto, provides that—

> "No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act."

The amendment further provides that, upon the presentation to the secretary of state within 90 days after the final adjournment of the Legislature of referendum petitions in the form and with the requisite signatures of qualified electors, the secretary of state shall submit to the electors at the next succeeding general election such act and that—

> "No such act or section or part of such act shall go into effect until and unless approved by a majority of the qualified electors voting thereon."

Under and by virtue of the terms of the foregoing amendment to the Constitution the act of 1917 was not to go into effect until July 27, 1917. On July 10, 1917, the board of supervisors of the county of Fresno adopted the following resolution:

> "The 1917 Legislature having passed a law authorizing the extermination of squirrels by the county horticultural commissioner and this board having already in operation a system of extermination under a local county ordinance and it appearing that it would be to the best interest of all concerned for this county to avail itself of the state law authorizing such work to be done by the horticultural commissioner:
>
> "Now therefore, it is by this board ordered that the matter of exterminating squirrels within the county of Fresno be and the same is hereby turned over to the horticultural commissioner of this county from and after the 26th day of July, 1917."

[2] It would seem to be clear from our foregoing review of the legislation providing for the eradication of animal pests that the power of the board of supervisors of Fresno county to provide for the destruction of ground squirrels and gophers and for the creation of liens for the expenditures incurred therein under and in accordance with the act of 1917 did not and could not come into being until such time as the said act of 1917 itself went into effect. It is argued quite plausibly by the appellant herein that the board of supervisors under the broad powers granted to that body by the terms of subdivision 26 of section 4041 of the Political Code possessed the power to anticipate the going into effect of said act, since it was certain of going into effect upon July 27, 1917, the date upon which the resolution of the board of supervisors was itself and by its express terms to take effect. The authorities cited by the appellant and which are People v. Blanding, 63 Cal. 333, State of Nevada v. Irwin, 5 Nev. 111, People ex rel. Graham v. Inglis, 161 Ill. 256, 43 N. E. 1103, and Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 452, would seem to support its contention, provided its premise were conceded to be correct, viz., that the act of the Legislature having so far proceeded in the course of its passage and approval as to be certain of taking effect upon a particular date, the board of supervisors might anticipate that certainty by the adoption of a resolution to come within its terms, which resolution would go into effect contemporaneously with the act itself. But in the instant case this premise is not correct. The act in question, though passed by the Legislature and approved by the Governor, had not yet reached or passed the point of time when it would be certain of taking effect. It was still inchoate and prevented from taking present effect by the provisions of the referendum clause in the Constitution, and was further subject to be delayed in taking effect and even of being defeated altogether by the presentation of a referendum petition and by an adverse election. There was, therefore, no certainty of going into effect of this act at the time the board of supervisors undertook to exercise the discretion to come within its provisions which said board could only exercise when said act had become effective or when, under the cases relied upon by the appellant, it was certain to thus become effective. Such being the state of uncertainty as to when, if ever, this act was to become effective, we can find no escape from the direct application of the cases of Harrison v. Colgan, 148 Cal. 69-77, 82 Pac. 674, and Santa Cruz Water Co. v. Kron, 74 Cal. 222, 15 Pac. 772, to the status of this case as presented by the plaintiff's amended complaint. Even if it be conceded for the sake of argument that the board of supervisors of the county of Fresno were not required by the terms of the statute of 1917 to adopt any formal resolution declaring an intention to proceed thereafter in the matter of the eradication of squirrels under the provisions of said act, but that said board might manifest such determination by any other form of acquiescence in its provisions, the amended complaint herein is utterly silent as to any other formal or informal action being taken by said board other than that expressly pleaded therein and which, as we have seen was premature. It follows that no sufficient

foundation was laid in the plaintiff's pleading for the imposition of the lien which is sought therein to be established and enforced. The demurrer to said complaint was therefore properly sustained.

Judgment affirmed.

We concur: MYERS, C. J.; LENNON, J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

193 Cal. 558

BAXTER v. SHANLEY-FURNESS CO.

(S. F. 10304.)

(Supreme Court of California. May 9, 1924, as Modified June 5, 1924.)

1. Statutes 🔑190—Liberal construction does not mean disregard of plain requirements of statute.

The rule of liberal construction does not mean a disregard of plain, unequivocal requirements of a statute or an enlargement or restriction of a plain provision of a written law.

2. Innkeepers 🔑11(11)—Notice held not compliance with statute concerning deposit of valuables.

Hotel company's posted notice, "Positively not responsible for any valuables unless left at hotel office," *held* not compliance with Civ. Code, § 1860, requiring innkeeper to post notice that he will not be liable for property unless placed in fireproof safe.

3. Bailment 🔑14(1)—Bailee for hire chargeable only with ordinary care in safeguarding bailor's property.

A depositary or bailee for hire is liable for loss of subject of bailment only when he has been guilty of some negligence; he being chargeable only with ordinary care and diligence in safeguarding his bailor's property.

4. Innkeepers 🔑11(11)—Not liable under statute as bailee for hire for loss of jewelry in absence of negligence.

Where defendant hotel company was not guilty of negligence in regard to loss of jewelry by guests, defendant as bailee for hire, under Civ. Code, § 1859, of personal property other than money, could not be charged with loss of the jewelry.

5. Innkeepers 🔑11(11)—Hotel company failing to comply with statute held liable as insurer for loss of money.

As to loss of money stolen from room of guests, hotel company which failed to comply with Civ. Code, § 1860, in regard to posting of notice, *held* subject to common-law liability as an insurer, notwithstanding its freedom from negligence; section 1859, limiting innkeeper's liability to that of depositary or bailee for hire as to personal property, expressly excluding money.

6. Innkeepers 🔑11(11)—Innkeeper failing to comply with statute liable as insurer.

If an innkeeper does not comply with the conditions of statutes exempting him from his common-law liability, such as Civ. Code, §§ 1859, 1860, the common-law liability as an insurer is imposed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by K. Baxter against the Shanley-Furness Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

S. Laz Lansburgh and S. Joseph Theisen, both of San Francisco, for appellant.

Milton A. Nathan, of San Francisco (Thomas Maul, of Placerville, of counsel), for respondent.

PER CURIAM. After a further consideration of this case since the granting of the application for a transfer and rehearing by this court after judgment of the District Court of Appeal, we are satisfied with and hereby adopt the opinion of that court herein, which was prepared by Mr. Presiding Justice Langdon, and is as follows:

"This is an appeal by the plaintiff from a judgment against him in an action in which he, as assignee of the rights of Sylvia, Gertrude, and Edmond Loyal, sought to recover the reasonable value of certain jewelry and money alleged to have been taken from the apartment of his assignors while they were guests of the defendant company at a hotel in San Francisco conducted by it.

"The trial court found that on November 23, 1918, the defendant corporation conducted a hotel in San Francisco, known as the 'Continental Hotel'; that upon that date said corporation received Gertrude, Edmond, and Sylvia Loyal as guests at said hotel, for a valuable consideration; that on that date these persons were the owners and entitled to the possession of certain personal property, including money and jewelry, aggregating in value the sum of $2,629.50; that this property was brought into the hotel by Gertrude Loyal, who was the wife of Edmond Loyal and the mother of Sylvia Loyal, in an alligator hand bag, which the said Gertrude Loyal, personally, carried into her apartment. It was also found that while the personal property in dispute was in said hand bag and in the apartment of the Loyals, they admitted to their apartment as their guests two men; that while these five persons were dining in one room of the apartment, the personal property disappeared from another room of the suite. It was found that the defendant company had not carelessly nor negligently permitted the property to be stolen and that said defendant did not take or carry away the same; that the defendant at all the times mentioned kept a fireproof safe in its office at said hotel and gave notice of nonresponsibility to its guests by putting up a notice in a prominent place in said office in the following words: 'Positively not responsible for any valuables unless left at hotel office.'

"The judgment for the defendant was based upon a conclusion of law that it had duly complied with the provisions of section 1860 of the Civil Code of the State of California and was relieved, therefore, of liability; it not having contributed in any manner to the loss of the property.

[1, 2] "The question is squarely presented as to whether or not the notice found by the court to have been posted by the defendant is a sufficient compliance with section 1860 of the Civil Code to relieve the defendant of its common-law liability as a hotel keeper.

"Section 1860, Civil Code, provides: 'If an innkeeper * * * keeps a fireproof safe and gives notice to a guest, * * * either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest, * * * that he keeps such a safe and will not be liable for money, jewelry, * * * unless placed therein, he is not liable, except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein.'

"The notice posted by the defendant contained no information that the defendant kept a fireproof safe and that guests should deposit valuables with defendant to be placed therein in order to charge it with liability therefor. The respondent argues that the liberal construction of Code sections expressly required by the Code itself demands an affirmance of this judgment. But the most extended application of the rule of liberal construction has never gone so far as to disregard plain, unequivocal requirements of a statute. As stated In re Jessup, 81 Cal. 408, 419, 22 Pac. 742, 745 (6 L. R. A. 594): '"Liberal construction" does not mean enlargement or restriction of a plain provision of a written law.'

"We are constrained to hold that under the findings the defendant has not been relieved of responsibility by virtue of the provisions of section 1860 of the Civil Code.

"Before the enactment of sections 1859 and 1860 of our Civil Code, in this state, an innkeeper was held to his common-law liability as an insurer of the goods of his guests. Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657. Sections 1860 and 1859 of our Civil Code were enacted on the same date. Together, they were intended to relieve the innkeepers in this state of the burden of their common-law liability. Section 1859 changed that liability from that of an insurer to that of a depositary or bailee for hire as to personal property of every kind and description, 'other than money.' In addition to changing the liability to that of a depositary for hire, this section limits the same, even though the evidence shows the innkeeper to be liable under the rules applicable to such a depositary, to $100 for each trunk and its contents, $50 for each valise or traveling bag and contents, and $10 for each box, bundle, or package and contents.

"Section 1860, Civil Code, goes further than section 1859, and provides a method by which the innkeeper may relieve himself even of his liability as a depositary for hire for money, jewelry, etc., if he complies with the conditions provided therein and his guest fails to deposit such articles with him. But as we have stated, those conditions were not substantially complied with and that section cannot aid the defendant.

[3-6] "The only other question involved is whether the defendant is chargeable as a depositary for hire with the limited liability prescribed by section 1859. A depositary or bailee for hire is liable only when he has been guilty of some negligence. He is chargeable only with ordinary care and diligence in safeguarding his bailor's property. 3 R. C. L. §§ 22 and 23, p. 96. As the trial court has found that the defendant was guilty of no negligence whatsoever, it cannot be charged as a bailee for hire, in so far as the property covered by section 1859 is concerned. As to the money found by the trial court to have been lost by the plaintiff's assignors, section 1859 expressly excludes this from its operation, and section 1860, Civil Code, being inapplicable because of the defendant's failure to comply with its provisions, the plaintiff is entitled to recover for the loss of the money under the common law. If an innkeeper does not comply with the conditions of statutes exempting him from his common-law liability, the common-law liability is imposed. 14 R. C. L. § 28, p. 528. This liability is not predicated upon actual negligence, but is a liability as an insurer. Elliott on Bailments, § 108, p. 113; Mateer v. Brown, supra; Pinkerton v. Woodward, supra. The finding of the trial court that the defendant was free from negligence would not affect, therefore, this common-law liability as to the money.

"The judgment is reversed, with directions to the trial court to enter judgment upon the findings in accordance with this opinion for the amount of money found to have been lost by the plaintiff's assignors while they were guests of the defendant, with interest from the date of said loss."

(193 Cal. 522)

RILEY, State Controller, v. HOWARD et al.
(S. F. 9962.)

(Supreme Court of California. May 7, 1924. Rehearing Denied June 5, 1924.)

1. Limitation of actions 🔑95(1)—Failure on part of trustee and beneficiaries to set in motion machinery of Inheritance Tax Act stripped them of protection of statute.

Absolute failure or refusal on part of trustee or beneficiaries to set in motion machinery of Inheritance Tax Act or in any wise to recognize or conform to its requirements stripped them of protection which Code Civ. Proc. § 338, subd. 1, may have afforded in an action to compel payment of transfer tax on ground trust agreement was transfer in contemplation of death.

2. Taxation 🔑862 — Adoption of Inheritance Tax Act of 1905 did not disturb lien created by act of 1893.

Adoption of Inheritance Tax Act 1905 (Laws 1905, p. 374) did not in any way affect or disturb any lien created by Laws 1893, p. 193, or any amendments thereto.

3. Taxation 🔑861, 895(4)—Taxability of inheritances and devises determined by law in effect at time of transfer.

Taxability of inheritances, devises, etc., such as are provided for by inheritance tax acts, must be determined by law in effect at time transfer is made and market value thereof as of date of death of decedent.

4. Limitation of actions 🔑95(1) — Statute held not to bar action by state to compel payment of transfer tax until three years after knowledge of transfer.

Where deed of trust conveying corporate stock was executed in contemplation of death, but was not recorded, and officers of state were ignorant of existence of trust, and nothing appeared concerning trust in administration of estate of decedent, Code Civ. Proc. § 338, subd. 1, did not bar action by state to compel payment of transfer tax imposed by Inheritance Tax Act of 1893 until three years after notice by state officials of existence of trust.

5. Taxation 🔑905(1)—Action to compel payment of transfer tax held to lie though there had been no appraisement and assessment of shares of stock transferred.

In action to compel payment of transfer tax under Inheritance Tax Act of 1893 (Laws 1893, p. 193) it is no defense that amount of tax has not been ascertained for reason that there has been no appraisement and assessment of shares of capital stock transferred.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Ray L. Riley, as Controller of the State of California, in the place and stead of John S. Chambers, as Controller of the State of California, against Frederick Paxton Howard and others. Judgment for defendants, and plaintiff appeals. Affirmed as to some defendants, and reversed as to others.

Hartley F. Peart, of San Francisco (H C. Lucas, of San Francisco, of counsel), for appellant.

Charles W. Slack, H. S. Young, and F. A. Denicke, all of San Francisco (Chauncey S. Goodrich, of San Francisco, of counsel), for respondents.

SEAWELL, J. The original petition in this proceeding was filed June 19, 1914, in the superior court of the city and county of San Francisco, to compel the payment of a transfer tax, as imposed by the Inheritance Tax Act of 1893 (St. 1893, p. 193) upon the right to transfer 4,995 shares of the capital stock of the Howard Investment Company, a corporation, made by Charles Webb Howard to Central Trust Company of California, a corporation, as trustee, to be held by it for the use and benefit of the several respondents herein, excepting defendants Trust Company and Investment Company. The Anglo-California Trust Company, a corporation, was, on July 2, 1912, substituted as trustee in place of Central Trust Company of California, the original trustee, and it has since continued to act as such. The action is continued in the name of Ray L. Riley, the successor in office of said John S. Chambers.

Demurrers to a third amended petition were sustained without leave to amend. The appeal therefore is from the judgment sustaining said demurrers. The grounds of demurrer are that the allegations of the petition do not state facts sufficient to constitute a cause of action and that it appears upon the face thereof that the causes of action are barred by the provisions of section 338, subd. 1, of the Code of Civil Procedure. The petition sets out two causes of action. The first alleges that said Charles Webb Howard made and executed said transfer in contemplation of his death and without valuable or adequate consideration. The second cause alleges that he intended that such transfer should take effect in possession and enjoyment at and after his death and that it was also made without valuable or adequate consideration. The shares of stock transferred are alleged to have been of the value of $600,000 at the time the trust instrument was executed, to wit, October 1, 1903. The inheritance tax act in effect at that time was the act of 1893, and the act in effect at the time of the death of Charles Webb Howard, July 17, 1912, was the act of 1905 (St. 1905, p. 374), together with such amendments as had been made to each act.

By the provisions of the trust instrument 4,995 shares of the capital stock of the Howard Investment Company, held in the name and ownership of Charles Webb Howard, were by him indorsed in blank and placed in trust subject to certain covenants, agreements, and reservations. He was made the attorney in fact of the trustee, irrevocably, to vote each and all shares of stock as he might deem advisable and to give or grant the consent of or offer the opposition of said shares to any corporate act and to receive as often as declared the net amount of all dividends. Upon his death his son, Frederick Paxton Howard, if living, was to be appointed attorney in fact, irrevocably, of said trustee and to exercise, jointly with said trustee, the same powers that were conferred upon the father, Charles Webb Howard. After the death of said Howard, Sr., and while the trust continued to exist, the trustee was directed to pay to his daughter, Maud Howard, and to his son, Frederick Paxton Howard, $250 a month each. Lesser amounts were to be paid quarterly to Bertha Shafter Goodrich, Chauncey Shafter Goodrich, Elizabeth Ely Goodrich, Frances Juliana Webster Goodrich. Said trust was to terminate and be at an end upon the death of his daughter, Maud, upon which event said shares of stock were to belong to and become vested in the following persons, their heirs or assigns, in named proportions: Frederick Paxton Howard, Bertha Shafter Goodrich, Elizabeth Ely Goodrich, and Frances Juliana Webster Goodrich. Charles Webb Howard specifically reserved unto himself the power of absolute revocation and dissolution of said trust and upon such revocation all of the shares and certificates of stock were to revert to and belong to him absolutely as in his first and former estate. A written notice of revocation served upon the trustee was all that was required to terminate the trust. The trustee accepted the trust subject to this and other conditions not material to the main questions presented. Frederick Paxton Howard and Maud Howard, being lineal descendants of decedent, Charles Webb Howard, were properly eliminated from the proceeding by the ruling of the court below for the reason that the act of 1893, the law in effect at the time the transfer was made, specifically exempted from taxation a transfer made by a father to his children (Stats. 1893, p. 193). As to the other beneficiaries the allegations of the petition are that they are strangers in blood to said decedent, and this being so their interests and property are subject to a transfer tax unless the bar of the statute can be made to apply to their case or unless for other reasons their interests are not liable for a transfer tax.

Charles Webb Howard died without revoking or changing in any respect said trust instrument. His estate, amounting to $131.70, was duly probated. Some time after his death his widow, Emma Shafter Howard, brought an action in the superior court of the city and county of San Francisco against his estate and recovered judgment for her community interest, 2,497.5 shares of said stock, which have been delivered to her, leaving the remaining 2,497.5 shares in the possession of the trustee subject to delivery as provided by the terms of the trust instrument upon the death of the surviving daughter, Maud Howard. It is the claim of appellant, state controller, that the shares remaining in the hands of the trustee for the beneficiaries named in said instrument or their successors, saving and excepting the son and daughter, are subject to an inheritance or transfer tax.

The petition contains the allegation that the trust instrument was not placed upon record, but was kept by the trustee as a private document, and its existence was withheld from public notice, and the agents of the state had, therefore, no knowledge of or any means of knowing of its existence until June 21, 1911, on which day its existence became known. It is further alleged that defendants Edward F. Goodrich, Elizabeth Goodrich Whitney, James L. Whitney, Frances Goodrich Leon, and Maurice Leon were each absent from the state for a period greater than three years immediately prior to the filing of the original petition and after the cause of action herein had accrued. Section 351, Code Civ. Proc. The action, therefore, as to the absentee defendants, even if it be conceded that the provision of section 338, subd. 1, is, as claimed by respondents, applicable to their case, would not be barred upon a mere reckoning of the time which had run. In other words, if the time be computed from the day on which the absent defendants came within the state to the day on which the petition was filed, it would not amount to a full period of three years. Section 351, Code of Civil Procedure, upon this theory of the case, would stand in the way of the plea of the three years' bar of section 338, subd. 1, supra, so far as the bare question of the absence of certain of the defendants from the state is concerned.

Appellant places the state's right to maintain the action upon further grounds, which may be thus epitomized: That the statute of limitations has not and cannot run against the state's interest; that there has been no repudiation of the trust; that the trustee holds in trust property in which the state has a vested interest (Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, reaffirmed in Trippet v. State, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. [N. S.] 1210); and it has not and cannot be delivered to the beneficiaries until the death of a person in being; that the obligation of the trustee to deliver said property to the beneficiaries has not yet matured (Chambers v. Gallagher, 177 Cal. 704, 171 Pac. 931).

[1] We think the absolute failure or re-

fusal on the part of the trustee and the beneficiaries to set in motion the machinery of the inheritance tax act, or in anywise to recognize or conform with its requirements, has stripped them of the protection which the shield of the statute may have afforded.

[2-4] Contrary to the claim of respondents, it must be announced at the outset as the law of this state, settled beyond the point of controversy, that the adoption of the Inheritance Tax Act of 1905 did not in any way affect or disturb any lien created by the act of 1893, or any amendment thereto. It has been repeatedly held by this court that the act of 1905 with its repealing clause did not operate to deprive the state of the right to collect or receive all transfer taxes accrued under the act of 1893, which had not been paid or ordered to be paid to the state at the time the repeal took effect, July 1, 1905. Estate of Martin, 153 Cal. 225, 94 Pac. 1053, and cases cited; Riley v. Havens (Cal. Sup.) 225 Pac. 275; Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Chambers v. Gallagher, supra; Nickel v. State, 179 Cal. 126, 175 Pac. 641; Estate of Brix, 181 Cal. 667, 186 Pac. 135; Estate of Potter, 188 Cal. 55, 204 Pac. 826. Many other authorities might be cited to the effect that the taxability of inheritances, devises, etc., such as are provided for by the several inheritance tax acts, must be determined by the law in effect at the time the transfer is made and the market value thereof as of the date of the death of the decedent. The means and mode for the collection of previously accrued and uncollected taxes were continued in force. Beginning with the act of 1893 and continuing through all subsequent acts the tax prescribed therein if not paid as provided by said acts, together with the interest thereon, "shall be and remain a lien on said property *until the same is paid.*" (Italics ours).

This case cannot be brought within the rule announced in Chambers v. Gallagher, supra, and Chambers v. Gibson, 178 Cal. 416, 173 Pac. 752. The facts are widely different. The latter case was decided upon the authority of the former. That case involved the right of the state to recover an inheritance tax from the executor of an estate in a personal action commenced more than 12 years after distribution had been made to the heirs. The petitioner prayed that the court appoint an appraiser to appraise the property in said estate and ascertain the amount of such tax; that a citation be issued to the executor to appear before such appraiser and be examined under oath, and show cause why he should not be held chargeable for the payment of said tax, and for judgment that the executor be declared liable for the payment and directed to pay such tax to the treasurer of the county. A demurrer was sustained to the petition on the ground that the action was barred by the provisions of section 338, subd. 1, Code of Civil Procedure. The bar of said statute having run prior to the enactment of section 4 of the revised inheritance tax act of 1913 (Stats. 1913, p. 1066), which act purported to remove the bar of the statute of limitations with respect to taxes which were barred at the time of its enactment, it was held that the act could not have a retrospective effect and revive causes of action which had theretofore become barred. The court in fixing the time when the statute of limitations would commence to run in such a case used the following guarded language:

> "We do not think the provisions of the act as it stood prior to 1913 show an intent to prevent the running of the statute of limitations in favor of the executor *after the distribution of the estate.* The scheme of the act was that the executor should see that the taxes were paid before he had made final settlement of his estate, or within thirty days thereafter. *His obligation became matured at the expiration of such thirty days at all events.* The intention was that the court having charge of the administration should not order the settlement of the estate or the discharge of the executor until such tax had been paid. Nothing is said in the law regarding the operation of the statute of limitations or purporting to prevent it from running against such demand, or to differentiate it from any other matured obligation to the state. The act of 1913 expressly declaring such intent is a strong indication that the Legislature itself did not suppose that it had previously done so. Doubtless the liability of the executor, under the terms of the act, continued *after the settlement* of the estate, if the tax was not previously paid, and *could be enforced* in a proper proceeding by the district attorney for that purpose under the provisions of the act. But there is nothing in the language of the act which declares that the statute does not run against such liability, as in other cases." (Italics ours.)

By the language quoted it is clear that that case is not an authority in anywise supporting the claim that the statute of limitations has run against the state's right to compel the payment of a transfer tax on the shares of stock held by the trustee, as in the instant case, for future distribution to the beneficiaries. In other words, the trustee's obligation to the beneficiaries has not become matured. An analysis of the act cannot fail to strengthen the conviction that the tax in suit is not barred by the provisions of section 338, subdivision 1, supra. Section 1 of said act of 1893, as amended in 1903 (St. 1903, p. 268), provided that:

> "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein or income therefrom which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor or

bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of California, * * * or to any lineal descendant of such decedent born in lawful wedlock, * * * by reason whereof any such person or corporation shall become beneficially entitled in possession or expectancy, to any such property, or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property, and at a proportionate rate for any less amount, to be paid to the treasurer of the proper county, as hereinafter defined, for the use of the state; and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. * * *"

Section 2, as amended in 1895 (St. 1895, p. 33, § 1), provided:

"When any grant, gift, legacy, or succession upon which a tax is imposed by section one of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, and the market value thereof determined, in the manner provided in section eleven of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided, that the person or persons, or body politic or corporate, beneficially interested in the property chargeable with said tax, may elect not to pay the same until they shall come into the actual possession or enjoyment of such property, and in that case such person or persons, or body politic or corporate, shall execute a bond to the people of the state of California, in a penalty of twice the amount of the tax arising upon personal estate, with such sureties as the said superior court may approve, conditioned for the payment of said tax, and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the county clerk of the proper county; provided further, that such person shall make a full and verified return of such property to said court, and file the same in the office of the county clerk within one year from the death of the decedent, and within that period enter into such security, and renew the same every five years."

Section 4 of the act provided that all taxes imposed thereby, unless otherwise therein provided for, shall be due and payable at the death of the decedent, and if the same are paid within 18 months, no interest shall be charged and collected thereon, but if not so paid interest shall be charged and collected from the time said tax accrued; provided, that if said tax be paid within 6 months from the accruing thereof, a discount should be allowed and deducted therefrom. In all cases where the executors, administrators, or trustees failed to pay such tax within 18 months from the death of the decedent, they were required to give a bond for its payment together with interest. Section 5 of said act provided for the modification of the imposition of the extreme penalty provided for in section 4 for the nonpayment of said tax by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, for which reason the estate cannot be settled at the end of 18 months from the death of the decedent. Section 6 makes it the duty of any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to said tax, to deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; but, if the estate be not in money, the executor or trustee shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into his hand for such legatees, and for such further order relative thereto as the case may require. The act gives all executors, administrators, and trustees the power to sell so much of the property of the decedent as would enable him to pay said tax in the same manner as they may be able by law to do for the payment of debts of an estate. Section 11 provided that when the value of any inheritance or other interest subject to the payment of such tax is uncertain, the superior court in which the probate proceedings are pending, on the application of any interested person or upon his own motion, shall appoint some competent person as appraiser, as often as and whenever occasion may require, whose duty it shall be forthwith to give notice to all persons known to have or claim an interest in such property. From the report of the appraiser the court shall assess and fix the market value of all inheritances or other interest and the tax to which the same is liable, and shall immediately cause notice thereof to be given to all parties known to be interested therein.

Section 14 provided:

"If it shall appear to the superior court, or judge thereof, that any tax accruing under this act has not been paid according to law, it shall issue a citation, citing the persons known to own any interest in or part of the property liable to the tax to appear before the court on a day certain, not more than ten weeks after the date of such citation, and show cause why said tax should not be paid. The service of such citation, and the time, manner, and proof thereof, and the hearing and determination thereon, and the enforcement of the determination or decree, shall conform to the provisions of chapter 12, of title 11, of part 3 [sections 1704 to 1724] of the Code of Civil Procedure. * * *"

By section 15 it is provided that:

> "Whenever the treasurer of any county shall have reason to believe that any tax is due and unpaid under this act, after the refusal or neglect of the persons interested in the property liable to said tax to pay the same, he shall notify the district attorney of the proper county, in writing, of such failure to pay such tax, and the district attorney so notified, if he have probable cause to believe a tax is due and unpaid, shall prosecute the proceeding in the superior court, as provided in section 14 of this act, for the enforcement and collection of such tax."

That the act has application to a trust arrangement such as the one before us is not, and, we think, cannot be, disputed. While this is true, the machinery provided by the act for its enforcement has more direct or special adaptability to the simple administration of the estates of deceased persons and to estates involving testamentary trusts than to a trust instrument not directly connected with either. The act was drawn on the theory that a disclosure or discovery of all property or interest subject to the tax would be made by appropriate proceedings to the court, and to the officers charged with the enforcement and collection of the tax, and if not brought to the attention of the proper officers by such a proceeding, that it should be brought to the attention of the court and the law officers by the trustees or beneficiaries named in the trust instrument. By section 6 it was made the duty of all trustees "having in charge or trust any legacy or property for distribution, subject to the said tax," to deduct the tax therefrom, and if "the legacy or property be not money he [executor or trustee] shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon." It was also the duty of the beneficiaries of the trust, subject as such to a transfer tax, to make known that fact to the officers charged with the duty of collecting the same. The various provisions of the act to that effect are numerous and too plain to require restatement. Section 2 provided that when any grant, gift, legacy or succession upon which a tax is imposed by section 1 shall be an estate, income, or interest for a term of years or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which the same is supported "shall be *appraised immediately after the death of the decedent*" and the market value thereof determined, and the tax prescribed by the act shall be "*immediately due and payable* to the treasurer of the proper county," etc. (Italics ours.)

Instead of paying the tax a bond may be executed by the persons or corporation beneficially interested in the property chargeable with said tax to the state conditioned for its payment with interest when they or it shall come into the actual possession or enjoyment of such property. Such person shall make a full and verified return of such property to the court and file the same in the office of the county clerk within one year from the death of the decedent and within that period enter into such security and renew the same every five years. Under such procedure the payment of the tax may be postponed for a number of years. The bar of the statute would not under such circumstances become available. The tax could not be actually paid in any case *at the death* of the decedent. It must first be determined by an appraisement of the property or interest which supports it, as provided by the act. By section 11 the court in which the proceedings are pending, upon the application of an interested party or upon its own motion, shall appoint an appraiser to fix the value of the property or taxable interest "as often and whenever occasion may require." This may be done notwithstanding the fact that more than three years have passed since the death of the decedent. The value of the property or interest is to be determined as of the day of death and not in reference to a subsequent day.

Chambers v. Gallagher, supra, as above pointed out, goes no further than to hold that any personal action brought against the executor more than three years after final distribution has been made is subject to the bar of the statute. That authority does not hold that the statute commenced to run immediately upon the death of the decedent. On the contrary, it was said that the executor should have seen to it that the taxes were paid before he made final settlement of his estate, or within 30 days thereafter, and the obligation to pay the taxes was held to have matured at the expiration of such 30 days in all events. In the instant case the trustee has the property in its possession, and its obligation to deliver it to the beneficiaries has not yet matured.

The estate of the decedent, Howard, as reported to the court, amounted to $131.70. Distribution was made of that amount. Neither the attention of the court nor any one else was called to the fact that a large estate, a portion of which, at least, was subject to the payment of a tax, had been transferred by deed to a trustee by a private instrument. Neither were the parties benefited thereby nor the subject-matter of the transaction brought to the attention of any court in any proceedings in which their liability to pay a tax could have been legally determined. In Chambers v. Gallagher, supra, as in all the cases cited, the parties and the subject-matter were before the court. Every fact necessary to authorize the court and the law officers to compel the payment of the taxes was known. Former Chief Justice Shaw, in delivering the opinion for the court, said that it was the intention of the act:

> "That the court having charge of the administration should not order the settlement of the estate or the discharge of the executor until such tax had been paid."

But the court having ordered the settlement of the estate, and the suit being one to compel the executor to personally make good the taxes after a long lapse of time it was concluded that the statute began to run not later than the day of the settlement of the estate. It was further said that—

> "The liability of the executor, under the terms of the act, continued after the settlement of the estate, if the tax is not previously paid, and could be enforced in a proper proceeding by the district attorney for that purpose under the provisions of the act."

Such an action, however, was subject to the bar of the statute.

It is clear upon authority that the cause of action did not accrue at the time of the death of the decedent. Whether the cause of action accrued at the time of the settlement of the estate, as held in Chambers v. Gallagher, supra, or whether under the provisions of section 4 it accrued within 18 months from the death of the decedent, as held in Ritcher v. Commonwealth, 180 Ky. 4, 201 S. W. 456, in construing a section of a statute identical with section 4, and both being proceedings in which the whole situation was before the court, would afford respondents no assistance, as the point fixed by either of those cases when the statute begins to run has not been reached by any progressive steps taken by respondents in the instant case. By their fault they have at no time initiated a proceeding by which they could claim the benefits provided by the statute. The law under such circumstances will not give them a greater benefit than they would have been entitled to had they pursued the course which it has defined. As stated before, the property subject to a tax is still in the hands of the trustee, and, both it and the interested persons having failed to set in motion the only procedure which the inheritance tax act contemplates, they will not for that reason be relieved of their legal obligations. If a will disposing of an estate subject to a tax should, innocently or with evil intent, be withheld from the records of a court for a period of three years and one day after the death of the testator, or if a person leaving a taxable estate should have been deceased for a like period before the fact of death became known, no court, we apprehend, under the act as framed, would hold that all claims to inheritance taxes were defeated by the three years' bar of the statute of limitations. This case is not distinguishable on principle from either of the above illustrations.

Our conclusion in this respect makes it unnecessary to discuss or decide the question whether the state, upon the death of the decedent, became vested with an interest in decedent's estate equal to the amount of taxes assessable against said property in the same sense that an estate vests in an heir upon the death of an ancestor, or whether the state became vested with a right, merely, to the tax. By this ruling other questions raised by respondents are also disposed of.

[5] It is the argument of respondents that no tax can exist until the amount of the tax is ascertained or determined, and, for the reason that there has been no appraisement and assessment of the shares of capital stock in the instant case, the tax never became "immediately" or "due and payable" at all. Conceding the soundness of this argument it follows that the statute of limitations has never been set in motion and petitioner's action has not become barred. Nothing, therefore, stands in the way of the state's attempt to subject the property to the processes of the law. Such is the purpose of the action.

Respondents claim a vested right to the property in suit by virtue of the trust instrument. It would make no difference, so far as the taxability of the stock herein is concerned, whether that right vested at the time of the execution of the instrument or upon the death of the decedent. There has been no moment of time since 1893 that there has not been in existence an inheritance tax act Riley v. Havens, supra. So the tax on the right to transfer must be appraised and assessed under the act of 1893 and the amendments thereto, or under the act of 1905, the act in effect at the time of the death of said decedent. If the latter act controls the matter, respondents Frederick Paxton Howard and Maud Howard might be placed in a worse position than they find themselves under the act of 1893, inasmuch as the act of 1905 provides for an imposition of a transfer tax, observing certain exemptions, upon gifts made to the children of a decedent, and the other respondents would in no wise be helped by being brought within the latter act. The fact that the trust instrument was subject to revocation by the trustor is not material, for the reason that there was no revocation made of the trust or transfer instrument.

We are of the opinion that the allegations of the petition do not state a cause of action against the Howard Investment Company. It is made a party to the action, appellant states in his brief, "because the capital stock of that corporation constitutes the trust fund upon which the state has a lien until the tax is paid." It is not alleged that that company asserts any right to or interest in said shares of stock. If such right or claim should hereafter develop, said company may be brought in as a party defendant, but upon the face of the pleading we cannot now see that respondent company is any wise interested in the result of the action.

It cannot be said as a matter of law that the pleading upon its face shows laches on the part of appellant which would be sufficient to justify the denial of the relief sought. The state was not a party to nor did it have notice of any action brought in any court in which the subject-matter of this controversy was at issue.

The judgment sustaining the demurrers without leave to amend as to Frederick Paxton Howard, Maud Howard, and the Howard Investment Company, a corporation, is affirmed. As to the remaining respondents it is reversed.

We concur: MYERS, C. J.; RICHARDS, J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SHENK, J.

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193 Cal. 573

RAISCH IMPROVEMENT CO. v. ARATA.
(S. F. 10892.)

(Supreme Court of California. May 16, 1924.)

Appeal and error ⟹627(2)—Appeal dismissed for failure to file transcript in time.

Motion to dismiss appeal on ground appellant failed to file transcript upon appeal in time, as prescribed by law and rules of Supreme Court (including Code Civ. Proc. §§ 473, 953a) granted, notwithstanding filing of transcript pending continuance of hearing of respondent's motion for his failure to have the required certificate of the trial court supporting his motion.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Suit by the Raisch Improvement Company against Joseph Arata. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Motion granted, and appeal dismissed.

Archibald B. Tinning, of Martinez (R. M. F. Soto, of San Francisco, of counsel), for appellant.

J. E. Manning, of San Francisco, for respondent.

PER CURIAM. The defendant appealed herein upon the judgment roll alone from a judgment in favor of the plaintiff foreclosing a street assessment lien. The matter now involved herein is a motion to dismiss the appeal upon the ground that appellant failed to file his transcript upon appeal in time. The judgment was entered in the lower court December 12, 1922; defendant's motion for a new trial denied January 17, 1923, and his notice of appeal therefrom was filed February 5, 1923. Thereafter he obtained successive orders from the trial judge extending his time to serve and present his proposed bill of exceptions on appeal to and including May 3, 1923, since which time no further extension has been granted. No notice under section 953a, Code of Civil Procedure, was ever filed here, and no draft or proposed bill or bill of exceptions was ever filed herein. October 26, 1923, the respondent served and filed notice of motion to dismiss the appeal upon the ground that the appellant had failed to file his transcript within the time prescribed by law and the rules of this court, and accompanied the same with a certificate of the county clerk certifying to all of the facts hereinabove stated, together with affidavit of respondent's counsel to the above facts, and further to the effect that no draft or proposed bill of exceptions or bill of exceptions had been served upon respondent's counsel. The motion came on for hearing before us at the time for which it was noticed, November 5, 1923, at which time we refused to grant it, for the reason that the respondent had failed to furnish us with a certificate from the trial judge to the effect that any proceedings which may have been pending before him for the settlement of a bill of exceptions had been terminated. Counsel for respondent stated at the hearing that he had requested such a certificate from the trial judge, who declined to furnish the same, for the reason that no proceedings had been instituted before him for the settlement of a bill of exceptions or transcript. We thereupon continued the matter to the next succeeding San Francisco calendar to enable respondent to obtain and furnish such certificate. Thereafter, and on the same day, November 5, 1923, appellant filed herein his transcript upon appeal. The motion came on for hearing thereafter on March 11, 1924, at which time there was on file herein a certificate of the trial judge certifying that no proposed bill of exceptions herein had ever been presented to him for settlement or approval; that he had never been requested to settle any bill of exceptions herein; and that no notice had even been presented to him requesting a transcript of testimony; and that he had made no order for any such transcript of testimony; and that no such transcript as is provided by section 953a, Code of

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Civil Procedure, had ever been presented to him for approval, certification, or settlement. At said hearing counsel for appellant conceded that he was not entitled to be relieved from his default under the provisions of section 473, Code of Civil Procedure, for the reason that the six months' period therein limited had long since elapsed.

We are of the opinion that the motion to dismiss should be granted. At the time it first came on for hearing respondent was then entitled under the law and under the rules of this court to a dismissal of the appeal, in the absence of circumstances in excuse of appellant's delay. His motion would have been granted at that time but for his inability to then furnish the certificate of the trial judge above referred to, which inability was due to no fault or negligence on the part of counsel for respondent. We arrive at this conclusion the more readily by reason of the fact that we have examined the transcript, which is now on file, together with appellant's opening brief, and are of the opinion that nothing is shown therein which would justify a reversal of the judgment appealed from.

The appeal is dismissed.

193 Cal. 567

JOENS v. BAUMBACH. (Sac. 3522.)

(Supreme Court of California. May 15, 1924
Rehearing Denied June 12, 1924.)

1. Boundaries ⚿20(1)—Grant of land along highway presumed to extend to center thereof.

Where intent of grantor of land bounded by highway rests on presumption, grant will be deemed to extend to center of highway rather than edge.

2. Boundaries ⚿20(1)—Grant of land held to roadway bounding it and not to center of road.

A grant of land, describing it as fronting upon a particular reserved roadway, and also giving description by metes and bounds, *held*, notwithstanding the usual presumption, a conveyance up to the roadway and not to the center of it.

In Bank.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by John J. Joens against C. O. Baumbach. Judgment for defendant, and plaintiff appeals. Reversed.

Glen West, of Lodi, for appellant.

Levinsky & Jones, of Stockton, for respondent.

WASTE, J. Plaintiff brought this action to quiet title. Judgment was entered for the defendant, and plaintiff has appealed.

Appellant and respondent are the owners of adjoining parcels of land; that of the respondent being described as lying immediately north of that belonging to the appellant. The location of the boundary line between the two properties is really the point in dispute, and the controversy involves the title to a strip of land 30 feet in width. A solution of the problem presented by the appeal depends upon the proper interpretation to be given the description contained in the deed by which appellant acquired his land. James W. McMannis was the common owner of both parcels of land. On June 2, 1902, he conveyed the land now owned by plaintiff to William T. Hughes, who, in turn, on July 11, 1919, and by deed containing the same description as in the deed to him, conveyed the property to plaintiff. The property so conveyed was designated as being in the county of San Joaquin, "and bounded and particularly described as follows, to wit: 17 acres in the southwest corner of the southeast quarter of the southwest quarter of section 8 (8) in township three (3) north of range seven (7) east, M. D. M., more particularly described as follows: Beginning at a point on the county road 20 feet east of a line bisecting north and south said southwest quarter of section eight in equal halves; running thence easterly on the county road eight hundred and twenty-three (823) feet; thence northerly nine hundred (900) feet; thence westerly eight hundred and twenty-three (823) feet; thence southerly nine hundred (900) feet to the point of beginning, containing 17 acres more or less, and the land herein described fronts on the county road a distance of eight hundred and twenty-three (823) feet on its south line, and fronts 900 feet on a reserved roadway 40 feet wide, upon its west side."

On December 15, 1902, which was after the execution of the deed to Hughes, grantor of appellant, McMannis conveyed to Joseph Spenker, predecessor in interest of the respondent, Baumbach, who now owns the property, a parcel of land described as follows: "Commencing at the northwest corner of the southeast quarter of the southwest quarter of section eight (8) in township three (3) north of range seven (7) east, M. D. M., and thence east along the said section line to the northeast corner of land sold to Martha Ann Bunch Taylor by deed recorded in book A, vol. 117, at page 319, San Joaquin County Records; thence south on the westerly line of said land of said Martha Ann Bunch Taylor to the northeast corner of land sold to William T. Hughes by deed recorded in book A, vol. 125, at page 55, San Joaquin County Records; thence west along the north line of said Hughes' land to the west side of the southeast quarter of the southwest quarter of said section eight (8); thence north along said west line to place of beginning; and excepting therefrom a roadway 20 feet wide along

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the west side of said tract of land, containing 8 acres of land, or thereabouts."

It is at once apparent that no assistance is to be derived from the deed to respondent in reaching a correct interpretation of the description of appellant's land. The references to the "county road" and "a reserved roadway" contained in the description of the land acquired and owned by appellant are made somewhat clearer by an inspection of a plat of the survey of the property of plaintiff introduced in evidence by stipulation, to show the location of these roadways. This survey discloses that there is a county road 60 feet wide immediately south of the property of appellant, and that a road 40 feet wide, spoken of by the parties as a "private roadway," is located immediately west of the lands of appellant and respondent. The survey also discloses that the south line of section 8 is the center line of the county road, and that the line "bisecting north and south said southwest quarter of section eight in equal halves," referred to in the description of appellant's land, is the center line of the private roadway. The point at issue is whether the land of the appellant is bounded on the south by the south section line which marks the center of the road, or whether the true southerly boundary line is the north line of the county road. If the land of appellant runs to the center of the roadway, the northerly 30 feet of the land claimed by him belongs to the respondent. If a correct interpretation of the description of the property fixes the north line of the county road as the southerly boundary of appellant's land, the property in dispute belongs to him. In other words if the call in appellant's deed, running "thence northerly nine hundred (900) feet," begins at the section line in the center of the county road, and the final call, running "thence southerly nine hundred (900) feet to the point of beginning," ends at the point of intersection of said line with the section line, the north boundary of appellant's land lies 30 feet south of the point where he contends it is, and where it should be if the north line of the roadway is the proper southerly boundary of his land.

[1] The respondent's contention that the section line marking the center line of the county road is the true south line of appellant's property is based upon the language of section 831 of the Civil Code to the effect that "an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown," and section 1112 of the Civil Code to the effect that "a transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." The argument of the respondent rests upon the general rule that, where a conveyance is of property abutting upon a public highway, the presumption is of an intention on the part of the grantor to convey title to the center of the highway. There can be no doubt that in those cases in which the intention of the grantor rests upon presumption the rule just stated may be applied, and that land described in a deed as bounded by a public highway or street will be considered as bounded by the center of the street, unless it clearly appears that it was intended to make the side line of the street a boundary, instead of the center. Moody v. Palmer, 50 Cal. 31. That rule, however, cannot be correctly applied in this case. The decisions of our court are to the effect that, while the presumption declared by the Codes will in all proper cases be given effect, it is one which in many ways may be rebutted, and one of the specific ways it may be rebutted is by a description by metes and bounds. Berton v. All Persons, 176 Cal. 610, 614, 170 Pac. 151.

[2] However clearly it may appear that an owner of a parcel of land holds title to the center of an adjoining roadway subject to a public easement, and that the boundary of the parcel is technically, therefore, the center of the street, in view of the fact that the owner of such land has no right to the possession or occupancy of any portion of such roadway, we are of opinion that, when a grantor describes his land, as was done in this case, as fronting on the county road, and running "thence northerly nine hundred (900) feet," it will be presumed that the grant conveys the given number of feet of land which is set apart for private use and occupancy. Earl v. Dutour, 181 Cal. 58, 60, 183 Pac. 438, 6 A. L. R. 1163. In the instant case we are aided in arriving at a solution of the problem by the descriptions in the deeds executed by McMannis, the common grantor. He did not include any part of the private roadway in the property conveyed to either Hughes or Spenker. In the deed to Hughes the private roadway was excluded by the description by metes and bounds, and in the deed to Spenker by the language "excepting therefrom a roadway twenty feet wide along the west side of said tract of land." Therefore the further description contained in the deeds from McMannis to Hughes, and Hughes to appellant, that the land fronts on the county road a distance of 823 feet on its south line, and fronts 900 feet on a reserved roadway 40 feet wide on its west side, is of material assistance in interpreting the description by metes and bounds. The land so described extended only to the easterly side of the private roadway, and that is undoubtedly what the grantors meant in using the expression "fronts * * * on a reserved roadway * * * upon its west side." The further description that the land "fronts on the county road * * * on its south line" should be given the same effect as that which is so clearly indicated by the description of the westerly

front of the property. We think it clear that McMannis, in deeding to Hughes, and the latter, in deeding to appellant, intended that the property conveyed should be bounded on the south by the north line of the county road. The land of appellant commences at the north line of the county road, and extends 900 feet northerly. Consequently the title to the strip 30 feet in width, which is in dispute here, is vested in appellant.

Some evidence was introduced in the court below, on the part of respondent, tending to establish title in him by adverse possession. The 30-foot strip of land was part of a vineyard, and there was testimony that on some occasions appellant and his predecessor were in possession, and that at other times the respondent exercised rights of ownership over the property It was stipulated that each party had been assessed and paid taxes upon the land "as described in the deeds." It would seem, therefore, that in order to determine on what property the parties paid taxes it would be necessary to interpret the deeds to the property in question, which would, in effect, result in disregarding the question of adverse possession, and in relying upon the record title.

The judgment is reversed.

We concur: MYERS, C. J.; LENNON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.

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66 Cal. App. 404

MILLER CREAMERY et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 4843.)

(District Court of Appeal, First District, Division 2, California. March 29, 1924.)

Master and servant ⚷419—Award of further compensation authorized.

Where condition of compensation claimant, whose compensation was terminated by agreement, grew steadily worse under strain of work, to which he returned on physicians' advice, until he had to remain away from work for several days in week, and physicians advised rest and medical treatment, there was such recurrence and increase of disability as authorized award of further compensation under Workmen's Compensation and Safety Act, § 20, subd. d, which changes rule of section 65, relating to grounds for rehearing, if new state of facts has developed since award, section 27 as to binding obligation of compromise settlement of rights not being applicable.

Petition by James Acker, employé, for allowance of further compensation under the Workmen's Compensation and Safety Act opposed by the Miller Creamery, employer, and the New Amsterdam Casualty Company, insurer. Further compensation awarded by the Industrial Accident Commission, and employer and insurer bring certiorari. Award affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

LANGDON, P. J. This matter comes to us upon a writ to review an award made by the Industrial Accident Commission for further compensation to respondent James Acker, after an order had been made terminating compensation.

The respondent, James Acker, was an employee of Miller Creamery, working as a truck driver. He was injured in the course of his employment upon July 22, 1922, and while still suffering from the effects of this injury he was injured again in the course of his employment upon July 26, 1922. The petitioner Amsterdam Casualty Company, the insurance carrier, paid compensation to Acker in accordance with the orders of the Industrial Accident Commission up to June 9, 1923, and also furnished medical treatment to Acker, including a surgical operation and hospital care. Upon said last-mentioned date the Industrial Accident Commission made the following order:

> "Upon stipulation of the parties, it is ordered that upon payment to applicant of two weeks' additional compensation and the sum of $15 for the purchase of glasses, as prescribed in said stipulation, defendant's liability for continuing temporary disability payments under the findings and award of May 6, 1923, be and the same is hereby terminated."

This order was made upon a showing that Acker had returned to his work. On July 20, 1923, Acker petitioned the Industrial Accident Commission for an allowance of further compensation, alleging that since the termination of the compensation payments he had endeavored to work and had been steadily employed by the Miller Creamery, and that he had made every effort to continue in such employment, but his distress and pain had increased to such an extent that he had been obliged to be absent from his work for three days in the previous week and feared he would not be able to continue his duties. He requested an examination by Industrial Accident Commission physicians and an order allowing him compensation until his recovery.

A hearing was had upon this application. It was stipulated that a medical referee might be appointed at the expense of defendant to examine applicant to ascertain the nature of his present disability and report to the Commission as to the possible extent and duration of same, together with the prognosis of future treatment and recovery. After taking testimony and receiving reports from physicians, the Commission found that applicant was entitled to further medical treatment, as indicated in the report of Dr. H. L. Langnecker, and a temporary total disability compensation during the period of such medical treatment, and made its order accordingly.

The petitioners' position is that the Industrial Accident Commission acted in excess of its powers in making this supplemental award. This conclusion is reached upon the theory that the parties hereto had effected a compromise of their respective rights and that such compromise agreement is a binding obligation under the provisions of section 27 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), and the Commission has no power to impair the obligation of that contract.

On the other hand, the Commission insists that the order under review was a proper exercise of the power given it by section 20, subd. d, of said act, to "rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury"

The only question presented is whether section 20, subd. d, or section 27 of the Workmen's Compensation, Insurance and Safety Act applies to this case.

Petitioners rely upon the case of Georgia Casualty Co. et al. v. Ind. Acc. Com., 177 Cal. 289, 170 Pac. 625, but concede, as indeed they must, in view of the express provisions of the Workmen's Compensation, Insurance and Safety Act, as well as the express language of the case cited, that section 20, subd. d, operates to change the rule of section 65 of the act of 1917 if a new state of facts has developed since the award, and where the disability of the person in whose favor such award is made has either recurred, increased, diminished or terminated. And we think the situation in the instant case comes precisely within the provisions of section 20, subd. d, of said act. The record shows that after Acker had received medical and hospital care, his condition improved, apparently, to such an extent that the physicians advised a return to his work and he did return to it and stipulated with the petitioners that the compensation might be discontinued, and upon such stipulation an order was made terminating the compensation. Indeed it is difficult to see how such an order could have been refused at that time under the facts, even without the stipulation. Acker worked for about six weeks, and claimed in his peition for further compensation that his condition grew steadily worse under the strain of his work until he was forced to remain away from his work for several days in a week. This was, assuredly, a change in his condition—a change in the facts of the case. It was a recurrence or increase of his disability, probably due to the physical strain of his work. While resting in the hospital or his home, Acker's physical condition had been such that physicians had advised his return to work and he had acted upon this advice and the Industrial Accident Commission had acted accordingly in making its order for termination of the compensation. After six weeks of work physicians found his condition had so changed that they advised rest and medical treatment. This was clearly a recurrence of disability and a change in the condition of the applicant from the time the order terminating the compensation was made.

The award of the Industrial Accident Commission is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

66 Cal. App. 416

HALL et al. v. WEBB et al. (Civ. 4355.)

(District Court of Appeal, Second District, Division 1, California. March 31, 1924. Hearing Denied by Supreme Court May 29, 1924.)

1. Waters and water courses ⚿**78 — Taking water from cienaga taking from river.**

Taking of river water in cienaga is same as taking directly from river as respects riparian rights.

2. Waters and water courses ⚿**156(2)—Lower owners held to have acquired no interest in upper owners' riparian rights by contract.**

Under contract permitting lower owners to construct and maintain ditch across upper owners' land, in consideration of upper owners being allowed to divert certain amount of water, etc., lower owners acquired no interest in upper owners' riparian rights.

3. Waters and water courses ⚿**138—Prescriptive right held not acquired under contract.**

Lower riparian owners, constructing and maintaining ditch across upper land under contract with owners thereof, who diverted water from ditch to their ditch on several occasions, as authorized by contract, *held* to have acquired no prescriptive right to use of water in river as against upper owners.

4. Contracts ⚿**282—Right to cancel "satisfaction contract" may depend on whim or caprice, though question is one of operative fitness or mechanical utility.**

Promisor's right to cancel "satisfaction contract" may depend entirely on his whim or caprice, though question is one of operative fitness or mechanical utility, rather than fancy, taste, sensibility, or judgment.

5. Waters and water courses 🔑156(9)—Right to cancel contract.

Under contract providing that if construction of ditch by lower owners across upper owners' land lessened latter's water supply, as shown by past experience in use thereof, which they had sole right to determine, they could terminate contract, it was immaterial, if they so determined in good faith, whether water supply was actually lessened, nor would lower owners be entitled to take water belonging to upper owners, even if latter capriciously breached contract.

6. Waters and water courses 🔑138—Riparian owners held not estopped by silence to assert rights as against lower owners.

Riparian owners, permitting construction of ditch across their land by lower owners, under contract terminable by former if, in their judgment, their water supply was lessened or impaired, *held* not estopped to assert riparian rights, after terminating contract on such ground by having remained silent and permitted lower owners to use water for 18 years.

7. Estoppel 🔑95—Mere silence insufficient, unless party stands by and sees other party infringing on his rights.

Mere silence will not work estoppel unless party against whom it is invoked stood by and saw other party infringing on his rights, and express or implied consent to acts done by persons asserting no adverse claim cannot be made basis for estoppel by silence.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Norman Hall and others against E. H. Webb and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Charles C. Crouch and E. V. Winnek, both of San Diego, for appellants.

Wright & McKee, of San Diego, for respondents.

HOUSER, J. Gathered from the record, the facts of this controversy may be summarized as follows: The plaintiffs (known as the West Enders) are the owners of certain lands riparian to the San Pasqual river. The defendants are also riparian owners of lands located higher on the said river, and there are yet other owners of land (known as the East Enders) located still nearer the source of the stream. In 1898 the West Enders brought a suit against the East Enders with reference to the use of the waters of said stream, with the result that a compromise judgment was rendered whereby the use of 2,000 inches of the water of the river was divided between the parties to the suit. Neither the defendants here nor their predecessor in interest, although owning the land lying between the lands owned respectively by the West Enders and the East Enders in that litigation, were made parties thereto. The defendants, here instead of drawing their water supply directly from the river, obtained it from a cienaga located upon their land and lying closely adjacent to, and at a lower level than, the river. In 1902, which was several years after the compromise judgment was rendered in the litigation between the West Enders and the East Enders, the West Enders conceived the idea that they could obtain a greater supply of water by connecting directly with the water ditch of the East Enders, rather than by taking the water from the river after it had run in the river bed, not only past the land belonging to these defendants, but for a distance of about 3 miles in addition thereto, until it had reached a suitable point for its diversion in a ditch leading to the property of plaintiffs. To accomplish this plan it was necessary to obtain the consent of the predecessor in interest of these defendants to the construction of a ditch across his land. Accordingly an agreement was entered into between defendants' predecessor in interest as party of the first part, and the West Enders as parties of the second part. The recitals of their contract contained the following: That on the land of the party of the first part was a water supply which had a capacity of furnishing 300 inches and upwards of water for 6 hours out of every 24 hours; that the parties of the second part had a water supply taken from the river after said river left the property of the party of the first part; that the East Enders had a water ditch above the property of the party of the first part, which ditch extended down to the east line of the property of the party of the first part; that the parties of the second part desired to construct a ditch through the land of the party of the first part so that it would connect with the ditch of the East Enders; that the party of the first part desired to grant said permission, provided the construction of said ditch and the taking of said water through it would not in any way affect his said water supply. It was thereupon agreed that the ditch be constructed. The following parts of the agreement are also deemed pertinent to the present controversy:

> "And the parties of the second part also agree that they will not at any time put down to bed rock, the diverting dam at Garlock's place, or deepen the structure of the dam below the point at which it is at present constructed.
>
> "And the parties of the second part also agree to always keep said ditch in good repair, and also to keep said dam at Garlock's place in its present condition.
>
> "And the parties of the second part further agree that if the construction of said ditch should in any way lessen said water supply of the party of the first part as shown by past experience in use of said supply, of which the party of the first part, his heirs or assigns, shall have the sole right to determine, then the party of the first part, his heirs or assigns, shall have

the right to notify the parties of the second part thereof, and thereupon the rights of the parties of the second part to use said ditch shall cease, and all rights of all parties under this contract shall terminate.

"And the said party of the first part shall have the right to divert from said ditch a sufficient amount of water to irrigate, not exceeding thirty acres of land at any one time, which acreage shall participate with the other acreage of the parties of the second part pro rata. * * * And the party of the first part shall also have the right to use a pro rata of flood waters which may flow through said ditch."

It was further agreed that the party of the first part should not be liable for any damages caused to the ditch by live stock belonging to the party of the first part, also, that—

"The parties of the second part shall have the right to conduct said water in said ditch where the same passes across the San Pasqual river in a submerged flume, but so long as said parties of the second part shall maintain an open ditch or dam to conduct said water across said river, they shall maintain it in such manner that it will not back water or sand to interfere with the reservoir of the party of the first part."

The ditch was constructed, and for a period of two or three years thereafter was used by the parties to the agreement in accordance with its provisions. The use of the ditch through the land of plaintiff's predecessor in interest, down to the point where it crossed the river, was then abandoned by the West Enders, who at that time, with the consent and permission of the party of the first part to said agreement, took their water supply directly from the river at a point on the land of the party of the first part and near the east boundary thereof.

In 1916 an extraordinary flood occurred, which resulted in filling the cienaga on the land of the party of the first part with trees, sand, and sediment, which utterly destroyed the cienaga as a source of water. In the month of February, 1920, defendants here served notice on plaintiffs terminating the easement created under the agreement of 1902. During all the time between the date of execution of the agreement and the date of the notice of termination of the easement the defendants had used "from said ditch a sufficient amount of water to irrigate not exceeding 30 acres of land at any one time," as provided by said agreement. After the said notice had been served, plaintiffs brought this action against defendants, by which plaintiffs sought to have it adjudged that defendants had no interest in the waters of the said river, nor any right to divert the same, save and except as to surplus water flowing in said stream in excess of the waters acquired by plaintiffs in the compromise judgment in the action between plaintiffs and the West Enders (and to which action defendants were not a party); and to restrain defendants from interfering with plaintiffs' use of said ditch and with their taking of water to the extent and in the manner aforesaid from said stream. Judgment went for defendants; the court thereby declaring that defendants, as owners of the lands described as belonging to them, are "entitled to all the rights of riparian owners in the flow of said stream." From that judgment the plaintiffs appeal.

[1, 2] Although there is no finding by the court on the point, it is clear from the evidence that the water in the cienaga was a part of the water of the river. Whatever water defendants took from the cienaga was the same, so far as riparian rights were concerned, as though the water had been taken directly from the river. Anaheim Union Water Co. v. Fuller, 150 Cal. 328, 88 Pac. 978, 11 L. R. A. (N. S.) 1062; Los Angeles v. Pomeroy, 124 Cal. 623, 57 Pac. 585; Los Angeles v. Hunter, 156 Cal. 607, 105 Pac. 755; Montecito Valley Co. v. Santa Barbara, 144 Cal. 588, 77 Pac. 1113. The question therefore is whether or not the contract between the parties had any effect upon the riparian right of defendants to the water in the river; also, whether or not defendants had the power to determine that the construction of the ditch lessened defendants' "water supply." Considering the language of the contract, it purports only in the main to grant permission to plaintiffs to construct a ditch across the defendants' land. There was no attempt to directly convey to the plaintiffs any interest whatsoever in the "water supply" belonging to defendants' predecessor in interest, either as confined to the cienaga, or in his broader riparian right to water in the river. Neither are words used in the contract by which through even extremely liberal interpretation, such a result would follow. The greatest effect that can be given to the language of the contract is contained in the words of the contract itself, that "the parties of the second part (plaintiffs) may construct and maintain a ditch" over a designated route; in consideration of which right the plaintiffs bound themselves to do certain things and to allow the defendants certain privileges and immunities. In effect, a privilege was extended to the plaintiffs, to be exercised for such a length of time as might be agreeable to the defendants. It must therefore be concluded that, so far as the contract itself is concerned, plaintiffs acquired no interest in defendants' riparian rights.

[3] It is well settled that in circumstances such as are here presented no prescriptive right in the plaintiffs to the use of the water in the river could arise as against the defendants. In the first place, it is obvious that a permissive right such as was enjoyed by the plaintiffs could never ripen into a

prescriptive right. Mr. Wiel, in section 587 of volume 1 of his third edition on Water Rights in the Western States, so lays down the rule and supports it by many cases, including Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Jensen v. Hunter, 5 Cal. Unrep. 83, 41 Pac. 14; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. 223; and Davis v. Martin, 157 Cal. 657, 108 Pac. 866. And in the succeeding paragraph Mr. Wiel also says that—

> "The use must 'substantially interfere' with the property right of the owner; there must be an actual invasion of his property. There must have been such a use of the water, and such damage, as would raise a presumption that complainant would not have submitted to it unless the respondent had acquired the right to so use it. The burden is on the adverse claimant to show such invasion."

In the case of Williams v. Costa, 52 Cal. App. 403, 198 Pac. 1017, where many cases are cited, the principle is laid down that the right to acquire water by prescription cannot be acquired by a lower riparian owner on a stream as against an upper riparian owner thereof. The facts of the instant case show that on several occasions during the time that the plaintiffs were taking water from the river the defendants diverted the water from the ditch of the plaintiffs to the ditch of the defendants, and the authorities appear to be to the effect that such an invasion will prevent the acquisition of the title by prescription. Authors v. Bryant, 22 Nev. 242, 38 Pac. 439; Wasatch Irr. Co. v. Fulton, 23 Utah, 466, 65 Pac. 205. But besides all this it is expressly admitted by appellants that, in view of the fact that the trial court found against the plaintiffs on the issue of prescription, the point is not urged here, and that "no such question is presented or involved upon this appeal."

[4, 5] Defendants' right to the use of the water in the river being unimpaired, either by virtue of the contract, or because of the permissive use of the water by plaintiffs over a term of years, the remaining question presented to this court has to do with defendants' cancellation of the contract, which involves only the right of plaintiffs either to maintain the ditch as originally constructed or as later used by its connection with the river proper on the lands of defendants at or near the east boundary thereof. As heretofore stated, the agreement provides that, if the construction of the ditch should in any way lessen the water supply of the defendants, as shown by past experience in the use thereof, of which lessening the defendants should have the sole right to determine, then the defendants should have the right to terminate the contract. In this connection, the findings of fact by the trial court were that the flood of 1916 lessened and impaired defendants' water supply, but that said water supply (referring to the cienaga) was in no wise lessened or impaired by any act or acts of the plaintiffs. However, the court further found that the defendants "in good faith determined that the water supply mentioned in the contract of 1902 had been lessened and impaired, and thereupon served the notices upon the plaintiffs set forth in defendants' answer." The effect of such finding is that, although the defendants honestly believed that the construction and the maintenance of the ditch by the plaintiffs had lessened defendants' water supply, as a matter of fact such was not the case. But the "water supply" of the defendants was not limited to the water which they obtained from the cienaga. Their real water supply included that which was obtained from the cienaga, but the defendants had a much wider and broader right from the river itself. So that, if the construction and the maintenance of the ditch on the lands of the defendants near the eastern boundary thereof actually had the effect of lessening defendants' water supply, as applied to the broader riparian rights of the defendants, then the "water supply" referred to in the contract was affected by reason of the plaintiffs' acts.

Considering that the riparian rights of the defendants were in no wise impaired by the terms of the contract of 1902, or by any subsequent act of the parties, the question of whether or not the defendants rightfully terminated the contract becomes merely incidental. If the defendants did not part with any interest in their riparian rights, it is of comparatively small importance whether or not plaintiffs are entitled to maintain a ditch over defendants' land. However, in that connection, appellants contend that the defendants could not capriciously determine that the effect of the construction and the maintenance of the ditch was to lessen their water supply, but that such determination must depend upon facts which caused the defendants to reach such a conclusion based in this particular instance upon "past experience in the use of said supply." The case falls within the principle governing what are sometimes called "satisfaction contracts." They are divided into two heads: (1) Where the fancy, taste, sensibility, or judgment of the promisor are involved; and (2) where the question is merely one of operative fitness or mechanical utility. As to the first class of cases, the authorities are practically uniform to the effect that the right of the promisor to cancel such a contract may depend entirely upon his whim or his caprice. Relating to the second class of contracts, it is said in 9 Cyc. p. 620, in announcing the prevailing rule, that—

> "There is no good reason why in cases of operative fitness or mechanical utility the same principle of law should not be applied. Al-

though the thing to be done may not involve the feelings, taste, sensibility, or personal opinion of the promisor, yet he, in making the contract, may not have been willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. And as there is assuredly no law which prevents a person from making contracts of this kind if he chooses, the courts should not hesitate to enforce them. * * * Such a contract may be one-sided, in being dependent upon the caprice of one of the parties; it may be an unwise contract to make; but if it is entered into voluntarily, the promisee is bound, and can have no right to ask a court to alter its terms in his favor."

Counsel for appellants appear to concede that such is the law. The only contention in that regard is that in this particular case the decision of the defendants to the effect that their water supply was lessened, in order that it bind the plaintiffs, must have been founded upon "past experience in the use of said supply." But the difficulty with that argument is that the contract does not say that the defendants' conclusion in that regard must be logical or correct. The defendants' reasoning may be good, or it may be bad; but in either case it is final. The trial court found that the defendants "in good faith determined that the water supply mentioned in the contract of 1902 had been lessened and impaired; and so long as defendants in good faith, that is, honestly, reached the conclusion that the construction and the maintenance of the ditch lessened and impaired the water supply of the defendants, it is of no materiality that upon judicial inquiry it might be determined by the court, as a matter of fact, that the decision should have been to the contrary. The language of the contract here is that the defendants "have the sole right to determine" that fact, and, if the question is now to be left to any one else in the world, it injects into the contract something to which the original parties did not agree and to which, in all probability, the defendants' predecessor in interest would not have agreed. It is evident that the intent was that whether the water supply was affected by the acts of the plaintiffs was to be left to the sole determination of the predecessor in interest of the defendants or to his assigns. Having inserted such a provision in their contract, the court cannot now say that it was an unwise provision; that it was injudicious or indiscreet; that it should not have been agreed to; and therefore adjudge that the plaintiffs should be relieved therefrom. The legal rights of the parties must be ascertained and determined solely according to the provisions of their agreement. It is their contract; they are responsible for it, and they must abide by the consequences. Parlin & Orendorff Co. v. Greenville, 127 Fed. 59, 61 C. C. A. 591; Wood Machine Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; McCarren v. McNulty, 7 Gray (Mass.) 139.

Even if it should be assumed that the defendants capriciously breached the contract, still such assumption would not help the plaintiffs' case. In an appropriate action the only judgment that the plaintiffs would be entitled to recover would be either damages for such breach, or relief in permitting the plaintiffs to use the ditch for conveying their own water. Certainly because the defendants failed to keep the covenant to which reference has been made would give the plaintiffs no right to take any part of the water belonging to the defendants.

[6, 7] Appellants also urge that the defendants are estopped now to assert their riparian rights because over a course of 18 years they were silent and permitted the plaintiffs to use the water as against the defendants' superior rights. But, as heretofore shown, the plaintiffs did not by their acts thereby acquire any new or additional rights. Whatever was done was with the acquiescence of the defendants, who were never called upon to disturb the plaintiffs in the exercise of the privilege thus accorded them until, in the judgment of the defendants, the water supply of the defendants was lessened or impaired. The contract was continuous in its nature; it was not limited as to time in any way. Whenever in the judgment of the defendants their water supply was affected by reason of the maintenance of the ditch, the defendants had the sole right to terminate the contract. Mere silence will not work an estoppel, except where the party against whom the estoppel is invoked has stood by and seen the other party infringing upon his rights (Crisman v. Lanterman, 149 Cal. 655, 87 Pac. 89, 117 Am. St. Rep. 167); and there never was any infringement here. No adverse claim as against defendants was ever asserted by the plaintiffs. Everything that the plaintiffs did was with the express or the implied consent of the defendants, and the plaintiffs cannot use such consent as a basis for an estoppel, on the ground that the defendants remained silent when it was their duty to speak.

No error appearing, the judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

(66 Cal. App. 409)

PEOPLE v. CITY OF REEDLEY et al.
(Civ. 2703.)

(District Court of Appeal, Third District, California. March 31, 1924. Hearing Denied by Supreme Court May 29, 1924.)

1. Constitutional law 🔑80(2) — Permit from state board of health to discharge sewage into river does not limit court's power to abate nuisance.

Permit by state board of health, authorizing city to discharge sewage effluent into river, does not authorize creation or continuance of nuisance, or limit court's power under Const. art. 6, § 5, to abate nuisance, in view of Public Health Act 1907, § 1, though section 3 provides that city may be enjoined from discharging effluent until permit has been obtained.

2. Constitutional law 🔑55 — Constitutional power to abate nuisance cannot be limited by legislative action.

Power of superior court, under Const. art. 6, § 5, to abate nuisances, can only be limited or abridged in manner provided for amending Constitution, and not by legislative action.

3. Municipal corporations 🔑838—Permit from state board of health held not to authorize pollution of stream.

Civ. Code, § 3482, providing that nothing done or maintained under express authority of statute can be deemed a nuisance, does not authorize discharge of injurious matter into public stream or empower state board of health to issue permit authorizing creation or continuance of such nuisance.

4. Municipal corporations 🔑846—Finding discharge of sewage into river was not a nuisance sustained.

In action to abate nuisance, consisting of discharge of sewage effluent into river by city, expert testimony in support of defense that effluent was rendered harmless before discharge by city's methods of treating it *held* sufficient to sustain finding that city was not maintaining nuisance.

5. Appeal and error 🔑1040(13), 1042(1)—Error in overruling demurrer to answer and denying motion to strike out defense held cured by finding.

Error, if any, in overruling demurrer to city's answer, in suit to enjoin discharge of sewage effluent into river as nuisance, and denying motion to strike out defense of permit by state board of health, *held* immaterial, in view of finding, sustained by testimony, that city was not maintaining nuisance.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the People against the City of Reedley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

W. R. McKay, Dist. Atty., and H. Scott Jacobs, both of Hanford, R. Justin Miller, of Minneapolis, Minn., and F. E. Kilpatrick, of Gilroy, for the People.

C. W. Tackaberry, of Reedley, and Frank Kauke, of Fresno, for respondents.

PLUMMER, J. This action was brought in the name of the state of California by the district attorney of Kings county to abate an alleged public nuisance. The nuisance complained of consisted of the discharge, by the city of Reedley, of sewage effluent into Kings river at a point about nine miles from where Kings river crosses the county line between the county of Kings and the county of Fresno. The action was begun in the superior court of the county of Kings and thereafter transferred to the superior court of the county of Tulare for trial.

The complaint sets forth that Kings river is a large natural stream of water having its source in the Sierra Nevada mountains and flowing in a general westerly direction through the counties of Fresno and Kings in the state of California; that a large portion of the waters of said river are diverted from the river into the numerous canals and irrigation ditches radiating from the river in different directions, and that in cases of extreme flood the excess waters of said river empty into Tulare lake; that the city of Reedley has a population of over 2,000 people and is situated on the southeasterly bank of Kings river, about 10 miles up the stream from the point where Kings river crosses the county line between Fresno and Kings counties; that for more than three years last past the city of Reedley had been, and at the time of the filing of the complaint was, discharging sewage effluent and other substances into Kings river, which substances were offensive, injurious, and dangerous to health; that said substances were polluting the waters of Kings river and rendering it unfit for use and were constituting an obstruction to the free use of property to the inhabitants of a large number of residents of Kings county living along said river; and, also, that said substances were rendering the waters of said river unfit for irrigation purposes, domestic purposes, and other purposes and uses to which said stream was naturally adapted were its waters pure and unpolluted. It is further set forth that such acts on the part of the city of Reedley are injurious to health, and will, unless restrained by the court, beget epidemics and various diseases to the great detriment of the inhabitants of Kings county.

As a defense to plaintiff's cause of action the defendants set forth that after due and regular proceedings taken and had therefor as provided by the Public Health Act, approved March 23, 1907 (St. 1907, p. 893), and the various amendments thereof, a permit had been issued by the state board of health authorizing said city to discharge sewage effluent into Kings river; that said permit was unrevoked and in full force and effect and, as a further and separate defense, the city of Reedley pleaded that the sewage effluent being discharged by it into the waters of Kings river had first been treated and subjected to such processes as rendered it harmless, free from deleterious substances, and in such condition as to be nowise injurious to health or tending to render the waters of said river unfit for use. The issues thus presented were tried by the court, findings made in accordance with the defenses interposed by the defendants, and judgment entered that the plaintiff take nothing by reason of its action. Plaintiff appeals from the judgment and as grounds of reversal urges that the permit issued by the state board of health to the city of Reedley constitutes no defense and that the testimony is insufficient to support the findings of the court that the city of Reedley is not discharging into the waters of the Kings river substances injurious to health, etc., and is not maintaining a nuisance.

[1, 2] An examination of the authorities leads us to the conclusion that the appellant's first contention is correct, that is, that the permit by the state board of health, unrevoked at the time of the trial, is not a conclusive or absolute defense; that such a permit is only evidence that the state board of health has granted to the defendant city the privilege of discharging sewage effluent into the waters of Kings river under certain specified conditions provided for by the rules and regulations adopted by the state board of health and issued after the state board of health has satisfied itself that such sewage effluent will not be injurious. Such a permit does not authorize a city to create or continue a nuisance or in any wise limit the power of the court to abate the same in the event it finds that a nuisance exists or is being created and continued under the claimed authority of such a permit. Section 1 of the Public Health Act particularly sets forth that it is not the intent of the Legislature in passing the act to limit any of the laws of the state relating to the preservation of public health but only to supplement the same. The power of the court to abate nuisances is found in section 5, art. 6, of the Constitution, and can only be limited or abridged in the manner provided for amending the Constitution and not by legislative action. We do not think that section 3, providing that the city may be enjoined from discharging sewage effluent into the waters of any stream until the permit has first been obtained from the state board of health, tends in any manner to limit the constitutional power of the superior court to abate nuisances. It is a power given by the act of the state board of health in the exercise of its jurisdiction to conserve the health of the state to require cities to conform to all such regulations as the state board of health may deem necessary before such sewage effluent in any case may be discharged into any of the public waters of the state of California.

The powers of the superior court in relation to nuisances and in the general exercise of its jurisdiction are set forth very concisely in the concurring opinion of Justice Sloss in the case of Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, at page 690, 137 Pac. 1119, 1138 (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822):

> "The courts of this state derive their powers and jurisdiction from the Constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act. An attempt to take away from the courts judicial power conferred upon them by the Constitution, or to impose upon them judicial powers not granted or authorized to be granted by the Constitution, is void."

[3] This statement of the law is supported by a long list of authorities there cited. The defendants in connection with the first defense set out calls our attention to section 3482 of the Civil Code, which reads:

> "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

We do not see that this section alters the situation in any particular. It certainly does not authorize any one to discharge injurious matter into the waters of a public stream or empower the state board of health to issue a permit which would authorize any person to create a nuisance or continue a nuisance after being created. It has been held a number of times in this court that a license, permit, or franchise does not authorize the creation or maintenance of a nuisance. Voorheis v. Tidewater Southern Railway Co., 41 Cal. App. 315, 182 Pac. 797; Coats v. Atchison, 1 Cal. App. 441, 82 Pac. 640; Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51. Other states support the same rule. See extended note to Missouri, Kansas & Texas Railway Co. v. Mott, 98 Tex. 91, 81 S. W. 285, 70 L. R. A. 579.

[4, 5] The fact that we agree with appellant as to the inconclusiveness of the first defense set out by the defendants in their answer is by no means decisive of this case. The trial court, while it permitted the defendants' first defense, set forth in the answer, to remain as a part of the pleadings in the case and allowed the defendants to introduce testimony showing the proceedings taken and had before the state board of health and the issuance of the permit as provided for in the Public Health Act, did not base its findings and judgment thereon; that is to say, it did not stop simply with the introduction of the permit referred to herein, but allowed both the defendants and the plaintiff to introduce a great deal of testimony showing the character of the works maintained by the city of Reedley, the processes to which its sewage was subjected, and

after a very full and complete admission of testimony, as to the present action of the city of Reedley, what it was doing to render the sewage effluent of the city harmless, came to the conclusion, as set forth in defendants' second defense, that the city of Reedley has not discharged into the waters of the Kings river any substance injurious to health or which prevented said waters from being safely put to any of the uses to which they were theretofore naturally adapted, and, upon these findings, drew its conclusions of law that the city of Reedley was not creating or continuing a nuisance and entered judgment denying the plaintiff's petition for an injunction. Upon the questions tendered by the defendants' second defense in their answer, much testimony is set out in the transcript. The plaintiff called as its principal witness F. E. Twining, a chemist, whose testimony tended to show that such sewage effluent was always a potential element of danger; but, as we read his testimony, we do not find anything therein going to the effect that the sewage effluent discharged by the city of Reedley into the waters of Kings river is absolutely inimical and a positive source of danger to the inhabitants using the waters of said stream in the manner and for the purposes to which it could be used were there no such sewage effluent discharged therein. The defendants, in support of the defense, that the sewage effluent of the city was first rendered harmless before being allowed to find its way to the waters of Kings river, called as witnesses Andrew M. Jensen, a civil engineer and sanitary expert; Ida May Stevens, chief bacteriologist for the bureau of communicable diseases for the state board of health; R. F. Goudey, assistant engineer in charge of the bureau of sanitary engineering of the state board of health at Berkeley, Cal.; Ralph Hilscher, a sanitary engineer and director of the bureau of sanitary engineering of the state board of health; and C. G. Gillespie, a sanitary engineer and at one time director of the state board of health. These witnesses went into the subject of sewage disposal at considerable length and explained the various processes by which obnoxious substances are rendered harmless and also the various methods of disposing of such substances. These witnesses agree that sewage farms suggested by the plaintiff as a possible means of disposal were not advisable in this case, and their testimony also is to the effect that there is no reasonable probability for a communication of diseases by the sewage effluent discharge by the city of Reedley into the waters of Kings river when it was treated as it was being treated or processed at the time of the trial.

Upon this testimony, covering a great many pages in the transcript, but, in substance and effect as above stated, the learned trial court found that the city of Reedley was not maintaining a nuisance and that the injunction should not be granted.

This being the finding of the court, and there being sufficient testimony to sustain such finding, it is wholly immaterial whether the trial court erred in overruling the plaintiff's demurrer to the defendants' answer and in denying the plaintiff's motion to strike out the defendants' first defense—that is, the defense of the certificate issued by the state board of health—because, if the city, at the time of the trial, was not maintaining a nuisance, whether the proceedings leading up to the issuance of the permit were regular or irregular, valid or void, would in no wise affect the judgment which the court should enter when it found that no present nuisance existed.

We therefore conclude that, irrespective of the first defense, the judgment of the trial court, based upon findings as just stated, showing no present nuisance, must be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 445

BRININSTOOL et ux. v. PACIFIC ELECTRIC RY. CO. (Civ. 4238.)

(District Court of Appeal, Second District, Division 1, California. April 5, 1924.)

1. Appeal and error 🔑979(2)—Granting new trial on conflicting evidence discretionary.

Granting new trial on ground of insufficiency of evidence to sustain verdict, there being substantial conflict in evidence, rests so fully in discretion of trial court that its action is conclusive on appellate court, unless it appears that there has been an abuse of discretion.

2. Appeal and error 🔑979(2)—Granting new trial held not an abuse of discretion.

In action for injuries to passenger thrown from street car, action of court in granting new trial after verdict for defendant, on ground of insufficiency of evidence, *held* not an abuse of discretion warranting interference.

3. Appeal and error 🔑1015(2)—Test stated for determining correctness of grant of new trial for insufficiency of evidence to sustain verdict.

Order granting motion for new trial upon ground that evidence is insufficient to sustain judgment will not be disturbed, where there was at trial a conflict in evidence, unless it can be said a verdict in favor of moving party would not have found sufficient legal support in evidence.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by E. A. Brininstool and wife against the Pacific Electric Railway Company. Verdict for defendant. From an order granting a motion for new trial, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for appellant.

Jones, Wilson & Stephenson, of Los Angeles, for respondents.

CURTIS, J. This action was instituted to recover damages against the defendant for injuries alleged to have been sustained by the plaintiff Estelle O. Brininstool in attempting to board an electric street car belonging to and operated by the defendant in the city of Los Angeles. The case was tried before a jury, who rendered a verdict in favor of the defendant. Plaintiffs moved for a new trial upon all the grounds set forth in section 657 of the Code of Civil Procedure, except subdivision 5 thereof. The court granted the motion upon the ground that the evidence was insufficient to sustain the verdict. From this order the defendant has appealed, and now contends that the trial court was guilty of an abuse of discretion in granting this motion.

In the complaint it is alleged that, while the defendant's car was at a standstill at the usual stopping place for taking on and letting off passengers, at the corner of Hill and Fifth streets in the city of Los Angeles, the plaintiff Estelle O. Brininstool undertook to board said car for the purpose of becoming a passenger thereon, and that when she was on the lower step of said car, on her way into said car, the defendant negligently, carelessly, and suddenly started said car forward with a lurch, and she was thrown thereby from said car upon the paved street below. This allegation is denied by the defendant, and upon the decision of this issue thereby made hinges the final determination of this controversy.

In support of this allegation of the complaint plaintiffs produced four witnesses, including the said Estelle O. Brininstool, all of whom testified in substance that the car of defendant had come to a full stop before the said Estelle O. Brininstool attempted to board it, and that after she was on the lower step of the car it suddenly started up and she was thrown to the pavement. Mrs. Brininstool testified that she and Mrs. Frazier were at the northwest corner of Hill and Fifth streets waiting for the car; that the car approached the intersection of these two streets on Hill street from the north; that it first stopped a short distance north of the usual stopping place at said street intersection, on account of another car which was directly in front of it. When this second car passed down the street, the car for which the witness was waiting slowly approached the regular stopping place and came to a standstill, and the witness and Mrs. Frazier both stepped upon the first or lower step of the car for the purpose of boarding it and going to their homes. Almost immediately upon their stepping upon this first step the car started with a jerk, throwing Mrs. Frazier to the street first and then the witness. Mrs. Brininstool was corroborated in her testimony by Mrs. Frazier, whose statement of the affair agreed in all essential particulars with that of Mrs. Brininstool. Another witness, Isadore Gralla, a newsboy selling papers at this corner, testified that he saw the car come to a standstill and the ladies attempt to board it. After they got onto the lower step of the car, he turned around to sell papers, and the next thing he saw was Mrs. Frazier falling off of the car about 15 feet from the point where they started to board the car, and in about 15 feet more Mrs. Brininstool fell off. The other of the four witnesses, who testified in favor of plaintiffs, was Mrs. Moffatt. She stated that she attended a meeting with Mrs. Brininstool and Mrs. Frazier the afternoon of the accident; that she went with them to the corner of Fifth and Hill streets, where they were to take the car; that Mrs. Brininstool and Mrs. Frazier were standing waiting for the car when it approached very slowly and came to a complete stop; that when the car had stopped its rear entrance was in front of, or opposite, the point where the ladies were standing; that the ladies attempted to board it, but the bell to start the car was given "so quick that it was hard to tell how long it stopped." She further stated that on account of the traffic she did not keep her eyes upon the ladies all the time, but that immediately upon hearing the bell she looked to see where her friends were, and saw Mrs. Frazier thrown to the street and Mrs. Brininstool still on the first step of the car, and later she saw her, after she was thrown from the car, sitting in an upright position in the street. Another witness for plaintiffs was Mrs. Mary A. Rice, who gave her testimony by means of a deposition. She did not see Mrs. Brininstool or Mrs. Frazier at the time they attempted to board the car, but did see them on the step of the car and saw them fall from the car onto the street. Mrs. Frazier fell first and then Mrs. Brininstool.

Against this testimony the defendant produced four witnesses, the conductor and motorman on the car, and two passengers. These witnesses, with the exception of the motorman, testified substantially that the car did not stop at the point where Mrs. Brininstool and Mrs. Frazier attempted to board it, but that after the car had left its usual stopping place at this street intersection, and while it was in motion, Mrs. Brininstool and Mrs. Frazier attempted to board it, and that in so doing they were thrown therefrom to the street and injured. The motorman testified that he stopped the car at the regular stopping place, and that after receiving the signal to proceed he started his car slowly and in the regular way, and while moving at a very slow rate of speed down the street, he suddenly received three violent bells, very hard, and stopped his car with a jerk. From his position he could not see the ladies as they attempted to board the car, and he did not see them at any time either before or after the accident.

[1] It is apparent from this brief reference to the evidence in the case that there is a sharp and substantial conflict between the evidence offered on behalf of the plaintiffs, and that given for the defendant, upon the vital issue in the case as to whether the car from which Mrs. Brininstool was thrown had come to a full stop or was moving at the time she attempted to board it. With this testimony before it, the trial court granted plaintiff's motion for a new trial. It is well settled in this state that the action of the trial court, in granting or refusing a new trial, when there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive on the appellate court, unless it appears that there has been an abuse of such discretion. Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Wright v. Salzberger (Cal. App.) 218 Pac. 785.

[2] It is the contention of the defendant, however, that the great weight of the evidence is in its favor, and that the order of the trial court, granting plaintiff's motion for a new trial, made under such circumstances, was an abuse of the discretion reposed in it. The fallacy of this argument lies in the assumption by defendant that it is within the province of the appellate court to pass upon the evidence and determine the weight thereof. The trial court, in granting the motion of plaintiff for a new trial on the ground of the insufficiency of the evidence, must have necessarily concluded and found that the weight of the evidence was with the plaintiffs. This right to pass upon the evidence, as we have already shown, belongs exclusively to the trial court, and its determination thereof is controlling, not only of its action, but also of the action of this court. We are therefore unable to agree with the defendant that there was any abuse of discretion on the part of the trial court in granting plaintiffs' motion for a new trial.

[3] There is a further reason why the order granting a new trial must be affirmed by this court upon the ground stated in the order. The evidence of Mrs. Brininstool and Mrs. Frazier, corroborated by the other witnesses for the plaintiffs, would without question have sustained a verdict in favor of the plaintiffs, and it is well established in this state that an order granting a new trial, upon the ground that the evidence is insufficient to sustain the judgment, will not be disturbed, where there was at the trial a conflict in the evidence, unless it can be said that a verdict in favor of the moving party would not have found sufficient legal support in such evidence. Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483. It has also been held—

> "That the action of a trial court, in granting a new trial upon the ground of the insufficiency of the evidence to justify the decision, 'is so far a matter within its discretion that, if there is any appreciable conflict in the evidence, it is not open to review.'" Otten v. Spreckels, 24 Cal. App. 251–256, 141 Pac. 224, 226.

The respondent also claims that the order of the court granting plaintiffs' motion for a new trial should be sustained on other grounds. In view of the conclusion reached by us that the order should be sustained upon the ground of the insufficiency of the evidence to support the verdict, we deem it unnecessary to consider any other ground which might be advanced in support of the order.

The order granting plaintiffs' motion for a new trial is affirmed.

We concur: CONREY P. J.; HOUSER, J.

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66 Cal. App. 380

RUMMELSBURG et al. v. McDONALD, Sheriff, et al. (Civ. 2712.)

(District Court of Appeal, Third District, California. March 28, 1924. Hearing Denied by Supreme Court May 26, 1924.)

1. Pleading 🔑214(1)—Truth of allegation of complaint assumed on demurrer.

Truth of allegation of complaint must be assumed on demurrer.

2. Evidence 🔑418—Parol evidence admissible to determine whether contract is that of principal or agent, if doubtful.

Where reading of simple contract, such as chattel mortgage, however inartificially drawn, discloses its execution for or on behalf of principal, or intent to bind such principal, or leaves matter in doubt, parol evidence is admissible to determine whose contract it is, even if sufficiently clear to bind agent.

3. Chattel mortgages 🔑63—Affidavit of good faith held sufficient.

Affidavit of mortgagor and "H. R. of H. R. & Son, the mortgagees, in said mortgage," that it was made in good faith and without design to hinder, delay, or defraud creditors, *held* sufficient.

4. Chattel mortgages 🔑84—Pleading 🔑192(6)—Defendants in foreclosure suit held not entitled to question sufficiency of unrecorded mortgage by demurrer.

Where complaint, in suit to foreclose mortgage, does not show that defendants, other than mortgagor, are creditors of latter or subsequent purchasers or incumbrancers, they cannot question sufficiency of mortgage by demurrer for absence of allegation that it was recorded, as provided by Civ. Code, § 2957; unrecorded mortgage being valid between parties thereto.

5. Chattel mortgages 🔑278—Burden held on defendants in foreclosure suit to set up and prove interest in mortgaged property.

In suit to foreclose mortgage, allegation of complaint that defendants, other than mortgagor claimed some interest in mortgaged property subject to mortgage, cast burden on them to set up and prove their interest.

6. Partnership 🔑199—Failure in action by, to allege publication and filing of certificate cannot be raised by special demurrer for uncertainty.

In suit to foreclose mortgage to partnership, failure of complaint to allege publication and filing of certificate of copartnership, as required by Civ. Code, §§ 2466, 2468, cannot be raised by special demurrer for uncertainty, but may be raised by demurrer for want of capacity to sue, or by plea in abatement.

7. Chattel mortgages 🔑277—Complaint in foreclosure suit held to sufficiently aver ownership by mortgagor.

It is disputable presumption that one exercising acts of ownership of property, as by executing mortgage on it, is owner, and allegation of such execution in complaint to foreclose is sufficient averment of ownership.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by H. Rummelsburg and another, as partners, doing business as H. Rummelsburg & Son, against J. J. McDonald, Sheriff of County of Solano, and others. From judgment for defendants McDonald and others, plaintiffs appeal. Reversed, with directions.

Frances C. McInnis and W. U. Goodman, both of Fairfield, for appellants.

Joseph M. Raines, and Theodore W. Chester, both of Fairfield, for respondents.

FINCH, P. J. This action was brought to recover the amount alleged to be due on a promissory note and to foreclose a chattel mortgage given to secure the same. The demurrer to the complaint interposed by the defendants other than Painter was sustained, and judgment was entered in favor of the demurring defendants. This appeal is from the judgment.

In so far as material to the questions raised by this appeal, the complaint alleges that at the times mentioned therein H. Rummelsburg and R. Rummelsburg were partners, "doing business under the firm name and style of H. Rummelsburg & Son, certificate of said partnership under said name and proof of publication thereof being on file in the manner and form required by law in the office of the county clerk of the county of Solano"; that on the day they bear date the defendant Painter executed and delivered to "H. Rummelsburg & Son" the promissory note and mortgage on which the action is based; that the defendants other than Painter "claim some right, title or interest in the personal property described in the chattel mortgage above mentioned and referred to; that the claims of the defendants and each of them are subsequent to and subject to the mortgage of plaintiffs." A copy of the mortgage, containing a copy of the note, is attached to the complaint and made a part thereof.

[1, 2] Respondents contend that the chattel mortgage was not given to the plaintiff partnership, but to the individual partners. The mortgage recites that it is made "to H. Rummelsburg and Roland Rummelsburg, copartners, doing business under the firm name and style of 'H. Rummelsburg & Son' * * * mortgagees," and the plural, "mortgagees," is employed throughout. If there were nothing else to indicate the intention of the parties, it might be inferred that the words "copartners, doing business," etc., are merely descriptive, but the mortgage further recites that it is given "as security for the payment to 'H. Rummelsburg & Son,' the said mortgagees." The promissory note set out therein is made payable "to the order of H. Rummelsburg & Son." The affidavit on behalf of the mortgagees is made by "H. Rummelsburg of Rummelsburg & Son, the mortgagees." The most that can be said in favor of respondents' contention is that on its face the mortgage is uncertain as to whether it was given to the partnership or to the individual partners. The complaint alleges that it was given to "H. Rummelsburg & Son." If this allegation is true, and on demurrer its truth must be assumed, then the mortgage was executed by H. Rummelsburg on behalf of and as agent of the partnership. If in their answer the defendants shall deny this allegation, parol proof will be admissible at the trial upon the issue thus raised. "The rule is well settled that, where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is; and this even in cases where the instrument is sufficiently clear in its terms to bind the agent." S. P. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 371, 50 Pac. 650, 651; Bean v. Pioneer Mining Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106. In a case involving the question whether a promissory note was the individual note of the signers thereof or the note of the company of which they were officers, their signatures being followed by their official designations, the court said:

> "Promissory notes, like other instruments, must be given that effect which accords with the obvious intent of the parties to them." Farmers' & Mech. Bank v. Colby, 64 Cal. 352,

28 Pac. 118; McCormick v. Stockton, etc., R. R. Co., 130 Cal. 100, 104, 62 Pac. 267.

In opposition to the foregoing authorities respondents rely on the cases of Davidson v. Knox, 67 Cal. 143, 7 Pac. 413; Feder v. Epstein, 69 Cal. 456, 10 Pac. 785; Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364; and Billings v. Finn, 55 Cal. App. 134, 202 Pac. 938. There is no inconsistency between the two lines of cases. Those cited by respondents have to do with the question of proper parties to actions and the manner of acquiring jurisdiction over defendants, matters which must be decided in accordance with what is done by a plaintiff rather than by what he intended. The cases hereinbefore reviewed involved the interpretation of contracts, questions in which the intention of the parties is the all-important consideration. Davidson v. Knox is typical of the cases cited by respondent. The defendants therein were described as "Richard F. Knox, Joseph Osborne, Samuel P. Ely, W. T. Robinson, and Philip V. R. Ely, copartners, doing business under the firm name of Knox & Osborne." Three of the defendants were served with summons. The Elys were not served. Section 388 of the Code of Civil Procedure provides that—

> "When two or more persons, associated in any business, transact such business under a common name, * * * the associates may be sued by such common name, the summons in such cases being served on one or more of the associates."

The court said:

> "We are of opinion that this is an action against the individual partners * * * and * * * the plaintiffs can only proceed against the parties served."

[3] Respondents urge that the affidavit attached to the mortgage is insufficient. The body thereof reads as follows:

> "Joseph E. Painter, the mortgagor in the foregoing mortgage named, and H. Rummelsburg of H. Rummelsburg & Son, the mortgagees, in said mortgage named, each being duly sworn, each for himself, doth depose and say: That the aforesaid mortgage is made in good faith and without any design to hinder, delay or defraud any creditor or creditors."

The affidavit is sufficient. Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552; Alferitz v. Scott, 130 Cal. 474, 62 Pac. 735.

[4, 5] The complaint does not allege that the mortgage was recorded. Section 2957 of the Civil Code provides:

> "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless * * * it is acknowledged or proved, certified, and recorded in like manner as grants of real property."

The complaint does not show that the demurring defendants are creditors of the mortgagor or subsequent purchasers or incumbrancers of the property, and therefore they cannot, by demurrer, question the sufficiency of the mortgage, which is valid between the parties thereto without being recorded. Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801. The nature of the defendants' claim of interest in the mortgaged property does not appear from the allegations of the complaint. The allegation that they claim some interest therein which is subsequent and subject to plaintiffs' mortgage cast the burden upon defendants to set up and prove their interest. San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92.

[6] It is urged that the allegation in the complaint of the publication and filing of the certificate of copartnership, as required by sections 2466 and 2468 of the Civil Code, is insufficient. The defendants demurred on the ground that the complaint is uncertain in that it cannot be ascertained therefrom "whether or not the certificate of partnership * * * was ever published as required by law." In Spreckels v. Grace Darling Hosp. Ass'n, 28 Cal. App. 646, 153 Pac. 718, it was held that failure to allege such publication and filing cannot be raised by special demurrer for uncertainty, but may be raised by special demurrer on the ground of want of legal capacity to sue. In Holden v. Mensinger, 175 Cal. 300, 303, 165 Pac. 950, 951, it is said that such failure "merely subjects the complaint to the special defense of a plea in abatement." In Amundson v. Shafer, 36 Cal. App. 398, 400, 172 Pac. 173, 174, in which case a hearing was denied by the Supreme Court, it is said that a compliance with the provisions of sections 2466 and 2468 "need not appear upon the face of the complaint. If the fact be that the person maintaining such an action has not complied with the sections mentioned, the point may be presented as a defense by way of plea in abatement." In may be stated further that the demurrer herein was not sustained on the ground here urged. The order sustaining the demurrer reads as follows:

> "In the above entitled action, as to the demurrer of certain defendants directed to the point as to whether the mortgage was given to the partnership it is ordered that the said demurrer be sustained."

[7] It is urged that the complaint does not allege that Painter had any interest in the property at the time of the execution of the mortgage. In Sielbeck v. Grothman, 248 Ill. 435, 94 N. E. 67, 21 Ann. Cas. 229, it is said, although the statement is not necessary to the decision, that in a foreclosure proceeding "the bill should allege the title of the mortgagors in the mortgaged premises. 1 Wiltsie on Mortgage Foreclosures (1899 Ed.) § 276." In the section cited it is said:

"It is not necessary to aver in so many words that the defendant has title to the mortgaged premises; it is sufficient to aver the making of the mortgage."

In Jones on Mortgages (7th Ed.) § 1454, it is said:

"An allegation of the execution of the mortgage is also sufficient without any averment of title in the mortgagor. He is estopped by his deed from denying his title."

It is a disputable presumption:

"That a person is the owner of property from exercising acts of ownership over it." Code Civ. Proc. § 1963, subd. 12.

In Henke v. Eureka Endowment Ass'n, 100 Cal. 429, 34 Pac. 1089, the court said:

"The first contention of appellant is that no consideration is alleged in the complaint for the execution by defendant of the agreement upon which a recovery is sought. Section 1614 of the Civil Code provides that 'A written instrument is presumptive evidence of a consideration.' It is a familiar rule of pleading under our code system that every fact which a plaintiff will be called upon to prove at the trial must be averred in his complaint. It is equally a rule that presumptions of law should not, or at least need not, be stated. When the plaintiff averred in her complaint that the defendant executed a contract in writing wherein it promised, at a given date, to pay her a certain sum of money she stated facts from which the law presumed a consideration; hence it was unnecessary to aver it specially."

In this case the complaint alleges that Painter executed the mortgage in question upon the property therein described, and from the exercise of such act of ownership the law presumes, in the absence of evidence to the contrary, that he was the owner of the property.

The judgment is reversed, with directions to the trial court to overrule the demurrer and give the demurring defendants a reasonable time to answer.

We concur: PLUMMER, J.; HART, J.

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66 Cal. App. 438

HUNT v. ALAMITOS LAND CO. et al.
(Civ. 4187.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1924.)

1. Appeal and error 🔑1010(1) — Appellate court bound by trial court's findings sustained by evidence.

The appellate court is bound by the findings of the lower court, where sustained by evidence.

2. Quieting title 🔑36—Decree not granted, where no property corresponding to description in complaint exists.

A decree quieting title will not be granted, where there is no property such as that described in the complaint.

3. Estoppel 🔑63—Defendants in suit to quiet title not estopped to claim description of property in complaint erroneous.

Defendants in suit to quiet title were not estopped from claiming that description of property was other than that contained in the complaint by having caused property to be returned for assessment purposes under such description.

4. Appeal and error 🔑757(3) — Appellate court not required to search record for evidence.

It is not incumbent on appellate court to search record for evidence.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action to quiet title by H. B. Hunt against the Alamitos Land Company, a corporation, and others, in which defendants filed cross-complaint. Judgment for defendants, and plaintiff appeals. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellant.

Denio & Hart, of Long Beach, for respondents.

HOUSER, J. In this action plaintiff sought a decree quieting title as against the several defendants as to a certain lot described in the complaint as lot 4 of block 82 of a survey of a certain tract. The defendants answered and set up a cross-complaint against plaintiff in which it was prayed that the title to apparently the same property, but described as lot 4 of block Z of another survey of the same tract, be quieted as against plaintiff. Judgment went for the defendants on their cross-complaint, and plaintiff appeals therefrom.

Plaintiff claimed through certain mesne conveyances originating in a tax deed, and the defendants claimed as owners both prior to and subsequent to the date of the tax deed. The identity of the property itself was not in dispute. The difficulty consisted only in a determination of whether or not it was lot 4 of block 82 or lot 4 of block Z.

Some years before the litigation here involved was instituted a decree had been granted by the superior court quieting title to plaintiff's predecessor in interest as against these defendants in lot 4, block 82. Three or four years later an attempt was made to modify that decree by changing the description of the property therein described so that it would apply to lot 4 of block Z. However, it was conceded on the trial that such amended judgment was invalid and of no effect. It appears that the tract which included the property here in question had been the subject of several different surveys and resurveys, each of which had been placed of record by the defendants. This particular lot 4 was triangular in shape, and was separated from any other lot or block by a street on each of two of its sides, and on its remaining side by the right of way of the Pacific Electric Railway Company. An examination of one of the surveys shows that before the Pacific Electric Railway Company acquired its right of way lot 4 of block Z was a large lot, which later, possibly by reason of part thereof having been taken for such right of way, was reduced in size and became of the triangular shape. One of the witnesses, who was a surveyor by occupation, testified at the trial that "the lot 4 of the unnumbered block in Map Book 5, p. 55, lies in the same position as the southwesterly portion of lot 4, block Z, on the map shown on Miscellaneous Records 43, pp. 9 and 10." There was nothing to indicate that this piece of property ever had been a part of block 82, and it is separated therefrom by a street which, according to the map, is over 60 feet in width.

[1, 2] On the evidence the trial court found that there was no such property described as lot 4, block 82, and that said block 82 consists only of three lots, numbered 1, 2, and 3; that said block 82 was separated by a public street known as Obispo street from lot 4, block Z, the property affected by this action, and that said lot 4, block Z, is correctly described as a triangular lot marked 4, bounded on the west by the easterly line of Obispo street, on the south by the northerly line of Second street, and on the northerly and easterly side by the southerly line of the Pacific Electric Railway right of way. That this court is bound by the findings of the lower court, which are sustained by the evidence, is so well settled as to require no citation of cases to support the statement. There being no such property as lot 4, block 82, it would follow that a decree quieting title to property under such a description of it could not be granted.

One of the contentions of appellant is to the effect that an estoppel against defendants existed by reason of the fact that defendants had caused a map of the property to be filed which showed it as being lot 4 of block 82. But that contention is disposed of by the finding of the court contrary to plaintiff's contention. There was no map which showed a lot 4 of block 82.

[3, 4] Appellant also urges that because in a certain year defendants caused the property in question to be returned for assessment purposes under the description of lot 4, block 82, defendants were thereby estopped to claim that in reality the description should have been lot 4 of block Z. The attention of the court has not been directed to either any evidence of or any stipulation to that fact, and defendants deny that either exists. While it is not incumbent upon this court to search the record therefor, our investigation has failed to disclose the fact upon which the contention of appellant for such estoppel must be founded. However, even assuming its existence, the elements of estoppel are lacking to such an extent that we are unable to agree with appellant upon the point itself.

No error appearing, it is ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

193 Cal. 584

CUYAMACA WATER CO. et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN DIEGO COUNTY et al. (S. F. 11138.)

(Supreme Court of California. May 21, 1924. Rehearing Denied June 12, 1924.)

1. Judges 🔑44—Interest because of citizenship in outcome of action by city to quiet title to waters of river held not such as to disqualify.

Interest of judges in outcome because inhabitants, taxpayers, and property owners of plaintiff city in action to quiet title in it as successor of pueblo to waters of river therein, as having right to use them as trustee for its inhabitants, *held* neither separate, severable, individual nor defined; not direct pecuniary or property interest or involving an individual right or privilege whereby liability or pecuniary gain would occur on event of action, but too remote and conjectural to operate as disqualification, under Code Civ. Proc. § 170, subd. 1.

2. Judges 🔑44—Not disqualified because as taxpayers they could have brought action for city.

Judges are not disqualified in action by city to quiet title because had it neglected or refused to bring it they, as taxpayers, could have done so.

3. Judges 🔑42—Not disqualified because city intends, if unsuccessful in action, to acquire judge's rights in other property.

That judge owns water rights which city has declared its intention to acquire if unsuccessful in its action to quiet title to other waters does not disqualify him for the action, any interest not being direct, but indirect and consequential.

In Bank.

Application by the Cuyamaca Water Company and others for writ of prohibition to the Superior Court of California in and for San Diego County and the Judges thereof. Peremptory writ denied.

Crouch & Sanders and Sloane & Sloane, all of San Diego, and Flint & MacKay and Arthur R. Smiley, all of Los Angeles, for petitioners.

S. J. Higgins, City Atty., and A. F. H. Wright, Asst. City Atty., both of San Diego, and T. B. Cosgrove and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondents.

PER CURIAM. This is an application for a writ of prohibition to prevent all of the judges of the superior court of San Diego county from proceeding in a certain cause pending in that court wherein the city of San Diego is plaintiff and the petitioners herein are defendants. The sole ground for the application is the claim of a disqualifying interest possessed by the respondent judges under subdivision 1 of section 170 of the Code of Civil Procedure, which provides that no judge shall sit or act in any action or proceeding "in which he is interested." A general demurrer has been interposed to the petition and the matter is therefore submitted on the material facts thus admitted to be true.

The pending cause referred to is an action to quiet title. It is alleged in the complaint that prior to 1850 the pueblo of San Diego was situated along both banks of the San Diego river, and, under the laws of Spain and Mexico was entitled to a paramount and prior right to the use of all the waters of said river in trust for its inhabitants; that upon the incorporation in 1850 of the present city of San Diego it succeeded to all of the rights of the pueblo, and ever since has been and now is the owner of such prior and paramount right to the use of the waters of said river in so far as the same may be necessary for the city and the inhabitants. It is further alleged that the defendants therein claim an estate and interest in and to said waters and the use thereof adverse and superior to the interest of the city of San Diego, and that such claim is without right. Plaintiff prays that the defendants be required to set forth the nature of their claims to said waters, and that it be adjudged that whatever rights they possess in and to the same be declared to be subject and subordinate to the rights of the plaintiff. The theory of the action appears to be the same as that under which the city of Los Angeles established its paramount right to the use of the waters of the Los Angeles river. Los Angeles v. Los Angeles, etc., Co., 152 Cal. 645, 93 Pac. 869, 1135; City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755. The nature of the right was involved in the earlier cases of Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, and Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762.

It is alleged in the petition that each and all of the respondent judges are inhabitants, residents, citizens, and taxpayers of the city of San Diego, and that certain of them are owners of real property within said city. The alleged disqualification is asserted on the ground that, if the allegations of the complaint are true, the city owns the right to the use of the waters as trustee for the inhabitants of the city, and that each of such inhabitants, including each of the respondent judges, is the owner of a vested right in and to his proportionate share of such waters, and that the same is ascertainable and definable.

The petitioners describe the interest which will disqualify a judge as "a direct pecuniary or direct property interest or one which involves some individual right or privilege in the subject-matter of the litigation whereby a liability or pecuniary gain must occur on the event of the suit." In Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22, it is defined as "any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered." In the same case it is pointed out that if the so-called interest of the judge be "remote, contingent and speculative" it does not constitute a disqualifying interest.

It is contended that the status of an inhabitant of the city of San Diego as the successor of the ancient pueblo is peculiar; that in him is vested a beneficial interest in his proportionate share of the waters acquired by the pueblo; that this interest is common to all the inhabitants of the city and is a different interest than that held by an inhabitant of a city which is not the successor of a pueblo. The extent of the interest of the inhabitants of the former pueblo and of the occupants of land within the city, its successor, was defined in Lux v. Haggin, supra, as follows:

> "The inhabitants of the former pueblo who were using water when this territory was transferred to the United States had not acquired a vested right to any particular quantity of water. And the occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water and at such times as accords with the laws regulating the public and municipal trust."

The right of the present inhabitants of the city as thus defined and limited may be said to be similar to that conferred by section 549, Civil Code, on inhabitants of all cities in the state, including cities not successors of the ancient pueblos. That section provides that:

> "All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor. * * *"

The obligation enjoined by that section of the Code has been held to apply to a municipal corporation. South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490. If this right as thus defined does not create in an inhabitant a vested right to any particular quantity of water it would be impossible to determine what his proportionate share would be. In the pending quiet title action it will not, of course, be determined that the city is or is not entitled to any particular quantity of water. If the litigation terminates favorably to the plaintiff, the only right which will be established and determined to be vested in the city will be a right to the water and the use thereof prior and paramount to the defendant's rights therein, and then only to the extent necessary for the needs of the city and its inhabitants. The amount needed is necessarily uncertain and conjectural and dependent upon conditions such as rainfall and other estabished sources of supply. The subject-matter of the action is the establishment of the priority of right, and not the quantity of water to be taken.

Petitioners rely on numerous decisions of this court wherein a disqualification was declared to exist. Particular stress is laid on the cases of North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315; Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22; City of Los Angeles v. Dehy, 169 Cal. 234, 146 Pac. 662, and Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 187 Pac. 1056.

In the case of North Bloomfield G. M. Co. v. Keyser, supra, the action was brought by the city of Marysville to enjoin the mining company from prosecuting certain hydraulic work, because the effect of such work was to so fill the bed of the Yuba river as to interfere with drainage, and thus endanger the lives and health of the inhabitants of the city. The respondent judge owned land, not within the city, but equally affected by the mining operations complained of. It was held that if the relief prayed for in the complaint were granted the same judgment that would stop the flow of tailings and débris on the lands of the city could stop such flow on the lands of the respondent. The interest of the judge was held to be not uncertain or remote, but a direct and immediate interest in the result of the action.

In Meyer v. City of San Diego, supra, an action was brought by a citizen and taxpayer of the city to set aside a contract between the city and a water company involving an expenditure of $1,500,000 of the city's money, and to enjoin the issuance and sale of bonds voted to carry out the contract. It was held that the judge, who was a resident, taxpayer, and property owner within the city, was disqualified. The disqualification was placed upon the ground that he was a property owner; that a decision upholding the validity of the contract and proposed bond issue would have the direct and certain result of immedi ately affecting the value of his property. The court said:

> "The disqualification does not spring from the fact that the judge is a citizen, inhabitant, and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of forty years, as he shall decide. * * * The judgment which he renders in the case will be binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct, measurable, pecuniary interest."

In the case of City of Los Angeles v. Dehy, supra, the Natural Soda Products Company instituted an action to enjoin the city of Los Angeles from diverting, by means of its aqueduct, all of the waters of the Owens river at points on the river above the lands of the plaintiff. The respondent judge owned lands riparian to the river immediately below the intake of the Collins ditch, which was the point of diversion by the city. Under the issues tendered by the complaint the court would be called upon to determine what quantity of water the city was to divert. With reference to the interest of the trial judge the court said:

> "* * * It seems clear to us that he has a direct and immediate interest in at least one of the matters involved, an interest that is of pecuniary concern to him. * * * It is obvious that it is to the interest of respondent as a riparian owner below the intake of the Collins ditch, that the quantity of water to be awarded the city by virtue of its Collins ditch rights be as small as possible. The smaller the amount so awarded, the greater will be the amount left to flow over his land, subject to his rights as a riparian owner."

The case of Lindsay-Strathmore Irrigation District v. Superior Court, supra, involved the disqualification of a judge to try an action involving conflicting claims between two irrigation districts to underground waters in which the plaintiffs sought to enjoin the defendants from pumping operations which would have the effect of depleting those underground waters. The judge was the owner of a city lot within one of the districts, and this court held that he was disqualified because of the circumstance that the continued pumping would in time lower the water plane beneath his lot, and that his interest in the result of the litigation was therefore direct, pecuniary, and proprietary and served to disqualify him even though the extent of the interest was very small in amount.

In the case of Oakland v. Water Front Co., 118 Cal. 249, 50 Pac. 268, on which the respondents rely, the complaint alleged that the city was the owner in fee of certain lands lying in front of the city of Oakland below the line of ordinary high tide, and alleged that the company claimed some interest or estate in and to the lands adverse to the city. The action was brought to determine such adverse claim. The defendant denied the title of the respondent and alleged title in itself. The company sought to disqualify the judges of the superior court of Alameda county on the ground that they were owners of property located in said county assessed by the city for taxes. The court said:

> "The theory of the appellant is that, if the respondent should recover the land sued for, it might be so used as to produce some municipal revenue, and thus affect to some extent the rate of taxation, as a consequence of which the taxes which the said judges would have to pay on their property might to some imaginable extent be lessened, and that thus they are interested and disqualified. * * * In our opinion the word 'interested,' as used in the section of the Code relied on, embraces only an interest that is direct, proximate, substantial, and certain, and does not embrace such a remote, indirect, contingent, uncertain, and shadowy interest as that asserted as a disqualification in the case at bar."

With reference to the rule that "no man shall be a judge in his own cause" the court said:

> "But surely that means a cause which is really his own cause; not that he must be a formal party to the record, but that it must be such a cause that a judgment rendered therein would necessarily and directly and substantially affect his personal rights. We cannot conceive that the Legislature meant to declare that a mere contingent possibility that some future supposable financial condition of a municipality might in a slight degree affect a judge as a taxpayer would strip him of all his personal judicial qualities."

In the case of Higgins v. City of San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209, the plaintiffs brought the action for themselves and all taxpayers of the city against the city and the San Diego Water Company, to obtain a judgment declaring a certain lease from the water company to the city to be void and to enjoin the city and its auditor and treasurer from making any further payments to the water company thereunder. The respondent judges were resident property owners and taxpayers in the city. This court held that their interest was too remotely involved to operate as a disqualification. The court reviewed the holding in the Meyer Case, and said, at page 312 (58 Pac. 703):

> "In the Meyer Case, supra, the validity of the bonds was involved; by that judgment the judge was to place upon his property, or to refuse to do so, a certain, direct, definable, pecuniary burden, capable of mathematical ascertainment, and it was for this reason the judge was held to be disqualified. But such is not the case here, and we do not think the rule should be extended beyond the boundaries defined in the Meyer Case. The action here is on an im-

plied contract for the reasonable value of the use of the water company's plant and may be tried by a jury. We can see no difference between this case and ordinary cases involving liabilities upon contract generally where judgments may be entered against cities, counties, or the state. To hold that no taxpaying judge could sit in such cases would render the administration of justice in the courts nearly impossible."

The case of Los Angeles v. Pomeroy, 133 Cal. 529, 65 Pac. 1049, was an action by the city to condemn certain water-bearing lands, the result of which, if successful, would be to impose upon the city the burden of paying the water company a large sum of money. The fact that the judge was a resident, taxpayer, and property owner within the city was held not to disqualify him.

[1] We are satisfied, from an examination of the issues involved in the pending quiet title action and the authorities on the subject, that the so-called interest of the respondent judges in the outcome of the action is neither separate, severable, individual, nor defined; that it is not a direct pecuniary or direct property interest or one involving an individual right or privilege whereby a liability or pecuniary gain would occur on the event of the suit, and that the alleged interest is too remote and conjectural to operate as a disqualification.

[2] Petitioners further contend that, if the city had neglected or refused on proper demand to bring said action, either one of the respondent judges might have done so as an inhabitant, taxpayer, and property owner of the city, and that in such case he would in effect be in the position of sitting in judgment in his own case. We cannot assent to this view. If this contention be upheld it would operate to disqualify the local judges in all taxpayers' suits, and innumerable judgments heretofore rendered in this state, as was declared by the court in Oakland v. Oakland Water Front Co., supra, "would have to be held void, and extreme embarrassment and confusion would follow." It was said in Lindsay-Strathmore Irrigation District v. Superior Court, supra, quoting from Johnson v. German, etc., Co., 150 Cal. 336, 88 Pac. 985:

> "'Any act of the disqualified judge in violation of the provisions of the statute, is absolutely void wherever brought in question.'"

A reference to a few cases will illustrate that the test sought to be applied by petitioners cannot be approved. The case of Harter v. San Jose, 141 Cal. 659, 75 Pac. 344, was an action brought by a resident and taxpayer of the city of San Jose to enjoin the mayor and common council of that city from executing a lease to one Terry of a portion of a public park for hotel purposes. It was contended by the plaintiff that the city was without power to execute the lease.

The case of Spires v. City of Los Angeles, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465, was an action brought by a resident and taxpayer of the city against the municipal authorities to restrain them from erecting a public library on a tract of land owned by the city of Los Angeles known as Central Park, on the ground that the city, as owner of said property, had dedicated it to the use of the public for park purposes and that such purpose would not permit erection therein of a public library building.

The case of Caulfield v. Berwick, 27 Cal. App. 493, 150 Pac. 646, was an action brought by the plaintiff as a resident and taxpayer of the city of Pacific Grove to restrain the defendants, as board of trustees of the city, from placing and maintaining tennis courts, croquet grounds, and children's playgrounds upon and in a certain public park known as Caledonia Park.

The recent case of Kelly v. Town of Hayward (Cal. Sup.) 219 Pac. 749, was an action brought by a citizen and taxpayer of the town of Hayward to secure an injunction against the erection by the board of trustees of a town hall, including rooms and offices for town officers and a jail, upon the plaza in said town.

It will thus be seen that taxpayers have been permitted to prosecute actions for alleged violations of public rights wherein the plaintiff taxpayer's situation is one in the nature of a beneficiary of a public trust and he is allowed to litigate the question on behalf of himself and all taxpayers similarly situated. See Davenport v. Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377. To hold that in such cases a taxpaying judge, whose rights might be said theoretically to be affected the same as the rights of the plaintiff and all other taxpayers, would be disqualified on the ground of "interest," would be an unwarranted extension of the rule, and therefore the test sought to be applied by the petitioners cannot be approved.

[3] The petitioners allege another and different ground of disqualification on the part of one of the respondent judges, to wit, that he is the owner of water-bearing land and water rights upon another and different stream and that the city of San Diego has publicly announced through its common council and attorneys that it is the intention of the city to acquire said lands and water rights in the event that it shall be unsuccessful in said action. Petitioners allege that if said judge should decide against the city in said action the effect of the decision would be to create a market for his water-bearing lands and water rights on the other stream, and that therefore he is disqualified by his interest in this respect. Clearly this alleged interest is not a disqualifying interest, for the reason that it is not a direct interest. If anything, it is indirect and consequential.

The peremptory writ is denied.

(193 Cal. 594)

In re ROLLS' ESTATE. (L. A. 7666.)

(Supreme Court of California. May 21, 1924.)

1. Husband and wife 🔑264—Clear and satisfactory proof necessary to overrule presumption of wife's community interest and property acquired after marriage.

The presumption created by Civ. Code, § 164, as limited by sections 162, 163, of wife's community interest in property acquired after marriage, can be overcome only by clear and satisfactory proof that the property was the separate property of the husband.

2. Husband and wife 🔑264—Evidence held not to show property was acquired by deceased as his separate property.

Evidence *held* not to show property of which deceased husband died seized was acquired by him as his separate estate, as against presumption under Civ. Code, § 164, that the property belonging to his estate was community property.

3. Equity 🔑44—When and for what purpose courts of equity will interfere in administration of estates.

Courts of equity will interfere in the administration of estates where the powers of courts of probate and their modes of procedure preclude them from doing complete justice, and then only for the purpose of rendering indispensable aid to courts of probate, remitting their decrees to that court to be carried into effect.

4. Wills 🔑64—Statute gives notice to parties to conjoint or mutual will, of its revocability.

Civ. Code, § 1279, gives notice, to all parties to a contract to execute a conjoint or mutual will, that such a will is subject to revocation.

5. Wills 🔑64—Joint disposition of property under testamentary instrument revocable as will, though irrevocable in equity as a compact.

Joint dispositions of property under a testamentary instrument are revocable as a will by either testator in the usual manner so far as relates to his own disposition, though such instrument as a compact is irrevocable in equity.

6. Wills 🔑63—Decree of final distribution where conjoint will was revoked by surviving testator as to her, held proper.

Where the survivor of two testators, husband and wife, who united in a conjoint will as to community property, revoked the same as to her, after having accepted the benefits thereof and by a later will disposed of the property in a different manner, a decree of final distribution in the probate of the conjoint will as the separate will of first testator, ordering one-half the property distributed in accordance with terms of conjoint will as the will of first testator, subject to the payment of certain legacies to the persons named therein, together with certain claims and expenses of administration, and decreeing the remaining one-half of the estate to be the community interest of the surviving testator subject to her testamentary disposition, *held* proper.

7. Wills 🔑68—Equity only has jurisdiction to enforce contract between spouses not to execute will contrary to disposition made under conjoint will.

Every will being subject to revocation by the testator, the remedy to enforce a contractual obligation or right such as an agreement between husband and wife not to execute a will that would change the disposition of community property made by a conjoint will pursuant to Civ. Code, § 1279, must be found in a court of equity.

In Bank.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Proceedings to probate conjoint will as the separate will of John Rolls in which an appeal is prosecuted from an order and from final decree of distribution. Affirmed.

Bowker & Sheridan, of Ventura, for appellants.

Lawrence W. Allen and Ellis Eagan, both of Los Angeles, for respondents.

SEAWELL, J. Section 1279 of the Civil Code of this state provides:

"A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will."

On April 16, 1919, John Rolls and Leah Rolls, husband and wife, residents of the city of Los Angeles, pursuant to the foregoing provision of the Civil Code, executed a conjoint and mutual will. The husband, being then ill, was taken to a hospital, where he died on the next day, following, as intimated, a surgical operation, at the age of 72 years. He left surviving him four children, the issue of a former marriage. On November 6, 1920, after the death of her husband, Leah Rolls executed a separate will and revoked as to herself said conjoint will. By the later will she made a different disposition of the estate described and referred to in said conjoint will than that made by said conjoint will. This act left the conjoint and mutual will as the separate will of her husband. Leah Rolls died on the 11th day of April, 1921. Two daughters, the issue of herself and a former husband, survived her. No steps were taken to probate the estate of John Rolls, deceased, until after the death of his wife, to wit, April 14, 1921, on which day a petition for the probate of the conjoint will as the separate will of John Rolls, deceased, was filed. Letters testamentary were issued May 2, 1921. Upon the hearing of the petition for a decree of final distribution in the matter of his estate, the court found, over the contest of appellants, that all of the property of the said estate was the community property of John Rolls and his wife, Leah Rolls, and that the will executed by the wife on November 6, 1920, had revoked said conjoint and mutual will as to said Leah Rolls. By the decree of distribution one-half of the property was ordered distributed in accordance with the terms of said conjoint will as the will of John Rolls, subject to the payment of certain legacies to the persons named therein, together with certain claims and expenses of administration, and the remaining one-half of said estate was decreed to be the community interest of Leah Rolls, subject to her testamentary disposition.

The appeal is taken from that portion of the decree of final distribution which finds that all of the property belonging to the estate of John Rolls was community property and that the conjoint and mutual will, executed April 16, 1919, was revocable at any time thereafter by either of the makers. By these findings the strength of appellants' appeal must be tested. Two other grounds are stated, but they are necessarily included in a consideration of the other grounds and do not require special notice.

John Rolls and Leah Rolls intermarried in Newfoundland in 1889. John Rolls was then and previously thereto had been engaged in conducting a general merchandise business, first at Rose Blanche and later at Grand River, Newfoundland, and his wife Leah was, at the time of said marriage, and previously thereto had been, engaged in conducting a private boarding house at St. John. At the time of this marriage John Rolls was the father of eight children, the issue of his marriage with Emily Lucretia Rolls, who died in 1887. The eldest of these children at the time of said marriage of John Rolls and Leah was 17 years of age and the youngest was not more than 5 years of age. All of said children, except those named in the will hereafter set out, died without issue. Those named in said will survived John Rolls. Leah Rolls was then the mother of two children, Maude Agnes Prouse and Sarah Dicks, the issue of herself and a former husband. No children were born as the issue of the marriage of John Rolls and Leah Rolls. In 1891, two years after their marriage, Rolls and his wife, accompanied by all of his children, became residents of the state of California, first locating at Santa Paula, Ventura county. The children of Leah Rolls remained in Newfoundland. Both John Rolls and his wife remained residents of California for a period of 30 years, residing at Santa Paula for a period of about 20 years, later at Merced, and finally making their home at Los Angeles, where both died. The children of John Rolls seemed to have made their home with the father and stepmother. There is nothing before us to indicate that there was anything of a discordant nature that occurred during their marriage relations which disturbed domestic tranquillity.

[1, 2] Shortly after his arrival at Santa Paula in 1891, John Rolls negotiated for and purchased a tract of land situate near Santa Paula, containing about 46 acres, at the price of $7,500. This purchase seems to have been the foundation of his estate which, in 1922, was inventoried to be of the value of about $23,660. He paid down on the purchase price $4,300 and gave back a mortgage for the balance—$3,200. Of the cash payment, amounting to $4,300, his brother, William Rolls, furnished $2,500, leaving but $1,800 as furnished by John Rolls, deceased. No evidence of sufficient strength was adduced at the trial to overcome the presumption created by section 164, Civil Code, that all property acquired after marriage by either husband or wife, except such property as may be acquired in accordance with the provisions of the two preceding sections (sections 162, 163) of said Civil Code, is community property. The presumption of the wife's community interest in property acquired after marriage can be overcome only by the production of clear and satisfactory proof that the property in question was the separate property of the husband. Meyer v. Kinzer, 12 Cal. 251, 73 Am. Dec. 538; Morgan v. Lones, 78 Cal. 59, 20 Pac. 248; Dimmick v. Dimmick, 95 Cal. 326, 30 Pac. 547; Jordan v. Fay, 98 Cal. 267, 33 Pac. 95; Davis v. Green, 122 Cal. 366, 55 Pac. 9; Rowe v. Hibernia Sav. & Loan Soc., 134 Cal. 405, 66 Pac. 569. No such proof was produced at the trial below. Both spouses had been engaged in business before marriage. The evidence is very convincing to the effect that John Rolls, upon arriving in California with his wife and large family of young children, was not able to raise more than $1,800 in cash. The source from which that sum came, or the manner in which it was acquired, is unexplained. There is no presumption that John Rolls had been more thrifty or sagacious in business than his wife had been. In fact, there is substantial evidence from which the inference must be drawn that he was financially weak at the time he moved from Newfoundland to California. The proof directed to this issue is not sufficient to produce conviction in an unprejudiced mind that the property of which John Rolls died seized was acquired by him as his separate estate. The finding of the trial court as to this issue must therefore be sustained. The Estate of Nickson, 187 Cal. 603, 203 Pac. 106, cited by appellant, is not an authority out of agreement with our conclusion in the instant case. The facts of that case are altogether different from those disclosed by the record now before us. The law, as there stated, may as well be invoked in affirmance of the instant case.

This brings us to a consideration of the question whether either of two testators who have united in a conjoint and mutual will may, after the death of the other, and after having accepted the benefits conferred by said conjoint will, revoke the same as to the survivor. The portions of the will material to this issue are as follows:

> "Second. Our joint estate consists of a mortgage of seventeen thousand dollars ($17,000) on a ranch formerly owned by us at Santa Paula, California, and at present the property of J. G. Leavens. The property now occupied by us, known as 5343 Santa Monica boulevard, Los Angeles. Eighty-five hundred (8500) shares of the capital stock of the Ben Ezra Mining Company of Nevada. And whatever money, either in our separate or joint accounts, in any bank at the present time.
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> "Third. The above property, both real and personal, at the time of the death of either of us, shall be held by the survivor during his or her lifetime, the use and income thereof to be enjoyed by such survivor as he or she shall deem best, during the remainder of the life of such survivor.
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> "Fourth. At the death of the survivor, after all funeral expenses and debts have been paid, the above property shall be distributed as follows: One thousand dollars ($1,000.00) to be paid to Thomas K. Winsor, our grandson, when he shall become of age. Five hundred dollars ($500.00) shall be paid to Jessie Rolls, our daughter-in-law. The balance and residue to be divided equally among the surviving children of John Rolls.
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> "Fifth. All personal effects of either of us, at the time of the death of either of us, to be distributed among the surviving children of John Rolls."

[3] The will declares itself to be joint as well as several. The probate court has determined that the property thereby devised was community property. The joint and several will, so far as it purported to be the will of Leah Rolls, was denied probate because of the execution of the later will revoking the first. It is not claimed that Leah Rolls was wanting in testamentary capacity or that her will does not conform fully to all legal requirements. The grounds of objection are that she agreed and contracted with her husband not to execute a will that would in any wise change the disposition of the property made by the conjoint will. Whatever there may be of merit in this claim, we are satisfied that the question cannot be litigated in a probate court, but that relief in such cases must be sought in a court of equity. The remedy of a person injured by the violation of a contract to make testamentary provision for another must be pursued in a court of equity and not in a court of probate. Courts of equity will interfere in the administration of estates where the owners of the courts of probate and their modes of procedure preclude them from doing complete justice and then only for the purpose of rendering indispensable aid to courts of probate, remitting their decrees to that court to be carried into effect. Redfield on the Law of Wills, vol. 3, § 20, p. 305. The case of Monsen v. Monsen, 174 Cal. 97, 162 Pac. 90, was a suit in equity to enforce an alleged contract by which the decedent had agreed that the plaintiff should receive and inherit a child's share of the property which decedent might leave. It was there said:

> "The action is of a type familiar in this court, and illustrated by a line of decisions beginning with Owens v. McNally, 113 Cal. 444 [33 L. R. A. 369, 45 Pac. 710]. As was said in that case, there has been 'from a very early date a general concurrence among the authorities upon the proposition that a man may make a valid contract binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement specifically by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract.' Without referring to the numerous decisions in other jurisdictions, we make note of the cases in which the rule, as thus declared, has been recognized here. (McCabe v. Healy, 138 Cal. 81 [70 Pac. 1008]; Baumann v. Kusian, 164 Cal. 582 [44 L. R. A. (N. S.) 756, 129 Pac. 986]; Rogers v. Schlotterback, 167 Cal. 35 [138 Pac. 728]; Blanc v. Connor, 167 Cal. 719 [141 Pac. 217].)"

To this list may be added Osborn v. Hoyt, 181 Cal. 336, 184 Pac. 854; Estate of Ross, 180 Cal. 651, 182 Pac. 752; Estate of Ross, 185 Cal. 8, 195 Pac. 674; Roy v. Pos, 183 Cal. 359, 191 Pac. 542; Steinberger v. Young, 175 Cal. 81, 165 Pac. 432.

Schouler on Wills, Executors and Administrators (6th Ed.) vol. 1, § 718, p. 817, thus comments on the unfriendly spirit with which mutual or conjoint wills were regarded by the common law and spiritual courts of England and by our earlier American cases:

> "When these mutual or conjoint wills first came up in practice, the common-law and spiritual courts of England pronounced against them. A mutual or conjoint will, it was said, is unknown to the testamentary law of this country. These courts saw, doubtless, that to give the contract under which such wills were made a practical operation as mutually intended was beyond their own jurisdiction; and regarding the instrument simply as a will the irrevocable nature of such a writing interposed to their minds a strong ground of objection. The same unfavorable position is taken by some of our earlier American cases, on the theory that they could not be revocable and that it was a necessary characteristic of a will that it be revocable.
>
> "But the later and better opinion, in both England and the United States, treats the conjoint or mutual will as capable of probate, provided it has been executed with all the statute formalities requisite for other wills, and has not been revoked by some later instrument. The real point of decision by Sir John Nicholl in Hobson v. Blackburn (the leading case adverse to such wills), was that such an instrument, though jointly executed, could not be set up in probate against the later will of one of the parties which revokes his share of the mutual disposition; in other words it only denied the theory that joint wills were irrevocable, in the strict testamentary sense, unless by the joint or mutual concurrence of the testators. Joint dispositions of property, under a testa-

mentary instrument, are, therefore, though irrevocable in equity as a compact, revocable as a will by either testator in the usual manner so far as relates to his own disposition. But, on the other hand, if either testator dies without revoking his disposition, the will may be admitted to probate as his last and separate will on proof of due execution as in other cases, notwithstanding some one else executed and disposed of property by the same instrument. Hence a conjoint or mutual will, is not necessarily invalid, even when viewed for probate merely and in the simple sense of a testament. That the will happens to be made in conformity to some agreement, or imports on its face a mutuality of testamentary purpose, and a compact not to revoke without a joint assent, does not defeat its character as a will."

[4] Mr. Schouler further observes that the law of mutual wills is still in a somewhat confused state, regarded as a doctrine of general jurisprudence. It was doubtless because of this confused condition that the Legislature of our state relieved the subject of all uncertainty and confusion by the enactment of section 1279 of the Civil Code. We know of no other state which has a similar section. Whoever enters into a contract with another to execute a conjoint or mutual will does so with notice given by the statute itself that such a will is subject to revocation.

[5] In Woerner's American Law of Administration (3d Ed. § 37, p. 74) it is said:

"* * * The doctrine announced by Jarman in the later editions seems, therefore, incontrovertible on principle, and is sanctioned by the current of English and American decisions. It asserts the revocability of joint and mutual wills as testamentary dispositions of property, and therefore entitled to probate as such, to be consistent with their irrevocability as contracts, and therefore enforceable in equity if broken by the revocation of the testamentary disposition. Accordingly, if by two mutual wills, or in a joint will, two testators will their respective estates to the survivor of them without further testamentary disposition, the will of the one who first dies (which is the joint will) is entitled to probate, and the survivor may then dispose of the property devised at leisure, for the will has fully accomplished its office, and made the property his."

[6, 7] Joint dispositions of property under a testamentary instrument, as stated by the law text-writers and supported by many decisions, are, therefore, though irrevocable in equity as a compact, revocable as a will by either testator in the usual manner so far as relates to his own disposition. We have no doubt that the probate court made the only distribution of the property that the law would permit it to make. Every case to which we have been cited, or which has fallen under our observation in our examination of the subject, in which the relief here sought has been granted, has been a suit in equity. See, also, 40 Cyc. pp. 2116, 2117. Every will under our statute being subject to revocation by the testator, the remedy to enforce a contractual obligation or right such as here sought to be enforced must therefore be found in a court of equity. Whether or not the appellants ought to prevail in a suit in equity under the peculiar facts of the case before us, we express no opinion.

The order and decree appealed from are affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.; WASTE, J.; SHENK, J.

193 Cal. 544

PEOPLE v. SLISCOVICH. (Cr. 2613.)

(Supreme Court of California. May 9, 1924.
Rehearing Denied June 6, 1924.)

1. Criminal law 🔑438—Admission of photograph of room where killing occurred, for illustrative purposes, held proper.

Admission in evidence of photograph of kitchen where the murder occurred, taken after homicide, for illustrative purposes, *held* proper, and it was not necessary that the room be reproduced with absolute fidelity so as to include unimportant objects.

2. Homicide 🔑179 — Truth of statements causing accused's alleged insanity immaterial.

Where, in murder prosecution, the defense was insanity, alleged to have been caused by statements told accused, the test of determining insanity, was whether he was in fact told the things which he claimed caused insanity, and what effect, if any, they had upon his mind, and it was immaterial whether or not the things disclosed actually happened.

3. Criminal law 🔑1170½(1)—Erroneous admission of evidence to refute plea of insanity held not prejudicial.

In murder prosecution, where defense was insanity, claimed by accused to have been caused by statements told him, his testimony having been corroborated, that deceased had drugged a certain plasterer and another man, and robbed the latter of money, erroneous admission, for state, of testimony of two witnesses, one a plasterer and another who had lost some money, that the former had not been drugged, and that the latter had been drugged but not robbed, *held* not prejudicial as materially impairing credibility of accused and his witness, where the state did not show its two witnesses were the men accused had in mind.

4. Homicide 🔑270—Whether claimed statements were made to accused and whether they caused insanity held for jury.

Where, in a murder prosecution, defense was insanity, claimed to have been caused by statements to accused concerning deceased, it was function of the jury, in addition to determining whether claimed statements were made, to determine whether such statements, if made, would cause insanity of accused.

5. Homicide 🔑338(1)—Erroneous admission of testimony refuting plea of insanity held not prejudicial, where verdict would have been the same.

Where, in a murder prosecution, defense was insanity, claimed to have been caused by statements told accused as to what deceased had done, erroneous admission of evidence, in behalf of state, to show that things claimed to have been related to accused did not in fact occur, *held* not prejudicial, where the verdict, if jury had believed the statements had been made, would have been the same.

6. Criminal law 🔑726—Remarks of prosecuting attorney with reference to other prominent murders held legitimate reply to argument of defense.

Where in a murder prosecution, counsel for accused in argument to jury stated, "Men are walking to-day on the streets of Sacramento who shot men down in cold blood, without provocation," reply of district attorney referring to certain cold-blooded murders of two prominent persons, and that the murderers had not been apprehended, *held* legitimate reply.

7. Criminal law 🔑726—Misconduct of prosecuting attorney invited by accused could not be assigned as error requiring reversal.

Alleged misconduct of district attorney could not be assigned as error and relied upon as reversal, where such argument was provoked and invited by counsel for accused.

8. Witnesses 🔑400(1)—When party is entitled to contradict his witness stated.

To entitle a party to contradict his witness, under Code Civ. Proc. § 2049, by showing statements elsewhere contrary to his testimony, it must appear, not only that the party was surprised by testimony, but that such testimony was prejudicial.

9. Homicide 🔑179—Witness' belief that indulgence in liquor might cause insanity of accused held not competent on issue of insanity.

Where, in a murder prosecution, defense was insanity, claimed to have been caused by statements told accused night before homicide as to certain acts of deceased, belief by accused's witness that indulgence by accused in liquor, which might be served by deceased, would make accused crazy, *held* not competent, or any evidence that accused was insane at time of killing.

10. Criminal law 🔑696(5)—Motion to strike evidence held properly granted.

Where objectionable testimony in behalf of defense came in before an opportunity was presented for an objection by the district attorney, the motion to strike it, assigning as reason therefor proper grounds, *held* properly granted.

11. Criminal law 🔑414—Relevant declaration admissible as independent evidence without necessity of laying foundation.

Relevant declaration by accused was admissible, under Code Civ. Proc. § 1870, subd. 2, as an independent piece of evidence, and hence no necessity existed for laying foundation as in case of impeachment by declarations.

12. Homicide 🔑179—Testimony in rebuttal of evidence of insanity held admissible.

In a murder prosecution, in which defense was insanity, claimed to have been caused by statements told accused the night before the homicide as to certain acts of deceased, where accused, in aid of his defense, testified that on the night of the homicide "everything turned black" just before the killing, evidence in behalf of state that 10 days before the homicide accused was drunk, and threatened to kill somebody, *held* admissible, being in a measure rebuttal in character.

13. Witnesses 🔑240(2)—Leading questions ordinarily permissible only in discretion of trial court.

Leading questions are ordinarily permissible only in discretion of trial court.

14. Witnesses 🔑240(2)—Trial court's refusal to permit leading questions held not abuse of discretion.

Trial court's refusal to permit counsel for accused to propound leading questions, requested because of claimed difficulty in eliciting answers from witnesses, *held* not abuse of discretion, where the testimony sought to be adduced by such questions was subsequently elicited from the witnesses by the use of simple language.

15. Witnesses 🔑249—Trial court's refusal to permit witness to explain answers to questions held proper.

Where a witness had completely answered the questions put to him, trial court's refusal to permit him to explain his answers, on the ground that any explanation would be a volunteer statement, *held* proper.

On Petition for Rehearing.

16. Criminal law 🔑726—Misconduct of counsel for defense in any given case occurring at trial or during argument to jury does not justify similar misconduct of district attorney.

Misconduct of counsel for accused, in any given case, occurring at the trial, or during the argument to jury, as by his commenting upon facts and circumstances not appearing in evidence, will not suffice to justify similar misconduct of the district attorney.

In Bank.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Martin Sliscovich was convicted or murder, and he appeals. Affirmed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LENNON, J. The defendant in this case was charged with the crime of murder. He was found guilty of murder in the first degree, and was sentenced to suffer the penalty of death. The appeal is from the judgment. Succinctly stated, the facts of the case upon which the prosecution relied for a conviction are substantially these:

On the evening of November 22, 1922, between the hours of 7 and 8 o'clock, at the home of Marco Radman and his wife, Jennie Radman, located at 1618 O street in the city of Sacramento, Jennie Radman was shot and killed by the defendant, Martin Sliscovich. At 7 o'clock in the evening of that day a group of persons were gathered in the kitchen of Marco Radman's home. There were present Jennie Radman, John Sliscovich, Mrs. Lebedina, George Radal, Klapich, Hall, who was an automobile salesman, the defendant, Martin Sliscovich, who was a roomer at the home of Mrs. Radman, the three children of the deceased, and a little daughter of Mrs. Lebedina. Some time between 7:30 and 8 o'clock on the evening in question Radal, Klapich, Hall, and the defendant left the room. John Sliscovich, Mrs. Lebedina, Mrs. Radman, and the four children remained. The three adults were sitting in somewhat of a semicircle near the stove, and the children were back of them in the corner playing "school." Mrs. Lebedina was sitting near the stove; next to her was John Sliscovich, sitting between Mrs. Lebedina and Mrs. Radman; next to him was Mrs. Radman. Martin Sliscovich, the defendant, who had been drinking, returned to the room with his hat on his head and his hands in his overcoat pockets. The defendant, while walking slowly towards Mrs. Radman, who was facing him as he entered the room, fired three shots from an automatic pistol into her body. John Sliscovich was also at this time shot and killed by the defendant. The defendant then went upstairs to the room which he occupied threw the gun upon the bed, and then left the house. Search was immediately made for the defendant by the officers of the law, but he succeeded in eluding them, and on the day following the homicide he purchased a ticket for Los Angeles. He was arrested some several months later in San Diego. There is some evidence to the effect that the defendant, Martin Sliscovich, was in love with the deceased, and that John Sliscovich, who, so far as the record shows, was no relation to the defendant, also entertained an affection for the deceased. It will be noted that the defendant, although he killed two persons, was charged only with and tried for the murder of Jennie Radman.

It is conceded that the evidence is sufficient to support the verdict and judgment. It is contended, however, in support of the appeal, that several rulings of the trial court were so prejudicially erroneous that, coupled with the claimed misconduct of the district attorney, the appellant was denied a fair and impartial trial.

[1] It is urged that the trial court abused its discretion in admitting in evidence certain photographs. The photographs had been taken several months after the homicide by a police officer of the city of Sacramento. These photographs portrayed the kitchen where the homicide occurred, and indicated the location of certain objects which were in the room at the time of the homicide. Among these objects were the three chairs which were occupied by Mrs. Lebedina, John Sliscovich, and Mrs. Radman. The chairs, for the purpose of the photographs, had been arranged by Mrs. Lebedina, an eyewitness to the shooting, in accord with her recollection of their position on the night of the homicide. Before the taking of the photographs Mrs. Lebedina seated herself in the chair which she had occupied at the time of the homicide. As a foundation for the introduction of the photographs Mrs. Lebedina testified that they were correct representations of the condition of the room on the night of the homicide. The photographs were admitted only for the purpose of illustration in order that the jury might follow the evidence of the different witnesses more clearly. As a diagram or illustration of the premises the photographs were admissible. People v. Crandall, 125 Cal. 129, 133, 57 Pac. 785; People v. Phelan, 123 Cal. 551, 56 Pac. 424; People v. Mahatch, 148 Cal. 200, 82 Pac. 779; People v. Loper, 159 Cal. 6, 21, 112 Pac. 720, Ann. Cas. 1912B, 1193. It is true that a witness, Hall testified that there was another chair in the room, and also some boxes with which the children were playing. Mrs. Lebedina, being recalled to the stand, admitted that the last-mentioned articles had been omitted from the photographs. It does not appear, however, that these articles were essential to an illustration of the manner and the method of the killing, nor that, if they had been included in the photographs, the photographs would have been any more illuminating for the purpose of illustration. The purpose of the introduction of the photographs was to show the different doors leading into the kitchen, and also the relative position of the three persons seated in the room at the time of the shooting. This was adequately done by the photographs in question, and for illustrative purposes it was not necessary that the room should be reproduced with absolute fidelity so as to include unimportant objects. People v. Grill, 151 Cal. 592, 598, 91 Pac. 515.

[2-5] It is the contention of the appellant that certain evidence was erroneously admitted and was prejudicial to the defendant's case. The defense in the instant case was insanity. The defendant, as a witness in his own behalf, testified in effect that certain things had been told him which so affected his mind that at the time of committing the murder he was insane. In this behalf the defendant testified, and in this he was corroborated by another witness, Radal, that previous to the night of the murder he had

been told by Radal and by one Kleest that a colored plasterer was drugged with whisky by the deceased, and that another man had been drugged and robbed of some $80 by the deceased at her home. Upon this phase of the case the prosecution called to the witness stand one A. J. Miller, who, it was claimed by the prosecution, was the colored plasterer referred to by the defendant. In response to the question propounded by the trial court, "I suppose you are the plasterer, are you?" the witness replied, "No, sir." Despite this answer and appropriate objections interposed by the defense the witness was permitted to testify, in response to questions by the district attorney, that he was acquainted with Mrs. Radman the deceased; that he had done some paper hanging and tinting for her; that while he was working for her he had drunk some wine with his meals, but that he had never been poisoned. Upon cross-examination it developed that the witness Miller was not the only colored man who had been working at the Radman house, but that there had been at least one other colored man working there. Another man, by the name of Mike Rubus, who had been living with Radal, and who had, in fact, lost $80, testified that he had not been drugged at the home of the deceased and that he had not been robbed of any money there. It was not, however shown in evidence that the witness Rubus was the man referred to by the defendant as having been drugged and robbed at the home of the deceased.

The test, of course, where the defense is insanity is not whether the facts claimed to have been told to the defendant and relied upon as a cause of the defendant's claimed insanity were true or false. The real test is whether the defendant was in fact told the things which he claimed caused his insanity, and what effect, if any, they had on his mind. The material thing in weighing the defendant's defense of insanity in the instant case was the communication of certain facts to the defendant, and it was entirely immaterial whether the things disclosed to him had or had not actually happened. Obviously, the fact that the things claimed to have been related to the defendant did not actually occur is not proof that the things were not related to the defendant. People v. Hurtado, 63 Cal. 288. Although inadmissible, the evidence complained of was not so prejudicial as to require a reversal. For after all is said and done, the testimony given by the two witnesses in question had but little tendency to impair the credibility of the defendant's testimony and that of his witness in corroboration of him. The witnesses introduced to prove that the incidents claimed to have been narrated to the defendant had not actually occurred were not identified by the prosecution as the persons the defendant had in mind. Not having shown that these were the men the defendant had in mind as having been respectively drugged and robbed, it cannot be said that the prosecution succeeded by the testimony of these witnesses in materially impairing the credibility of the defendant and the defendant's witness concerning the statements that had been made to him that two persons had been poisoned and robbed at the home of the deceased. Therefore the error complained of in this particular cannot be held so prejudicial to the defendant and his case as to require a reversal.

Moreover, it must be borne in mind that it was the function of the jury, in addition to determining whether the claimed statements were or were not in fact actually made to the defendant, to determine whether such statements, if they were made, did so affect the mind of the defendant as to render him insane. A review of the evidence upon the entire case, and particularly upon this phase of the case, shows sufficiently, we think, that, when the defendant was told that the deceased had poisoned or drugged and robbed two men with whom he was acquainted, the defendant did not have in mind "poisoning" or "drugging" in the ordinary sense, but had in mind that the deceased had poisoned or drugged these men by selling them what may be termed "moonshine whisky," and that one of these men had been robbed after indulging in such liquor given him by the deceased. The statements claimed to have been made to the defendant, i. e., that a colored plasterer had been poisoned by indulgence in whisky at the home of the deceased and that another man who had indulged in such liquor was robbed of some $80 are not statements of the nature that would ordinarily affect the mind of a man to the point of rendering him insane. And the jury may well have so found even though they had further found that the statements in question had in fact been made to the defendant. We are satisfied, upon a review of the evidence adduced upon the entire case, that the jury, even if they had believed that the statements had been actually made, would nevertheless have failed to give credence to the defendant's insanity claimed to have resulted from the statements made to him, and that the verdict would have been the same regardless of the evidence complained of.

[6, 7] Complaint is made of alleged misconduct on the part of the district attorney, which, it is claimed, was so flagrant in several instances as to prejudice the defendant in the eyes of the jury. During the course of his argument, and this is complained of, the district attorney made reference to the recent murder of Dr. Arbogast, a prominent physician of the city of Sacramento, and to the murder of Harry Brown, a prominent young attorney of the same city. Both men had been shot down in cold blood, and at the

date of the trial their murderers had not been apprehended. It is argued by the defense that these crimes because of the prominence of the victims and the brutality of their killing, had created a deep impression on the public mind, and it is insisted that a reference to these crimes necessarily prejudiced the jury against the defendant. The record shows that this misconduct, if misconduct it was, was invited by the counsel for the defense, when, in his argument to the jury, he said, "Men are walking to-day on the streets of Sacramento who shot men down in cold blood, without provocation." The argument of the district attorney, made in reply to this statement, was well within the limits of legitimate reply. The argument of the district attorney having been provoked and invited by counsel for the defendant, it cannot now be assigned and relied upon as misconduct requiring a reversal of the case. People v. Bush, 68 Cal. 623, 10 Pac. 169; People v. Philbon, 138 Cal. 530, 71 Pac. 650.

With reference to other portions of the argument of the district attorney, wherein it is complained that he was guilty of misconduct in his comments upon the character and personality of a witness for the defense, we cannot say, as is contended, that the district attorney exceeded the bounds of legitimate argument.

[8] Complaint is made of the ruling of the court refusing counsel for the defense permission to cross-examine or ask leading questions of one Mike Brevl, an uncle of the defendant, who was called to the stand as a witness for the defendant. In response to interrogatories which were put to him, the witness denied that he had had certain conversations with the defendant concerning the deceased previous to the homicide. This was the sum and substance of his testimony. Counsel for the defendant thereupon announced that he was taken by surprise, in that the witness, a short time before taking the witness stand, had said that he had had certain conversations with the defendant concerning the deceased previous to the homicide. There was no error in this ruling of the trial court. While it is true that under the provisions of section 2049 of the Code of Civil Procedure a party producing a witness may show that the witness had made statements at other times inconsistent with the testimony as given upon the witness stand, still the privilege permitted by this section may not be invoked on every occasion. The purpose of the provisions of this section is to permit a party who has in good faith, produced a witness upon the stand in the belief that the witness will give certain testimony in support of the party calling him to show that prior to being called to the witness stand the witness made statements which, if admitted in evidence, would have been favorable to the party calling the witness. But to entitle a party to contradict his own witness by showing statements elsewhere made, and contrary to those made upon the witness stand, it must appear not only that the party was surprised by the testimony of the witness, but that such testimony was prejudicial to the case of the party calling the witness. Therefore, the mere failure of a witness to testify favorably for the party calling him, unaccompanied by any testimony which would tend to the prejudice of the case of the party calling the witness, will not entitle such party to show that the witness has elsewhere made contrary statements concerning the facts sought to be elicited from him. The witness in the instant case not having testified to anything that was prejudicial to the defendant and the defendant's case, the defendant was not privileged to invoke the provisions of the code section last above referred to. Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 216, 93 Pac. 1049; People v. Creeks, 141 Cal. 529, 532, 75 Pac. 101; People v. Cook, 148 Cal. 334, 345, 83 Pac. 43; People v. Spencer, 58 Cal. App. 197, 225, 208 Pac. 380.

[9, 10] The motion to strike out the testimony of the witness Radal to the effect that he had told the defendant that it was foolish for the defendant to go to the home of the deceased, and there spend his money, "and make him crazy with that liquor," was properly granted. The testimony of this witness evidently came in before an opportunity was presented for an objection by the district attorney, and the motion to strike out was granted upon the ground that the testimony in question had no tendency to prove any of the issues of the case, and tended to do no more than to show that the deceased was dealing in the illicit sale of liquor. Surely the belief of the witness that indulgence by the defendant in liquor that might be served by the deceased would make the defendant crazy was not competent or any evidence of the fact that the defendant was insane at the time of the killing. It may be noted that, even if such testimony were admissible, evidence to the same effect and standing uncontradicted in the record was given by the defendant in his own behalf.

[11, 12] The district attorney was permitted, over the objections of counsel for the defendant, to elicit from a witness who was called in rebuttal upon behalf of the people evidence to the effect that the defendant about ten days before the commission of the homicide was drunk, and said he was "going to kill somebody." It is not readily and clearly ascertainable from the record before us just what was the real purpose of the district attorney in offering this particular piece of evidence. But the sum and substance of the discussion by way of argument of the objection interposed by counsel for the de-

fense would seem to indicate that the district attorney insisted that the testimony should be admitted by way of impeachment of the defendant and the defendant's witness Radal, and also that the testimony was admissible by way of rebuttal of defendant's testimony. It was insisted in the court below, and it is now insisted here by the defense, that no foundation was laid for impeachment purposes of either the defendant or the witness Radal, and that the testimony referred to was not in fact rebuttal. Relative to the point that no foundation had been laid for impeachment purposes in so far as the testimony of the defendant was concerned, it may be said that the testimony in question embodied a relevant declaration made by the defendant, and was therefore pursuant to the provisions of section 1870, subdivision 2 of the Code of Civil Procedure, admissible as an independent piece of evidence, and therefore there was no need for the laying of a foundation. In so far as the testimony of Radal is concerned we cannot see how the particular evidence in question had any tendency toward the impeachment of that witness. But, even though this be so, still the testimony in question was in a measure rebuttal in character, and therefore admissible. The defendant had testified in support of his defense of insanity that on the night of the homicide "everything turn black" just before the killing. The obvious purpose and tendency of the testimony complained of was to show that the defendant for at least ten days prior to the homicide was bent on murder.

[13, 14] A request was made by counsel for the defendant that an interpreter be appointed to translate the testimony of the defendant and the testimony of the defendant's witness Radal, upon the ground that they did not sufficiently understand the English language. The trial court, however, concluded, and so far as we are able to ascertain from the record, correctly, and there was no need for an interpreter. No complaint is made of the refusal of the trial court to appoint an interpreter. But, in view of the claimed difficulty in eliciting answers from the witnesses, it is insisted that the trial court erred in refusing to permit counsel for the defendant to propound leading questions. Leading questions are ordinarily permissible only in the discretion of the trial court. The record shows that, even though leading questions were not permitted, the testimony sought to be adduced by those questions was subsequently elicited from the witnesses by the use of simple language. Obviously, therefore, there was no abuse of the discretion of the trial court.

[15] We cannot take seriously the complaint that the trial court refused to permit the defendant, when testifying as a witness, to explain his answers. In the instances complained of the witness had fully and completely answered the questions put to him. The trial court rightfully refused to permit him to explain, upon the ground that he had already fully and completely answered the questions and upon the theory that any explanation would be no more nor less than a volunteer statement.

It is argued that the trial court by its frequent interruptions, of its own motion, of the counsel and of the witnesses for the defense, seriously impaired and impeached the defendant's case. After a perusal of the cold record before us, we cannot say that there is any merit in this contention.

We have considered all of the points made concerning the rulings of the trial court where the points have been argued in detail in the briefs and which we consider worthy of discussion. Complaint, however, is made that the trial court in numerous other instances erroneously permitted the prosecution to introduce immaterial matters for the purpose of attacking the credibility of the witnesses for the defense. No argument is made in support of this contention, other than a general reference to the transcript, and in one instance no reference is made to the transcript at all. We have nevertheless made an examination of the record, and do not find the points last referred to merit serious discussion.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; RICHARDS, J.

On Petition for Rehearing.

PER CURIAM. **[16]** The petition for a rehearing is denied. We deem it necessary, however, to say that the original opinion is not to be construed as holding that, where counsel for the defendant in his argument to the jury, departing from the record, comments upon facts and circumstances not appearing in evidence in the case, the district attorney will be justified in his reply argument in referring to matters and things which have no substantial basis in the evidence adduced upon the entire case. Manifestly, such misconduct of counsel for the defendant, in any given case, occurring at the trial, or during the argument to the jury, will not suffice to justify similar misconduct of the district attorney.

The argument complained of in the instant case was, in effect, a statement, prompted by a suggestion from counsel for the defendant, that crime, as a result of the lax administration of justice, was on the increase, and that juries should do their duty. Such an argument, it seems, would have been permissible, even if it had not been prompted by counsel for the defendant. People v. Molina, 126 Cal. 505, 508, 59 Pac. 34; People v. Burke, 18 Cal. App. 92, 102, 122 Pac. 435.

(193 Cal. 575)

EISENBERG et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11111.)

(Supreme Court of California. May 17, 1924.)

1. Courts 🔑487(1)—Supreme Court's order denying transfer of case approves decision, but not necessarily all reasoning.

Supreme Court's order, denying petition for transfer of a case to itself after decision in the district court of appeal, is approval of that court's conclusion but not necessarily all its reasoning.

2. Appeal and error 🔑436—Perfection of appeal divests superior court of jurisdiction only of matters embraced in judgment or order appealed from.

Under Code Civ. Proc. § 946, perfection of an appeal divests superior court of jurisdiction of all matters embraced in the judgment or order appealed from, but not upon any other matter embraced in the action.

3. Appeal and error 🔑447—Order for injunction pending appeal held not an "order upon or embraced within order appealed from," within statute divesting court's jurisdiction after perfection of appeal.

An order for injunction, pending appeal from a judgment, or order denying injunction, is not an order upon or embraced in the order appealed from, within Code Civ. Proc. § 946, divesting the trial court of jurisdiction in such cases when appeal is perfected.

4. Appeal and error 🔑447—Right to dissolve injunction pending appeal, limited to one granted without notice.

The right to dissolve or modify an injunction, pending appeal, is limited to cases where it was granted without notice to other party.

5. Judgment 🔑294, 336—Motions 🔑58, 59(1)—Trial court may modify or vacate judgment or order only in statutory manner.

A judgment or order, once regularly entered, can be modified or vacated by the trial court only in manner prescribed by statute.

6. Appeal and error 🔑447—Judge granting without notice injunction pending appeal could vacate it.

Under Code Civ. Proc. §§ 532, 937, an order granting temporary injunction pending appeal, without notice could be vacated or modified.

7. Courts 🔑107—Modification of Supreme Court opinion by striking words indicated merely that matter stricken was not involved.

Supreme Court's modification of its opinion by striking out statement that if injunction bond was insufficient, application should be made to the trial court for relief did not determine that no power remained in the trial court to grant such relief, but merely that the question was not involved.

8. Appeal and error 🔑447—When petitioner relied on restraining order, court could not annul it pending appeal.

The court, on principles analogous to estoppel, cannot annul or modify a restraining order pending appeal, where petitioner filed a bond, and incurred expenses and liability in reliance on it.

In Bank.

Application for writ of review by Ernest Eisenberg and another, directed to the Superior Court of the City and County of San Francisco and Frank J. Murasky, Judge thereof, to annul order vacating restraining order. Writ denied.

Gavin McNab and Nat Schmulowitz, both of San Francisco, for petitioners.

Heller, Ehrman, White & McAuliffe, of San Francisco, for respondents.

PER CURIAM. This is an application for a writ of review to annul an order of the respondent court vacating a restraining order theretofore granted by it for the purpose of preserving the status quo pending an appeal. The petitioners herein had commenced an action in the respondent court for an injunction, and upon the filing of their complaint made an application for an injunction pendente lite. An order to show cause was issued thereon, and, after a full hearing thereof, the court denied petitioners' application for an injunction pendente lite, and discharged the order to show cause. Desiring to appeal from the order denying their application for a temporary injunction, petitioners then applied to the trial judge for a restraining order to preserve the status quo pending such appeal. This application was made several days after the order denying the temporary injunction, and was made ex parte without any notice to the defendants in said action. The trial judge granted the application, and made an order for the issuance of a restraining order upon the filing and approval of a bond in the sum of $1,000. The bond was duly filed and approved, the restraining order pending the appeal issued, and thereupon petitioners perfected their appeal. Thereafter the defendants duly served and filed their notice of motion in the alternative, either to vacate the order for an injunction pending the appeal or that the bond upon such injunction be increased from $1,000 to $90,000. Upon the hearing thereof these petitioners objected to the jurisdiction of that court to hear and determine the motion on the ground that it was without jurisdiction so to do. The matter was argued and submitted, and the respondent court thereafter made an order vacating the injunction pending the appeal which had theretofore been issued. This last is the order which petitioners are here seeking to annul.

[1-3] Respondent takes the position that the trial court, having made its order denying the application for an injunction pendente lite, had no power to thereafter grant such an injunction to be effective pending the

appeal; that its order granting the same was void, and that its subsequent order vacating the same (which is the one here under attack) was therefore properly made. In the case of City of Pasadena v. Superior Court, 157 Cal. 781, 109 Pac. 620, the main question before this court was whether a superior court in an action brought to obtain an injunction may, in its judgment denying the right to such injunction, provide, nevertheless, for continuing in force pending a final determination of the action (on appeal) an injunction preliminarily issued. After an exhaustive consideration of the authorities, this court answered that question in the affirmative, resting its conclusion upon the constitutional grant vesting the superior court with "original jurisdiction in all cases in equity," and holding that the power to maintain the status quo by continuing an injunction pending an appeal is an inherent part of such equity jurisdiction. In Pierce v. City of Los Angeles, 159 Cal. 516, 114 Pac. 818, this court held that, after judgment has been rendered in favor of defendants, denying an injunction, and prior to an appeal being taken therefrom, the superior court has jurisdiction, under the Code of Civil Procedure, § 681, in the exercise of a wise discretion, and to preserve the status quo, to make an order restraining the defendants from performing the acts complained of pending the determination of a motion for new trial. In Mulvey v. Superior Court, 22 Cal. App. 514, 135 Pac. 53, a preliminary restraining order was issued and served. Thereafter, upon a hearing thereon, the court announced its decision sustaining a demurrer to the complaint without leave to amend, dissolving the restraining order and directing a judgment of dismissal. Prior to the entry thereof the plaintiffs moved, upon notice to the defendants, for an order reviving the original restraining order, for the purpose of preserving the status quo pending the appeal, which motion, after a hearing thereon, was granted. Thereupon the appeal was perfected to this court, and thereafter, the superior court being about to grant a motion of defendants for a modification of such injunctional order, the District Court of Appeal issued its writ of prohibition restraining it from so doing. The District Court apparently rested its decision upon the conclusion that the order for an injunction pending the appeal was a matter embraced within the judgment, and that therefore when the appeal was perfected the effect thereof was to deprive the trial court of the power to proceed further. The order of this court denying a petition for a transfer to this court after said decision of the District Court of Appeal may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in that opinion. It is clear that the perfection of an appeal divests the superior court of jurisdiction as to all matters embraced in the judgment or order appealed from. 2 Cal. Jur. 415, and cases cited. It is equally clear that the perfection of an appeal does not deprive the lower court of its jurisdiction to proceed upon any other matter embraced in the action, unless it is a proceeding "upon the judgment or order appealed from, or upon the matters embraced therein." Code Civ. Proc. § 946; 2 Cal. Jur. 418 et seq. An order for an injunction to preserve the status quo pending an appeal from a judgment or order denying an injunction is not an order upon or embraced in the order appealed from. While it is in a sense appurtenant to and concurrent therewith, it is nevertheless separate and separable therefrom. It may perhaps be said to be collateral to the order appealed from, but it is doubtful that it may be regarded as even incidental thereto, as costs may be said to be incidental to a judgment. The real reason why the trial court had no jurisdiction to vacate or modify the order which it had theretofore made for the issuance of an injunction pending the appeal is summed up in the following language in the opinion in Holtum v. Greif, 144 Cal. 525, 78 Pac. 12:

> "The decision of the trial court having been once made *after regular submission of the motion* its power is exhausted—it is *functus officio*." (Italics added.)

[4] In the case of United Railroads v. Superior Court, 170 Cal. 755, 151 Pac. 129, Ann. Cas. 1916E, 199, the obverse of this question was presented. There the trial court, after a full hearing upon notice of the application for an injunction pendente lite, had granted the same. Thereupon the defendants, desiring to appeal from that order, made application to the trial court for an order suspending and staying the operation of the preliminary injunction pending the appeal therefrom. The trial judge having announced his intention of granting that application, this court issued its writ of prohibition restraining him from so doing. The court in its opinion reviewed a long line of decisions of the courts of this state showing that for a period of more than 50 years the rule has been firmly established that the superior court may not revoke, modify, or otherwise disturb its judgments and orders regularly made, except in the manner prescribed by statute. It showed the specific application of this rule to provisional injunctions, resulting uniformly in the holding that the right to move for dissolution or modification of such an injunction is limited to cases where the injunction was granted without notice. Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544, 551; Hicks v. Michael, 15 Cal. 107, 117; Natoma Water & Mining Co. v. Parker, 16 Cal. 83; Curtis v. Sutter, 15 Cal. 265; Ots v. Superior Court, 10 Cal. App. 168, 101 Pac. 431;

2 Hayne on New Trial and Appeal, § 191. The conclusion thus arrived at is summed up in the quotation above made from Holtum v. Greif, supra, in the statement that "the decision of the trial court having been once made after regular submission of the motion its power is exhausted—it is *functus officio*." The court there recognized the rule, that, when the trial court has denied the provisional injunction or permanent injunction prayed for, it may nevertheless, in contemplation of an appeal, grant such injunction pending the appeal in order to preserve the subject of the litigation until the final determination thereof, so that such determination when made shall not be rendered nugatory. It pointed out that this rule could not be invoked to support the modification of the provisional injunction there proposed, for the reason that its effect would be precisely the opposite. Instead of preserving the status quo, it would lead to the destruction thereof. The provisions of sections 525 to 533 of the Code of Civil Procedure were there considered and held to be reasonable and valid regulations lawfully imposed by the Legislature upon the mode and manner of the exercise by the courts of their constitutional jurisdiction in equity.

Respondent insists that the rule of the Pasadena and Pierce Cases, supra, is applicable only to a case wherein the action has proceeded in the trial court to judgment, and an appeal is to be taken therefrom, and that it is not applicable to a case such as the one at bar wherein the appeal is to be taken from an order denying the provisional injunction prior to trial and judgment. This question has not been directly decided in this state so far as we are advised. The case of American Trading Co. v. Superior Court (Cal. Sup.) 222 Pac. 142, presented a case which was similar in this respect to the case at bar. There, also, the trial court denied an application for an injunction pendente lite, and granted a restraining order pending the appeal therefrom, but the question here raised was not there decided, for the reason that the parties thereto expressly conceded the validity of the restraining order so made. We do not find it necessary to decide that question here. We shall assume for the purposes hereof that the restraining order granted herein pending the appeal from the order denying the provisional injunction was valid when made.

[5-7] As was pointed out above, the rule is well settled that a judgment or order once regularly entered can be modified or vacated by the court which entered it only in the manner prescribed by statute, and it remains to consider whether or not the statute prescribes any method by which the restraining order pending appeal herein might be vacated or modified by the court which granted it. The order here under consideration was made ex parte and without notice to the adverse party. Section 937, Code of Civil Procedure, provides that "an order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made." If there be any room for doubt as to the applicability of this general rule to provisional injunctions which have been granted ex parte, we turn to section 532, Code of Civil Procedure, which provides that: "If an injunction is granted without notice to the person enjoined, he may apply upon reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the same," and prescribes the method to be followed in making such application, which was followed herein. This provision plainly reserved to the respondent court the jurisdiction and power to vacate or modify the restraining order granted by it without notice to the defendants. Petitioners do not seriously contend that the perfection of the appeal herein had the effect of divesting that court of such jurisdiction, but they do contend that the American Trading Company Case, supra, is authority directly to the contrary of the conclusion here reached. In that case, as in the one at bar, plaintiff appealed from an order denying the temporary injunction and secured a restraining order pending the appeal. No separate or express notice was given to the defendants in that case of the application for the restraining order. It was urged before this court upon a review thereof that the restraining order was void, because no notice of the application therefor was given to the defendants. It appeared from the record therein that the restraining order pending appeal was granted on the same day that the court directed the entry of an order denying the application for an injunction pendente lite and before the entry thereof. The court in its opinion did not expressly refer to this fact, but said that the jurisdiction of the trial court to make the restraining order could be sustained only "on the theory that the order granting the injunction pending the appeal is a portion of the order denying the injunction pendente lite," and "is necessarily based upon the notice and hearing for the injunction pendente lite, consequently no other notice is necessary." The question whether the trial court, having granted the restraining order, retained any jurisdiction to vacate or modify the same, was not there involved. The opinion as originally filed therein contained the statement that, "if in the judgment of the petitioner the bond given by the appellant was insufficient to protect it, application should be made to the trial court for relief in the premises." Thereafter the opinion was mod-

ified by striking this sentence therefrom. This modification is not to be regarded as a determination or indication on the part of this court that no power remained in the trial court to grant such relief, but merely that this question was not involved in that case.

[8] Petitioners contend that, inasmuch as they have, in reliance upon the order of the respondent court, filed a bond herein and thus incurred expense and subjected themselves to liability, and thus procured the restraining order here in question, the respondent court should be held to be precluded from either vacating or modifying the restraining order, upon principles analogous to estoppel. They cite as authority for this contention the cases of Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 227, 22 Pac. 594, 15 Am. St. Rep. 50; Hubbard v. University Bank, 120 Cal. 632, 52 Pac. 1070, and Jameson v. Chanslor-Canfield, etc., Oil Co., 173 Cal. 612, 160 Pac. 1066. These cases do not so hold, as we read them. They hold that merely when a stay bond upon appeal has been filed pursuant to the requirements of sections 941 to 946, inclusive, of the Code of Civil Procedure, and in full compliance with the requirements thereof, the appeal is perfected, and all further proceedings in the court below are thereby stayed, and it has no power thereafter to require a bond to be given in a larger amount, and that this is so, even though the amount of the bond so given was fixed by the court upon an ex parte application. This conclusion was arrived at, however, not by an application of the rules of estoppel or of principles analogous thereto, but upon consideration of the fact that the Code sections above cited grant to an appellant a clear right to procure a stay of proceedings by a compliance with the requirements thereof. When an appellant has so complied with these requirements, further proceedings in the court below are stayed, not by virtue of the action of the trial court in fixing the amount of the bond, but ipso facto by virtue of the provisions of the statute. In the Lee Chuck Case the appellant had no such absolute right to a stay, unless the trial court so directed, and the court there held that, when such direction was given, the Code sections last cited at once became operative, and upon compliance with the requirements thereof further proceedings upon the judgment were stayed thereby precisely as in other cases, under the express terms of section 946. We are of the opinion that the respondent court in vacating the restraining order here in question was acting in the exercise of the jurisdiction so to do reserved in it by the provisions of sections 937 and 532 of the Code of Civil Procedure. It is therefore ordered that the petition for a writ of review be denied, and the order to show cause discharged.

(66 Cal. App. 456)

MAHONY v. HAINES. (Civ. 4507.)

(District Court of Appeal, First District, Division 1, California. April 8, 1924. Rehearing Denied May 8, 1924. Hearing Denied by Supreme Court June 5, 1924.)

1. Attorney and client 🔑166(4) — Showing necessary for attorney to recover on contract for conducting action, stated.

For attorney to recover on contract for services in conduct of action he must show termination of litigation, or excuse for nonperformance of contract.

2. Fraud 🔑31—Contract induced by fraud may be affirmed and damages recovered.

For fraud of broker instructed to purchase stock at market price, and reporting purchase at price discovered by principal, after part payment, to be above market price, principal need not rescind and sue for money paid, but can affirm contract, as he does by demanding stock and return of overcharge, and likewise by subsequent payment, to prevent threatened resale, of balance claimed by broker to be due him, and then sue for damages for fraud; affirmance of contract not being affirmance or waiver of fraud.

3. Appeal and error 🔑1172(3)—Reversal in toto necessary where recoveries not segregated and one of two causes not maintainable.

Judgment for plaintiff in action on two quantum meruit claims, one not maintainable, must be reversed in toto, recoveries not being segregated, and record furnishing no means for division.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by W. H. Mahony against Byron W. Haines. Judgment for plaintiff, and defendant appeals. Reversed.

Charles F. O'Callaghan and Fred C. Peterson, both of San Francisco, for appellant.
W. H. Mahony, of Larkspur, pro se.

TYLER, P. J. This action was one brought by plaintiff, an attorney and counselor at law, to recover the sum of $650, alleged to be the reasonable value of certain legal services rendered by him to defendant. Judgment went in his favor for the sum of $250. Motion for a new trial was made and denied, and defendant appeals.

It is claimed that the evidence is insufficient as a matter of law to warrant the finding of the trial court that plaintiff rendered and performed for and on behalf of the defendant professional services of the value for which judgment was given.

The facts leading up to the controversy may be briefly stated as follows: Defendant had purchased through a brokerage firm known as Andrews & Co., of which one H. B. Blackstone was manager, certain shares of stock in a corporation. Defendant was induced to make the purchase by Blackstone upon representations that the stock was a safe and profitable investment. Blackstone was instructed to purchase fifty shares of the stock at the market price. The stock was not listed, but was dealt in as a curb stock on the New York Curb Exchange. Defendant was ignorant of its value, and he relied entirely on the statements of Blackstone with reference thereto. Blackstone reported to defendant that he had made the purchase and had paid $100 per share for the stock. Defendant from time to time made payments upon the purchase price, aggregating $4,000, and he was credited with the further sum of $200, representing dividends upon said shares of stock received by said brokerage firm, leaving a balance due of the sum of $800. Defendant subsequently learned that the stock at the time of its purchase was quoted at about $51 a share, and could have been bought around that figure. Upon ascertaining this fact he consulted plaintiff as to his rights in the matter, and was advised by him that the amount of the overcharge could be recovered. Plaintiff and defendant thereupon entered into a contract, by the terms of which defendant agreed to pay plaintiff 25 per cent. of all sums he might recover from said brokers. Blackstone had been demanding immediate payment of the balance due upon the transaction, and had threatened defendant that unless immediate payment was made the stock would be sold. According to the testimony of defendant, he had informed plaintiff that if he was compelled to make the payment in order to prevent a sale he would do so, as he wanted the stock. Plaintiff advised defendant that if he made the payment he would be precluded from recovering the amount of the overcharge. The brokerage firm continued to request payment of said alleged balance, and plaintiff thereupon, in a formal communication to Andrews & Co., informed them that an overcharge had been made, and demanded that the stock be delivered to defendant and the excess payment returned. The firm refused to comply with this demand. Plaintiff then interviewed its members, and from such interview and certain investigations on his part concluded that his client had been swindled, and he reported the matter to the district attorney of San Francisco. He also filed charges with the corporation commissioner with the object in view of procuring a revocation of the brokerage licenses of Andrews & Co. and Blackstone, in the hope that such action would bring about restitution of the overcharge. Notwithstanding these proceedings Blackstone persisted in his demand upon defendant that he pay the balance claimed to be due, accompanied by the threat that in default of payment the stock would be sold in satisfaction of the claim, and, in order to protect his stock, defendant, contrary to the advice of plaintiff, complied with the demand, and the stock was delivered to him. Plaintiff thereupon advised defendant that he had by this act ratified the transaction and destroyed his right to maintain an action to recover the money out of which he had been defrauded, and that he could therefore no longer conduct defendant's case. Thereafter this action was brought by him to recover the reasonable value of the services he had rendered.

It was his claim below, and is here, that, where an attorney contracts with a client to perform services upon a contingent basis, and his client settles the matter in controversy without the attorney's knowledge or consent, thereby preventing the attorney from fully performing the services agreed, the attorney may recover upon a quantum meruit the reasonable value of services actually performed. The appellant, while not disputing the accuracy of this statement of law, contends that in the case at bar the payment by him of the $800 to Andrews & Co. for the purpose of protecting his stock from the threatened sale did not constitute prevention of performance nor furnish any adequate excuse for plaintiff's failure to fully carry out his contract.

[1, 2] In order for an attorney to recover upon a contract for services in the conduct of an action it is necessary for him to show an actual termination of the litigation in which he is employed unless he can show an excuse for lack of performance of his contract. In seeking relief for the fraud practiced upon his client plaintiff could on his behalf have pursued different remedies. He could have rescinded the contract and sued to recover the money paid thereon, or he could have insisted upon performance of the contract and brought an action in deceit for damages. It is clearly shown by the evidence that the plaintiff himself was not in favor of rescinding the contract, knowing that his client wanted the stock; and, indeed, the transaction was ratified by the formal notice to the brokerage firm above mentioned, demanding the stock and the return of the overcharge, as well as by the subsequent payment by defendant of the balance demanded, after full knowledge of the fraud perpetrated upon him.

But these acts did not constitute a waiver of the defendant's right to recover damages for the fraud based upon the fact that the benefit he received was not that which under the representations of the broker he was entitled to receive. The affirmance of the contract was not an affirmance or waiver of the fraud. Hines v. Brode, 168 Cal. 507, 143 Pac. 729. Defendant's act amounted to no more than consent to be bound by the agreement, and was not a release or waiver of his claim for damages arising from the fraud practiced upon him. True, there was no legal obligation on defendant's part to complete the excessive payment, as he could in an action for damages have paid the money into court and restrained the brokers from selling his stock until the question of fraud should be determined; but his failure to exercise this right in no manner prevented him from pursuing his remedy for restitution of the overcharge. This being so, defendant's act in making the payment did not, as claimed, prevent any possible recovery against the brokerage firm or entitle plaintiff to abandon the performance of his contract. He was not, therefore, entitled to recover compensation from the defendant for his uncompleted services.

[3] During the time that plaintiff was engaged in taking steps for the protection of the defendant's interests in the stock purchase above referred to he was consulted by defendant in regard to another stock transaction with the same brokerage firm. The plaintiff made some investigation into the matter, and furnished to the defendant his opinion as to the latter's legal rights with reference thereto, and in the present suit compensation is also sought for the service thus rendered, and which, it is apparent from the record, was not covered by the existing agreement between the parties. Testimony was introduced as to the value of these services, and the judgment given in plaintiff's favor includes some allowance for them, which, however, is not segregated from the allowance for the remainder of plaintiff's services, and the record furnishes no means for dividing the amount of the judgment between the two matters in which the plaintiff was employed.

It follows from what we have said that the appellant's contention that the judgment is not supported by the evidence in the case must be sustained, with the consequent reversal of the judgment.

Judgment reversed.

We concur: KNIGHT, J.; ST. SURE, J.

66 Cal. App. 475

PEOPLE v. MULLINS. (Cr. 1167.)

(District Court of Appeal, First District, Division 2, California. April 9, 1924.)

1. Highways 🔑186—Evidence held to sustain conviction for driving automobile while intoxicated.

Evidence *held* to sustain conviction for driving automobile while intoxicated.

2. Criminal law 🔑465—Testimony of qualified witnesses that automobile driver intoxicated held admissible.

In prosecution for driving automobile while intoxicated, witnesses who stated symptoms on which they based their opinions as to whether defendant was intoxicated were properly permitted to give opinions.

3. Criminal law 🔑811(2)—Refusal of instruction as to effect of particular circumstance as indication of intoxication held not error.

In prosecution for driving automobile while intoxicated, in which none of the witnesses who testified to intoxication based testimony on any one circumstance, refusal to instruct as to effect of particular circumstance as indication of intoxication *held* proper.

4. Criminal law 🔑814(10)—Refusal of instruction defining "intoxication" in certain way held proper, in view of testimony.

In prosecution for driving automobile while intoxicated, in which evidence showed that defendant, when intoxicated, became dull, sleepy, and sodden, refusal of instruction finding "intoxication" as a high excitement of mind and elation arising sometimes to frenzy and delerium *held* proper.

5. Criminal law 🔑304(3)—Matter of common knowledge that intoxication makes some persons dull, sleepy, and sodden.

In prosecution for driving automobile while intoxicated, *held*, that it is a matter of common knowledge that some persons react to influence of intoxicating liquors by becoming dull, rather than by becoming frenzied.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

James T. Mullins was convicted of driving automobile while intoxicated, and he appeals. Affirmed.

J. O. Traber, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment entered upon a verdict of a jury finding him guilty of driving an automobile upon the public highway while under the influence of intoxicating liquor.

[1] Appellant contends that the verdict is unsupported by the evidence. We have read the entire transcript of the evidence, and it contains ample testimony from which the jury was justified in finding the defendant guilty as charged. The fact that the defendant and his nephew testified that defendant was not intoxicated merely raised a conflict in the evidence, as did also the fact, urged by the appellant, that the symptoms shown by the defendant at the time of his arrest and narrated by the witnesses are compatible with the statement of defendant that he was merely tired and sleepy on the afternoon when he was arrested, and was leaning out over the side of his automobile because it was his habit to do so when driving rather than to look through the windshield; that he was following this habit when he was arrested because the windshield was dirty, although it could be seen through. The justice of the peace before whom the defendant was brought immediately after his arrest, the constable and traffic officer who made the arrest, all testified that they had seen many

intoxicated persons, and recognized that condition when they saw it, and that the defendant was intoxicated at the time of his arrest, and they based their opinions upon the facts which they enumerated, i. e., that defendant was swerving in his automobile from one side of the road to the other, frequently going off the roadway into the dirt on his right-hand side, and driving automobiles coming from the opposite direction off of the highway into the dirt on his left-hand side; that he was hanging out over the side of the automobile, and that his entire appearance indicated intoxication, and his breath was redolent of alcoholic liquor when he was arrested. Defendant admitted drinking some wine on the day of his arrest. There is no merit, therefore, in the contention that the evidence does not warrant the verdict.

[2] Appellant objects to the action of the trial court in overruling his objection to the testimony of the arresting officers and of the justice of the peace relative to the condition of defendant at the time of his arrest. This objection was made upon the ground that these witnesses were not qualified to give opinions on the subject. Each of these witnesses stated the symptoms upon which he based his opinion, and we think the objections were properly overruled. "Whether a person was intoxicated is one of the most familiar subjects of nonexpert opinion evidence." 11 R. C. L. 608, § 31.

[3] It is also urged that error was committed by the court in refusing to give three instructions offered by defendant. One of these instructions was to the effect that weariness was not of itself an indication of intoxication, but was only a circumstance, which, taken with other circumstances, might lead to the conclusion that the person was intoxicated, and another instruction was to the effect that the odor of intoxicating liquor upon the breath of a person would not, of itself, indicate intoxication, but was only a circumstance which, taken with other circumstances, might lead to the conclusion that the person was intoxicated. A failure to give these instructions does not warrant a reversal of the judgment. None of the witnesses who testified to the intoxication of the defendant based his testimony upon any one circumstance alone, but upon a combination of circumstances, and it was these opinions which were before the jury upon the question of intoxication. If the jury believed the testimony of the witnesses for the prosecution—and they must have done so to have brought in a verdict against the defendant—they could not have believed that either of the circumstances mentioned in the requested instructions stood alone and by itself as evidence against the defendant.

[4, 5] The only other instruction complained of is the instruction to the effect that "intoxication is a high excitement of mind and elation or condition of mind that arises to enthusiasm sometimes to frenzy and sometimes to delirium, and that intoxicating liquors are such liquors which taken create this high excitement of mind, enthusiasm or elation, frenzy or delirium, and, unless you find from the testimony that the mind of the defendant at the time he is charged with committing the offense was in a high state of excitement, or was elated or had arisen to enthusiasm or frenzy, that the defendant was not guilty of being under the influence of intoxicating liquor." We think the instruction was properly refused. It is a matter of common knowledge that some persons react to the influence of intoxicating liquors by becoming dull, sleepy, and sodden rather than delirious or frenzied, and from the testimony in the record, the defendant was of this type.

The judgment and orders appealed from are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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66 Cal. App. 398

ST. CLAIR v. JOOS. (Civ. 4691.)

(District Court of Appeal, Second District, Division 2, California. March 28, 1924. Hearing Denied by Supreme Court May 26, 1924.)

1. Courts ⟹114—Court not authorized to enter stay of execution nunc pro tunc except to correct record.

In entering nunc pro tunc order staying proceedings pending appeal, the court is not authorized to do more than to make its records correspond with the actual facts, and cannot under the form of an amendment make a record or judgment that was never in fact made.

2. Forcible entry and detainer ⟹45—Stay of execution held not to result from acts of judges other than trial judge.

Under Code Civ. Proc. § 1176, providing an appeal taken by defendant in unlawful detainer suit shall not stay proceedings on judgment unless the trial judge so directs, a stay of execution *held* not to result from the acts of various other judges taking part in subsequent proceedings for approval of undertaking.

3. Forcible entry and detainer ⟹45—Mere filing of undertaking held not to effectuate stay of execution.

The mere filing of an undertaking would not effectuate a stay of execution in unlawful detainer under Code Civ. Proc. § 1176.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Martha J. St. Clair against Rachel E. Joos. From a judgment for plaintiff, defendant appeals. On application for writ of supersedeas. Writ denied.

F. E. Davis, of Los Angeles, and L. E. Dadmun, of San Diego, for appellant.

J. Wiseman Macdonald, of Los Angeles (Joseph Musgrove, W. W. Wallace, and Harold J. Cashin, all of Los Angeles, of counsel), for respondent.

CRAIG, J. Judgment having been given for the plaintiff and respondent in a suit in unlawful detainer, the defendant appealed and furnished undertaking for an attempted stay of execution, and the sureties thereon justified pursuant to notice. About six months later respondent moved the court for an order to require a new bond upon the ground that the sureties had become insufficient, and such order being granted, new sureties were furnished; but after several continuances of the hearing failed to qualify.

Appellant contends that execution was stayed, and here seeks a supersedeas, contending: (1) That the sureties tendered on the new undertaking should have been accepted upon the showing made in the court below, and that this court ought to approve such undertaking; or (2) that appellant having shown good faith, she is entitled to have execution stayed upon furnishing another undertaking, and that if it afforded the opportunity to do so, she can obtain bondsmen capable of justifying in the amount required.

The issues were tried and judgment entered thereon March 28, 1923, by Hon. F. M. Jamison of Modoc county, and on May 25th Hon. L. H. Valentine of Los Angeles county made an order reciting that—

> "Upon the hearing in the above-entitled action this day held, at which both parties were represented by respective counsel, the amount of the undertaking on appeal in the above-entitled action is hereby fixed at the sum of $3,000."

Previously, and on the 18th of April, 1923, an undertaking in the sum of $1,500 was filed, and pursuant to notice of exception to sureties served May 8th, they appeared and justified. On June 16th counsel for appellant wired Judge Jamison at Alturas:

> "Presiding judge here made orders fixing amount of undertakings on appeals, examined the sureties thereon, approved the undertakings, and same are filed. It may be necessary however under section eleven seventy-six C. C. P. for you as trial judge to grant order staying execution. Will you kindly do so and mail such order to me at once wiring me to that effect at my expense."

On June 19th Judge Jamison replied by wire as follows:

> "Will make orders staying execution in two cases of Sinclair against Joos. Have not data at hand to prepare orders. Prepare them and send them to me and I will sign and send clerk for filing."

It is stipulated that the predecessor of the present counsel for appellant would testify that to the best of his recollection he prepared such order, and that he was under the impression that the same was signed. However, it is further stipulated that—

> "There is not on file among the papers in the case of St. Clair v. Joos, No. 111662, any written order signed by Hon. F. M. Jamison staying the execution of the judgment rendered in said case, and that the register of actions in said case does not show that any such order was made."

On November 17th respondent served upon appellant a notice of motion for a new bond upon the ground that the sureties on the undertaking theretofore filed by appellant had become insufficient, and on December 17th Hon. Victor R. McLucas signed an order reciting that, it appearing from an examination of said sureties that since the giving of said undertaking they had become insufficient, appellant should give a new undertaking in the sum of $3,000, and that the time therefor be extended to January 3, 1924. An undertaking was filed by appellant on the 2d day of January, 1924, and objection to their sufficiency having been made by respondent, the sureties appeared before Hon. John M. York on January 18th and testified. The court then suggested that said sureties sign a new bond, and on January 30th another undertaking was filed, the matter having been continued from time to time, and on February 1st, upon objection by respondent, the court refused to accept said sureties, and declined to grant further time requested by appellant for the production of additional sureties. Appellant was served on February 2d with a notice to vacate the premises in suit.

On February 19, 1924, Judge Jamison signed, and thereafter there was placed on file, the following order:

> "Good cause appearing therefor, and by virtue of the power and authority vested in me by the provisions of section 1176 of the Code of Civil Procedure of the State of California, as the judge who tried the above-entitled action, it is hereby ordered, and this does hereby order and direct that the proceedings upon the judgment rendered in favor of plaintiff in the above-entitled action against the above-named defendant are hereby stayed, and that the defendant is hereby required to give a bond and undertaking staying execution of the judgment rendered in the above-entitled action, the amount of said undertaking to be fixed by any judge of the above-entitled court. Dated this 23d day of June, 1923. Witness my hand this February 19th, 1924, as of the date of June 23d, 1923. F. M. Jamison, Judge of Said Superior Court and Judge Who Tried Said Cause."

From the foregoing it appears that neither the files nor the register of actions reveals any order staying execution made by Judge Jamison, who tried the case, except that of

February 19, 1924, which was dated back nearly eight months; also, that the only bond which was ever approved was filed a month and 21 days after the date of the judgment.

This petition for supersedeas must be denied for several reasons.

[1] Whether or not the judge who is required by statute to decide whether execution shall be stayed pending appeal may delegate the power to fix the amount of bond, no order conferring such authority was in existence when the amount was fixed at $3,000, or when the sureties were accepted; but assuming that Judge Jamison's order of February 19, 1924, apparently intended as one nunc pro tunc, could have been made and filed to supply a discrepancy in the record of the case concerning acts which had in fact taken place, there is no record of a stay having actually been granted prior to that order, nor does the order recite that such was the fact. In the Estate of Skerrett, 80 Cal. 62, 63, 22 Pac. 85, the Supreme Court said of such an order:

> "Where all the conditions upon which the entry of a judgment or order depends exist, and the making or entry of the order is a mere ministerial duty or matter of course, and the performance of the duty is neglected or delayed, or where an order has actually been made and its entry omitted, we suppose it may be subsequently entered, and if justice requires, may be made to take effect nunc pro tunc, as of the date when it was actually made, or at any time when existing conditions imposed upon the court or its officer the duty of entering it. But here the making of the order in question rested entirely in the discretion of the superior judge, and was never a matter of course. Therefore, it could never have an existence until his discretion was exercised. And if it was actually made prior to February 5th, and its entry omitted, the fact that it was so made at the proper time should be shown by the record of the superior court."

In Hegeler v. Henckell, 27 Cal. 491, it was held that corrections may be made nunc pro tunc, but that the record itself must show the error. And in Kaufman v. Shain, 111 Cal. 16, 19, 43 Pac. 393, 394 (52 Am. St. Rep. 139), it was said:

> "In the exercise of this power the court is not, however, authorized to do more than to make its records correspond with the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given."

[2] Section 1176 of the Code of Civil Procedure provides that—

> "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs."

Any assertion, therefore, of a stay of execution resulting from the acts of the various judges who took part in the subsequent proceedings, would be ineffectual. Petitioner herein seeks to rely upon the ruling in Hill v. Finnigan, 54 Cal. 493, and the line of cases following it; but in McDonald v. Hanlon, 71 Cal. 535, 12 Pac. 515, it was said, as to an action in unlawful detainer:

> "This was an amendment to the Code of March 9, 1880, and it is claimed that the power of accepting an undertaking and directing a stay of proceedings is vested thereby in the court that tried the case exclusively. Such seems to have been the understanding of the statute, for, as has been remarked, application for a stay was first made to the court that tried the case. In this interpretation of the statue we agree, * * *"

And Cluness v. Bowen, 135 Cal. 660, 662, 67 Pac. 1048, 1049, held:

> "The restriction of that section takes the case at bar out of the rule declared in Hill v. Finnigan, 54 Cal. 493, as applicable to ordinary civil cases with respect to which there is no such restriction. It was so expressly held by this court in McDonald v. Hanlon, 71 Cal. 535, and by Chief Justice Searls in Gross v. Kelleher, 73 Cal. 639."

Section 681a, Code of Civil Procedure, also provides:

> "The court or the judge thereof shall not have the power, without the consent of the adverse party, to stay, for a longer period than thirty days, the execution of any judgment or order the execution whereof would be stayed on appeal only by the execution of a stay bond."

[3] The mere filing of an undertaking would not effectuate a stay of execution in a case of this nature, and on February 4, 1924, when the petition for supersedeas was filed in this court, the attempted nunc pro tunc order was not in existence. That order and the records being silent as to a stay having been in fact granted, but not entered, the order was ineffectual to create a stay of proceedings as of June 23, 1923, and it cannot be given such effect as of the date it was signed, February 19, 1924; furthermore, the court expressly directs that it be dated, and it obviously was the intention that it be entered as of June 23d. The failure of sureties to justify on the new undertaking, after the original bond had been declared insufficient, would have operated to void any stay of execution, had such previously been granted. Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

> "By virtue of section 1176, the power to stay proceedings upon a judgment in unlawful detainer is vested in the trial judge, and in the absence of such direction this court has no power to order a supersedeas. (Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922.)"

Plummer v. Agoure, 20 Cal. App. 319, 323, 128

Pac. 1014, 1016. See, also, Sarthou v. Reese, 151 Cal. 96, 97, 90 Pac. 187.

The petition for supersedeas is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

(66 Cal. App. 485)

SMITH et al. v. PACIFIC ELECTRIC RY. CO. (Civ. 4205.)

(District Court of Appeal, Second District, Division 2, California. April 10, 1924.)

1. Railroads 🔑327(3)—Pedestrian not relieved of contributory negligence by condition of headlight.

Where headlight would have been plainly discernible, had deceased pedestrian, before attempting to cross tracks, looked in direction of approaching motor, he was not relieved of contributory negligence, because the direct rays were not thrown on, but above, track.

2. Evidence 🔑8—Judicial notice taken of noise made by speeding electric freight motor.

Court is bound to know that electric motor for hauling freight cars could not, at speed of 25 to 30 miles per hour, have approached pedestrian of ordinary hearing about to cross track, without causing such vibration or rumble of track as would warn him, were he alert and attentive to his duty.

3. Railroads 🔑330(3)—Nonsuit for contributory negligence of pedestrian crossing track held proper.

Nonsuit on ground of contributory negligence of pedestrian, killed while crossing railroad by electric freight motor, *held* proper, in view of evidence as to headlight of motor and wigwag at nearby crossing, set in motion, with red light and ringing bell, when motor was near track, and judicial notice of noise from motor.

4. Appeal and error 🔑1047(1)—Any error in limiting proof of wigwag at crossing having been out of order to 10 days before accident harmless.

Any error, in action for killing, by electric freight motor, person living at corner of crossing, while recrossing track, in limiting, to 10 days before accident, proof of wigwag at crossing having been out of order, at intervals, so that it would not stop after trains passed, *held* harmless; there being no evidence or claim that it had not worked properly during that period.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Annie N. Smith and others, as heirs of Archie Smith, deceased, against the Pacific Electric Railway Company. From judgment of nonsuit, plaintiffs appeal. Affirmed.

D. A. Stuart, of Los Angeles, for appellants.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

WORKS, J. This action was brought for the recovery of damages caused to plaintiffs by the death of Archie Smith, who was killed upon the railroad tracks of defendant by one of its electric freight motors. Plaintiffs sued as the heirs of deceased. At the conclusion of the evidence offered by plaintiffs the trial court granted a motion for nonsuit on the ground that the evidence showed that deceased lost his life because of his contributory negligence, and judgment went for defendant accordingly. Plaintiffs appeal.

It is contended that the court erred in granting the motion for nonsuit. At the time of his death deceased was of the age of 56 years, well, vigorous, and in the full possession of all his faculties. He resided at one of the four corners formed by the intersection at right angles of respondent's right of way with a certain highway. On another of these corners, directly across respondent's double electric railway tracks from the residence of deceased, was situated a store. At a distance 72 feet from the highway property line a path crossed the tracks in a slightly diagonal direction from a point at or near the residence of deceased to a point at or near the store. Deceased had lived in the same place for a period of about 4 years, and during that time he and other residents in his neighborhood had used the path as a means of going to and returning from the store. The catastrophe which cost deceased his life occurred in the early evening, but after complete nightfall. He had been to the store and had made some purchases there. On returning toward his home along the path which has been mentioned he progressed to the point at which it intersected one of respondent's tracks, and was there run down and instantly killed.

[1] The track along which the motor was proceeding immediately before the accident is straight for a distance of several hundred feet from the point at which deceased was struck. The motor was moving along the right-hand track; that is, it was coming from the direction toward which a person, traveling as was deceased, must have looked to ascertain whether it was dangerous to cross at the moment. The motor was equipped with a headlight which was lighted. The reflection of this light was so placed at the time, however, that its direct rays were not thrown upon the track along which the motor proceeded, but into the air above the track. One witness testified that these rays at a distance of 200 feet in front of the motor were 40 or 50 feet above the ground. Appellants would make much of this condition of affairs, but it cannot avail them. It in no way tends to relieve deceased from the charge of contributory negligence.

While the approaching headlight was not as dazzling as it would have been if its direct rays had been projected along the track, it would have been plainly discernible to deceased if he had looked in the direction of the approaching motor before he attempted to cross, as it was his duty to do. The headlight was actually seen at a distance of 200 feet by persons in an automobile as the freight motor came toward the intersection, and they stopped in order to allow the motor to pass in front of them.

Near respondent's tracks and upon the line of the highway nearest the path already mentioned, being distant from the latter about 72 feet, as already indicated, was located what is known as a wigwag or automatic flagman. This device was maintained by respondent for the purpose of giving warning of the approach of cars or trains toward the intersection. It was excited to action upon the approach of a train to a distance of 600 feet from it and continued its action until the train had passed 300 feet beyond it. When in operation the wigwag oscillated back and forth perceptibly. When it started to operate, and as an accompaniment to its oscillation, a red electric light shone and a bell rang from it. The device was located between the point at which the path crossed the tracks and the direction from which the freight motor came. Before the motor reached the point from which the action of the wigwag was customarily excited, the device was dark, silent, and stationary. At that point the motor set it to work and it operated until after deceased was run down.

[2] Because a witness who was in the automobile above mentioned testified that he heard no noise from the approaching motor, appellants insist that deceased had no warning of its approach from any such source. This argument does not follow from the testimony of the witness, and it runs counter to sense and experience. The standing automobile in which the witness was seated was not itself quiet. Its engine was "running idle," according to the witness, and it did not "make a great deal of noise." This noise must have been sufficient, however, to prevent the witness from hearing the approaching motor, or he must have failed to hear it for some reason other than that it made no sound. The evidence shows that the motor was running at a rate of from 25 to 30 miles per hour at the time of the accident. It was a freight motor; that is, it was used for the purpose of drawing freight cars. We are pointed to no evidence as to its size, but, if we assume that it was a motor of the smallest kind employed in hauling freight trains, or of drawing even a single car, we are bound to know, as was the trial court, that it could not have approached deceased at the rate of speed attributed to it without causing such a vibration or rumble of the track as would have conveyed a vivid warning to him, a person possessed of at least ordinary hearing, as he was, if he were alert and attentive to his duty to himself and to respondent under the law.

[3] Appellants also contend that the motor was traveling at an excessive rate of speed. Also there was evidence that the persons in the automobile at the crossing heard no sound of whistle or bell from it as it approached, and appellants base their argument for a reversal somewhat on that ground. These two claims, as we conceive, cannot, under all the circumstances, have any bearing upon the question of the contributory negligence of deceased. The trial court, from the evidence as to the headlight and the wigwag, and from the judicial knowledge which it had as to the noise made on the tracks by the motor, was bound to draw the inference that deceased, in a moment of abstraction, preoccupation, or aberration, walked negligently into his death. In fact, the evidence as to the headlight and the wigwag, without the other circumstance, must have impelled the court irresistibly to that inference. The motion for nonsuit was properly granted.

[4] Appellants offered to prove that for more than a year preceding the accident the wigwag had not worked properly, or rather had been out of order at intervals. They expected to show that at such times it kept in operation for hours without intermission, not being stopped in its work by trains after they had passed the intersection. They argued, and argue now, that the long residence of deceased at the crossing made him familiar with the shortcomings of the wigwag, and that, under the conditions which they sought to establish by the offered evidence, he would have been relieved of all duty to note the actions of the discredited mechanism. Bearing in mind that the wigwag was inactive just preceding the catastrophe to deceased, and that it sprang into light, sound, and motion upon the approach of the motor, it is to be observed that there was no offer to prove that at any time it ever failed to operate upon the approach of a train when it had been inactive immediately preceding such approach. For this reason it is possible that the offered evidence was entirely immaterial, although as to that point we express no opinion. The trial court refused to admit the evidence as offered, and limited the proof of appellants upon the point to the period of 10 days preceding the accident. It is claimed that the court committed error in so limiting the evidence, but we need not determine that question. There is nothing in the record to show that the wigwag did not act perfectly in all respects during the 10 days, and no claim is made that it did not work perfectly during that time. If the court did err, which we do not decide, the error was therefore harmless. Deceased's familiarity with conditions at the intersec-

tion was such that he could not but have known that the wigwag had been working well for 10 days. He had the opportunity during that time to observe its behavior, and especially he had that opportunity when he went to the store to make his purchases. If the conditions as to the mechanism had been different during the 10 days, if it had been in order but part of the time, there would be present some reason for a consideration of the point which appellant makes, although we are not prepared to say that, even in such a situation, the error of the trial court, if for the sake of argument it be conceded that there was one, would have been harmful. It is possible that under the law it would have been incumbent upon deceased, under such a condition, to exercise a higher degree of prudence as to other avenues of protection to himself, by the more narrowly looking for a headlight and noting the vibration of the rails. In practice, the ordinarily prudent man, familiar with conditions at such a crossing, as was deceased by his long residence at the intersection, naturally would be impelled to the exercise of his every power of observation, if he knew that the wigwag was erratic in its action.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

66 Cal. App. 450

TOON v. PICKWICK STAGES, NORTHERN DIVISION, Inc. (Civ. 4204.)

(District Court of Appeal, Second District. Division 2, California. April 7, 1924.)

1. Judgment ⚿139—Trial court must exercise sound discretion in passing upon motion to set aside default.

In considering motions to set aside defaults, trial court must exercise a sound and legal discretion in such a manner as to serve and not defeat or impede ends of substantial justice.

2. Judgment ⚿138(3)—Refusal to set aside default judgment held an abuse of discretion.

Trial court's refusal to set aside a default judgment *held* to constitute an abuse of discretion, where defendant mailed summons and complaint, in an action for injuries, to his insurance carrier's attorney who had already been apprised of the accident, but who had no knowledge of service of summons and complaint until after default was entered, due to act of an inexperienced clerk, and who, on acquiring such knowledge, moved diligently to set it aside, and whose affidavits disclosed meritorious defense.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Louis R. Toon against the Pickwick Stages, Northern Division, Inc., a corporation. From an order denying its motion to vacate a default judgment, defendant appeals. Reversed.

B. P. Gibbs, of Los Angeles (W. I. Gilbert, of Los Angeles, of counsel), for appellant.

Thompson & Robertson, of Santa Barbara, for respondent.

FINLAYSON, P. J. This is an appeal from an order denying defendant's motion to vacate a default judgment.

The action is one having for its purpose the recovery of damages for injuries suffered by plaintiff in an automobile accident alleged to have been caused by defendant's negligence. Defendant, a California corporation, having its principal place of business in the city of Los Angeles, is a common carrier of passengers by automobile stage. The complaint, which was filed in the superior court for Santa Barbara county on October 21, 1921, alleges that on March 14th of that year, in the city of Santa Barbara, the driver of one of defendant's auto stages so negligently operated his vehicle that it ran into the automobile which plaintiff was driving, thereby injuring the latter.

On October 26, 1921, in the city of Los Angeles, the summons and a copy of the complaint were served upon defendant's secretary. On November 29, 1921, no appearance having been made by defendant within the time allowed by law therefor, plaintiff caused defendant's default to be entered, and on December 30, 1921, after an ex parte hearing of evidence presented by plaintiff, the lower court entered a judgment in plaintiff's favor. Defendant moved expeditiously to set aside the default and the judgment entered thereon by serving and filing on January 7, 1922, its notice of motion under section 473 of the Code of Civil Procedure. The showing made by defendant in support of its motion was not contradicted by any evidence on the part of plaintiff. The only question, therefore, is whether the facts set forth in the affidavits filed on behalf of defendant are sufficient to show that it would be an abuse of discretion to deny the motion to open the default.

The affidavits disclose the following: At the time of the accident defendant was insured against loss by the California Highway Indemnity Exchange, a mutual interinsurance association, having an office in the city of Los Angeles, and hereafter referred to as the insurance carrier. The policy of insurance requires the insurance carrier to assume charge and control of all suits and of all litigation arising out of accidents wherein the insured is involved. The insurance carrier employs a "claims attorney," who in this instance acted as counsel for defendant, and to whom, therefore, we shall refer indiscriminately as defendant's attorney and the insurance carrier's claims attorney.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Upon being served with the summons and complaint on October 26, 1921, defendant's secretary caused the documents to be placed in an envelope and mailed to the insurance carrier, whose office, as we have stated, is in the city of Los Angeles. That the papers were received by the insurance carrier in due course is evident from the fact that later when search was made they were found among the files in the office of its claims attorney. No letter of instructions was inclosed with the summons and complaint, and no instructions were given to the officers or agents of the insurance carrier. None of defendant's officers or employees had any knowledge that defendant's default had been entered until notified thereof by defendant's attorney.

Prior to the commencement of this action, and covering a period of some weeks, a correspondence was carried on between attorneys of the Automobile Club of Southern California and defendant's attorney, the purpose of which was to effect a compromise settlement of plaintiff's claim for damages. No satisfactory settlement having been arrived at, plaintiff took his claim out of the hands of the automobile club's attorneys and thereafter caused this action to be commenced by his present counsel.

Not until December 20, 1921, did defendant's attorney have any notice or knowledge that this action had been commenced. On that day, happening to be in the courtroom of the superior court for Santa Barbara county for the purpose of representing this defendant in the trial of another action, he overheard a chance remark which led him to examine the files in the office of the clerk of that court. This examination led to the discovery that summons and complaint had been served upon defendant's secretary and that defendant's default had been entered.

Returning to Los Angeles, defendant's attorney, who, it will be recalled, is the insurance carrier's claims attorney, made an examination of the files in his office. His office, it would seem, is one of a suite of offices rented by his principal, the insurance carrier. The examination disclosed that the summons and complaint had been received in the office. Both documents, together with the envelope in which they had been placed, were "inadvertently filed away by the employees" of the claims attorney in the latter's office, "without calling the matter to [the attorney's] attention." During a period of several months, including the time when the claims attorney was carrying on the correspondence with the attorneys of the automobile club relative to plaintiff's claim and up to the time when the summons and complaint were served, the claims attorney "had several changes in the personnel of his office force, including several new stenographers, whose duty involved the handling and filing of all papers in connection with claims made upon said California Highway Indemnity Exchange." In the affidavit which was made by defendant's attorney and presented to the lower court on the motion to set aside the default it is stated:

> "Through inadvertence and mistake, which ordinary care and diligence on the part of affiant could not have guarded against or overcome, the summons and complaint in this action became filed away in the files in the office of affiant, and were not called directly to his attention for consideration and action thereon."

None of defendant's officers has any personal knowledge of the facts involved in the accident. An investigation of the facts relating to the accident was made by defendant's attorney, who prosecuted inquiries and conducted an examination of the scene of the collision, and, according to his affidavit, "has personal knowledge of the locality, facts and circumstances under which the accident is alleged to have occurred." For this reason he made the affidavit of merits, and sets forth therein facts which, if true, show that defendant has a good and meritorious defense to the action.

[1] The legal principles by which courts are guided in considering motions to set aside defaults are well established and are comparatively simple. The trial court is to exercise a sound and legal discretion in passing upon the application. This discretion is not capricious or arbitrary, but it is an impartial discretion, and is to be exercised in such a manner as to conform with the spirit of the law by subserving and not impeding or defeating the ends of substantial justice. Waite v. Southern Pacific Co. (Cal. Sup.) 221 Pac. 204. "Section 473," says the court in Nicoll v. Weldon, 130 Cal. 667, 63 Pac. 64, "is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. * * * It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court may impose as the condition of granting the motion." See, also, Brasher v. White, 53 Cal. App. 545, 200 Pac. 657.

[2] Tested by these principles we believe that the learned trial court went beyond the

limits of a sound judicial discretion in refusing defendant's application to be relieved from the judgment taken against it by default. No negligence or culpability can be predicated of the conduct of defendant's secretary. When that officer was served with the summons and complaint he "thereupon," i. e., immediately, mailed them to his company's insurance carrier, by whom, it seems, they were received in due course of the mail. Under the circumstances of this case it was not incumbent upon defendant's secretary to do more than simply to mail the summons and complaint to the insurance carrier, whose duty it was, under its contract of insurance, to assume charge and control of the action. The facts of the case and the nature of defendant's defense were already known to the insurance carrier's claims attorney, who previously had carried on negotiations with the attorneys of the automobile club for a compromise settlement of plaintiff's claim. Indeed, he knew more about the facts and the merits of the cause than did any of defendant's officers. Obviously such a situation is not at all analogous to that of a defendant who, upon being served with summons, can protect his interests only by seeking some attorney whom he can employ and to whom he must communicate the facts of his case and the nature of his defense. Here, under the terms of defendant's contract with its insurance carrier, an attorney whose duty it was to defend the action was already provided for, and that attorney knew all that the client knew about the case and more.

Nor was there any personal neglect or culpable fault on the part of defendant's attorney. He had no personal knowledge or notice of the service of the summons and complaint until after the default had been entered. As soon as possible after hearing the chance remark which put him upon inquiry he made an investigation, and then with all diligence presented the motion to set aside the default.

The person who was responsible and solely responsible for defendant's failure to appear in the action within the time provided by law is none other than that unidentified, inexperienced employee in the office of the claims attorney who filed the documents in his employer's office files and then failed to call the latter's attention to them. But such thoughtlessness on the part of a new employee inconversant with the office routine was pardonable, and, in so far at least as it affected defendant's rights, his neglect was excusable. What was said by the Supreme Court in Downing v. Klondike Min., etc., Co., 165 Cal. 786, 134 Pac. 970, when considering a somewhat analogous situation, is apposite:

> "Our knowledge of the methods in vogue in law offices convinces us that such a mistake as the one detailed in the affidavits herein might be easily made, and the consequent default might take place without any culpable carelessness on the part of the attorneys of record."

There is nothing to indicate that plaintiff will be prejudiced in any way by a trial upon the merits, especially in view of the fact that it is within the power of the superior court to impose terms in granting the motion; and, since the affidavits disclose a meritorious defense, defendant should be given an opportunity to present that defense.

The order refusing to set aside the judgment by default is reversed, and the cause is remanded to the superior court, with directions to permit the defendant to file an answer to plaintiff's complaint within such time and upon such terms as that court may deem just and proper.

We concur: WORKS, J.; CRAIG, J.

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66 Cal. App. 386

KELSEY v. MILLER et al. (Civ. 4009.)

(District Court of Appeal, Second District, Division 2, California. March 28, 1924.)

1. Injunction ⚷145—Not issued upon affidavits stated on information and belief.

Generally injunctions may not issue on affidavits contents of which are stated on information and belief.

2. Injunction ⚷144—Allegations held to warrant granting of preliminary injunction though some on information and belief.

A preliminary injunction *held* warranted on allegations that defendant was about to embezzle property of an estate in his hands, and had conspired with another defendant to defraud the estate, where allegations made upon information and belief pertained to matters peculiarly within knowledge of defendants, and several important allegations were not so made, and all allegations were undenied.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Suit by Frank M. Kelsey, special administrator of the Estate of Mary Moore Miller, deceased, against Jared H. Miller, Cecil A. Sheward Miller, and others. Judgment for plaintiff, and named defendants appeal. Affirmed.

Kimball Fletcher and McDonald & Thompson, all of Los Angeles, for appellant Jared A. Miller.

A. P. Thomson, of Los Angeles, for appellant Cecil A. Sheward Miller.

Anderson & Anderson, of Los Angeles, for respondent.

WORKS, J. This is an appeal from an order granting a preliminary injunction. The order was made upon the verified complaint, there having been no showing in the cause contrary to the one made by that pleading. The allegations of the complaint are set forth, in part, in the opinion of this court in Miller v. Superior Court, 59 Cal. App. 334, 210 Pac. 832.

It is contended by appellants that the trial court, sitting as it was in the exercise of its ordinary powers as a court of equity, was without jurisdiction to grant the preliminary injunction. This point is made upon the ground that the relief asked for in the complaint was grantable only by the superior court in the exercise of its probate jurisdiction in the matter of the estate of Mary Moore Miller, deceased. This point, however, is no longer open, as it was settled adversely to the contention of appellants in Miller v. Superior Court, supra.

Appellants' next contention is that the complaint fails to allege facts warranting the issuance of the preliminary injunction, which, to state its effect in general terms, restrained appellants from dealing with and from removing from defendant banks or from the state any of the moneys or properties averred in the complaint to belong to the estate of Mary Moore Miller, deceased. In passing upon this contention it becomes pertinent to state allegations of respondent's pleading which were omitted from the opinion in Miller v. Superior Court, supra, as unnecessary to a decision of the points there considered, in addition to the averments there set forth. It is alleged that, upon information and belief, Jared was never the husband of Mary, but that for the purpose of cheating and defrauding Mary and her estate, and in connivance with his present wife, appellant Cecil, formerly known as Cecil A. Sheward, he falsely and fraudulently induced Mary to believe and she did believe during her lifetime that she was his lawful wife; that on or before August 15, 1915, and for a number of years theretofore, Jared was the legal husband of one Irene E. Miller; that on August 15, 1915, an action for divorce was commenced by Irene against Jared in the superior court of the state of California in and for the county of Alameda; that on August 30, 1915, he filed his answer to the complaint in that action; that on September 28, 1915, an interlocutory decree of divorce was rendered in favor of the plaintiff in that action; that prior to October 13, 1915, at Memphis, Tenn., and prior to the making or entry of any final decree in the divorce action, Jared went through a purported marriage ceremony with Mary; that Cecil A. Sheward loaned or supplied to Jared the funds necessary to enable him to proceed from California to Memphis for the performance of that ceremony, and also the funds with which he paid the expenses of a trip with Mary following the ceremony; that Cecil A. Sheward was one of the witnesses to the will of Mary; that Jared alleged in his petition for letters testamentary in the matter of the estate of Mary Moore Miller, deceased, that the property of the estate in Los Angeles county, where he and Mary had resided since their purported marriage, did not exceed in value the sum of $1,350, and that there was other personal property of the estate in Michigan of the value of $7,500; that this allegation was false and fraudulent, and that, upon information and belief, there was then personal property of the estate under the control of Jared of the value of more than $200,000, and that the estate was then also the owner of real property of large value; that unless restrained by the court Jared will, as plaintiff is informed and believes, embezzle the property of the estate in his hands and remove the same from the state; that, upon information and belief, Jared and Cecil have conspired together and are conspiring together for the purpose of defrauding the estate of Mary of the money and properties of the estate held by Jared, and that the latter will, unless restrained, transfer the same to Cecil for further concealment and for the purpose of having said moneys and properties taken out of the state; that, upon information and belief, Jared and Cecil, unless restrained, will remove the said moneys and properties from the state; and that, upon information and belief, a large portion of said moneys and properties are kept by Jared and Cecil in safe deposit boxes of the banking corporations defendant.

[1, 2] In support of their contention that the complaint, considered as an affidavit, does not show evidence sufficient to warrant the issuance of the preliminary injunction ordered by the trial court, appellants rely upon Davitt v. American Bakers' Union, 124 Cal. 99, 56 Pac. 775, Bishop v. Owens, 5 Cal. App. 83, 89 Pac. 844, Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530, and Martin v. Danziger, 21 Cal. App. 563, 132 Pac. 284. None of these cases has an application to the present controversy. We have not here a pleading containing the generalities and conclusions which were the subject of attention in each of the cases cited. The complaint before us is illuminatingly specific. The only difficulty lies in the fact that many of its averments are made upon information and belief, and we say this for the reason that the general rule is that injunctions may not issue upon affidavits the contents of which are stated upon information and belief. Doubtless appellants intend to rely upon this point, although they do not argue it, as it is hinted at in one of their briefs. For the purpose of considering it we have been careful, in stating the allegations of the complaint, to designate those which are made upon information and belief, leaving it to be understood that those not so designated are made positively. It is to be observed,

then, in considering the applicability here of the rule of law last mentioned, that: (1) Several important allegations of the complaint are not made upon information and belief. (2) Those which are so made pertain to matters which were peculiarly within the knowledge of appellants. (3) Although the preliminary injunction was issued after hearing pursuant to an order to show cause, no counter affidavits were filed, nor was an answer interposed, every averment of the complaint thus passing undenied. (4) If the allegations of the complaint, both those positively made and those made upon information and belife, are true, those allegations showed the most imperative demand for the granting of preliminary injunctive relief. Under such circumstances we are bound to say, not merely that the trial court was guilty of no abuse of discretion in making its order, but that the order was most proper. In a case in which a preliminary injunction had been granted upon the complaint and in which the defendant filed an answer and moved to dissolve the injunction, the Supreme Court said:

> "Some of the averments of the complaint, 'upon information and belief,' are not denied by the answer; others were sustained by positive affidavits at the hearing. Assuming the allegations which are not denied by the answer, those which are themselves positive, and those sustained by positive averments in affidavits to be true, we cannot say the court below abused its discretion in refusing to dissolve the injunction." Hiller v. Collins, 63 Cal. 235.

Suggestion has been made to us, since the foregoing was written, that the action has been dismissed as to appellant Cecil A. Sheward Miller. The order from which the present appeal is prosecuted therefore no longer stands as to that appellant.

Order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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66 Cal. App. 434

CHANCE v. KOBSTED. (Civ. 4733.)

(District Court of Appeal, First District, Division 2, California. April 2, 1924.)

1. Husband and wife 🔑272(1)—Divorce proceedings in themselves do not interrupt husband's powers in community property.

Divorce proceedings in themselves do not interrupt the husband's powers with respect to management and control of community property, such proceedings not taking property into custody of court.

2. Husband and wife 🔑270(1)—Wife cannot maintain action to quiet title to community property until dissolution of community.

A wife granted separate maintenance could not maintain an action to quiet title to the community property sold to defendant by husband's paramour without authority from the husband; her interest therein being inchoate until a dissolution of the community, and her remedy, if the husband could not be found, being under Code Civ. Proc. § 1822 et seq.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Bessie B. Chance against Soronus Kobsted. Judgment for plaintiff, and defendant appeals. Reversed.

E. Lyders, of San Francisco, for appellant.

George L. Stewart, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $200 in an action which the plaintiff brought against him involving the title to certain personal property alleged to have been the community property of herself and her husband, Charles T. Chance. She alleged that at the time of the filing of the complaint she was the lawful wife of Charles T. Chance; that in October, 1921, he deserted her to consort with one Midge Bowers; that thereafter, on November 5, 1921, he purchased certain furniture with community funds, and on December 21, 1921, commenced an action for divorce against plaintiff; that plaintiff, on cross-pleadings, obtained judgment in said action for separate maintenance, and on May 27, 1922, Midge Bowers sold said furniture to defendant. Plaintiff alleged that counsel fees and money for her separate maintenance allowed to her by the court in the divorce proceedings remain unpaid, and that an execution was issued to enforce payment of the same, and that the sheriff levied upon this personal property in the hands of the defendant as property of the community. There are additional allegations to the effect that Charles T. Chance has departed from the city and county of San Francisco, Cal., and cannot be found; that a warrant for his arrest has been issued under the provisions of section 270a, Penal Code; that the defendant claims some interest in the property adverse to plaintiff. The prayer is that the defendant be required to set forth the nature of his interest and that the court declare that the defendant has no interest in the property and that the title thereto is in plaintiff.

A demurrer, general and special, was filed to the complaint and overruled, and the defendant answered, stating that he purchased the furniture from the said Midge Bowers, acting for herself and for Charles T. Chance; that the household furniture so purchased by defendant had been openly and notoriously possessed by the said Midge Bowers for a period of six months or more preceding the said purchase by the defendant; that the sale was open and free from fraud; and that the defendant paid the reasonable value of said furniture for the same.

The appeal is upon the judgment roll, and the findings recite that at all times mentioned in the complaint the plaintiff was the wife of Charles T. Chance, who had deserted and abandoned her on or about the month of October, 1921, to live with said Midge Bowers; that on November 5, 1921, Charles T. Chance, with community funds of himself and the plaintiff, purchased the household furniture involved here. The facts with reference to the divorce action instituted by Chance and the decree awarding separate maintenance to his wife, all as pleaded by plaintiff, are then found. It is further found that on May 27, 1922, the said Midge Bowers, with intent to deceive and defraud this plaintiff, and to deprive her of her rights in and to the said community property, sold and transferred the same to the defendant for the sum of $185; that on June 9, 1922, an execution was issued upon the judgment for counsel fees, maintenance, etc., in the divorce action, and all the right, title, and interest of said judgment debtor, Charles T. Chance, in and to the said furniture, was garnished by plaintiff under and by virtue of said writ; that said defendant, on June 14, 1922, was restrained by order of court from disposing of said furniture pending the termination of this action, which was commenced by plaintiff in pursuance of the further order of said court; and that said restraining order was dissolved on August 25, 1922. It is further found that Charles T. Chance has deserted and abandoned plaintiff and is absent from the state, and that the defendant has sold portions of said furniture and converted other portions to his own use, and that the value of all of the furniture is $400.

From the foregoing facts the court concluded that the plaintiff had an equitable interest in the whole of said furniture to the extent of $200, and it was adjudged that the defendant should pay said sum to the plaintiff.

Appellant attacks the judgment upon the following grounds: That the respondent's husband is a necessary party to an action to quiet title to community personal property; that respondent has no title to the same; that the action being one to quiet title, the court was without power to give a money judgment therein; and that the judgment rendered does not dispose of the controversy between the parties because it does not provide that the appellant is entitled to the property upon the payment of $200 to respondent, and could not so provide because the rights of the husband therein are undetermined, and he may bring an action against this appellant for the value of the entire property.

[1] It is necessary to consider only the first objection. The plaintiff's interest in the community property involved here was a mere expectancy and not a title or interest. Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Roberts v. Wehmeyer (Cal. Sup.) 218 Pac. 22. Her husband had complete control over the same, with the exceptions noted in section 172, Civil Code. It was not found, however, that he exercised his right to sell the property to the defendant; but it was found that a stranger to the community, without authority from him, so far as the findings show, attempted to sell the property. Any action upon the part of such stranger would be unavailing, of course, and would not change the rights of the members of the community in the same. The wife's interest in the community property could only become vested and severable upon a dissolution of the community, and there was no dissolution of the community between the husband and wife in this case, and no order of the court in the divorce proceedings dividing the community property, so far as the record shows. Until such dissolution, either by divorce or the death of one spouse, the wife's interest was an inchoate one and not such as to form the basis for an action to quiet title to the property. Even divorce proceedings pending do not, in themselves, interrupt the husband's powers with respect to the management and control of community property, as the effect of such proceedings is not to take the property into the custody of the court. The husband continues to have control of it and full power to dispose of it. Lord v. Hough, 43 Cal. 581, 585.

[2] Therefore, in an action to quiet title to this community property the plaintiff must fail, and the demurrer was improperly overruled as it was directed toward the right of the plaintiff to maintain the action. "The subject of the action was community property. * * * Therefore the husband was the proper plaintiff."

See Chester v. Hill, 66 Cal. 480, 6 Pac. 132. See, also, Smith v. Furnish, 70 Cal. 424, 12 Pac. 392; McFadden v. Santa Ana Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Neale v. Depot Ry. Co., 94 Cal. 425, 29 Pac. 954; Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. As to personalty, the above rule remains unchanged by recent amendments to the codes.

If the husband of plaintiff was missing from the state and his whereabouts were unknown, as plaintiff alleges in her complaint, and he was entitled to the possession of any personal property situated in the state, his wife had her course of procedure outlined by sections 1822 et seq. of the Code of Civil Procedure in such cases made and provided; but the method pursued in the present action finds no sanction in any provisions of our Codes or any decisions of this state which have been called to our attention.

The question of plaintiff's right to subject community property, or the proceeds thereof, to the payment of the judgment against her husband in a proper proceeding, is not before this court upon this appeal, as plaintiff did not pursue that remedy, but sought to enforce an indeterminate equitable interest against the property.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

(66 Cal. App. 343)

PEOPLE v. JOHANSEN et al.

(Cr. 741, 2689.)

(District Court of Appeal, Third District, California. March 25, 1924. Hearing Denied by Supreme Court May 21, 1924.)

1. Criminal law 🔑112(3)—Jurisdiction of conspiracy is in county where conspiracy executed or overt act committed.

Under Pen. Code, § 777, jurisdiction of criminal conspiracy is in county where conspiracy agreement is entered into or in any county in which overt act in furtherance thereof is committed.

2. Criminal law 🔑198—Prior acquittal or conviction no bar to prosecution for subsequent continuance of offense.

Prior acquittal or conviction for membership in unlawful organization is no bar to prosecution for subsequent continuance of same offense.

3. Insurrection and sedition 🔑2—Literature of organization, published and circulated after arrest for membership therein, held admissible to prove character of organization.

In prosecution for being members of I. W. W., literature published and circulated by such organization after accused's arrest is admissible to show character of organization.

4. Criminal law 🔑1169(1)—Insurrection and sedition 🔑2—Admission of evidence relating to forbidden organization's attitude toward churches and religion, though error, held harmless.

In prosecution for being members of I. W. W., evidence relating to organization's attitude toward churches and religion, was erroneously admitted, but harmless when in quantity and character of little importance.

5. Insurrection and sedition 🔑2—Court's addition to accused's requested instruction relating to legality of general strike held not incorrect.

In prosecution for criminal syndicalism, where court gave requested charge that general strike for industrial and political ends and to secure change in control, if unaccompanied by illegal acts, would not be illegal, court's addition that, if such strike should be so conducted as to amount to unlawful terrorism, it would be illegal, *held* not erroneous.

6. Insurrection and sedition 🔑2—Charge as to knowledge as essential element of crime of being member of forbidden organization held sufficient.

Though court should have specifically instructed that knowledge of character of forbidden organization is element of crime of membership therein, its charge that to sustain conviction accused must willfully, unlawfully, feloniously, and knowingly be member thereof was sufficient, where defendants had previously been tried on similar charges or had been members for a long time.

On Petition for Hearing in Supreme Court.

7. Criminal law 🔑108(1)—Persons subpœnaed as witnesses cannot be heard to say they came into county involuntarily when prosecuted for criminal syndicalism.

Persons subpœnaed as witnesses in county in which they had never been before, and indicted therein for criminal syndicalism, could not be heard to say that offense was not voluntarily committed by them within such county, where they had had ample opportunity to sever their connection with forbidden organization before coming into county.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

B. Johansen and others were convicted of criminal syndicalism, and they appeal. Affirmed.

Austin Lewis and R. W. Henderson, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were convicted of violation of the Criminal Syndicalism Act. Stats. 1919, p. 281. They have appealed from the judgments of conviction and the orders denying their motions for new trials.

In the month of June, 1923, the criminal syndicalism case of People v. Stewart and others was on trial in the superior court of Sacramento county. The defendant Wood was then a resident of Alameda county, and the other defendants herein were residents of Los Angeles county. It does not appear that any of them had ever been in Sacramento county. In obedience to subpœnas regularly issued and served upon them, they all appeared as witnesses for defendants in the Stewart Case and testified, among other things, that they were members of the I. W. W. Immediately after leaving the witness stand, though not in the courtroom or in the presence of the jury, the defendants were arrested and thrown into jail and the indictment herein was thereafter found against them.

[1] It is urged that, since the defendants were in Sacramento county under compul-

sion, and not voluntarily, they were not willfully and intentionally members of the organization in that county, and that, therefore, the superior court of such county was without jurisdiction of the offense charged. It may be observed at the outset that the words "willfully and intentionally" in an indictment relate to the mental attitude of the offender rather than to the place of the offense. Section 777 of the Penal Code provides that—

> "Except as herein otherwise provided, the jurisdiction of every public offense is in the county wherein it is committed."

Jurisdiction of a criminal conspiracy is in the county where the agreement of conspiracy is entered into or in any county in which an overt act is committed in furtherance thereof. Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 632. Since membership in a forbidden organization, without the commission of an overt act, is made punishable by the statute, it follows logically that jurisdiction of the crime of being a member thereof is in any county into which such a member may go during the continuance of his membership. The question then is whether, in a case where jurisdiction depends upon the presence of the accused in a county, the superior court thereof can acquire such jurisdiction by compelling the accused to attend as a witness in another action, or by otherwise compelling his presence in such county. The case of People v. Martin, 188 Cal. 281, 205 Pac. 121, 21 A. L. R. 1399, is decisive of the question. In that case, as in this, jurisdiction of the offense depended upon the presence of the defendant in the county, and he was taken into the county under process of the court on a different charge from that of which he was finally convicted. He was extradited from the state of New Mexico to the county of San Diego on a charge of embezzlement. While held as a prisoner in that county he was charged with the crime of bigamy alleged to have been committed in Orange county prior to his extradition from New Mexico. Section 785 of the Penal Code provides:

> "When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county."

The defendant contended that the superior court of San Diego county was without jurisdiction and offered to prove at the trial that—

> "after the alleged marriage in Orange county he never returned to San Diego county until extradited."

The court refused to admit such proof. On appeal it was held that the offered evidence was immaterial and that the superior court of San Diego county had jurisdiction of the offense of the alleged bigamy committed in Orange county, notwithstanding the defendant had not voluntarily entered San Diego county after the commission of the offense.

[2] On the 1st day of November, 1922, in the county of Los Angeles, the defendants Ross, Johansen, and Bratland were indicted on a charge of being members of the I. W. W. on the 25th day of October, 1922. They were duly tried and were acquitted on the 11th day of May, 1923. On their arraignment herein they pleaded such acquittal as a bar. In support of their contention that such acquittal was a bar, appellants quote from 12 Cyc. 281, as follows:

> "An acquittal or conviction is no bar to a subsequent indictment for the same offense or the same species of crime, where the latter is alleged to have been committed at a different date from that previously tried, unless the offense is continuous."

The statement as to continuing offenses has relation, of course, to the continuance thereof up to the time of the charge and not to its continuance thereafter. If an acquittal or a conviction were a bar to prosecution for the subsequent continuance of the offense, then such acquittal or conviction would constitute, in effect, a license to so continue the offense. The jury in the Los Angeles case may have acquitted the defendants on the ground that they were without guilty knowledge of the character of the organization. Such acquittal would afford no protection to the defendants in the continuance of their membership after acquiring such knowledge. The conspiracy is a continuing one and its illegality is not alone in the act of engaging therein as a member, but in the continuance of such membership. People v. Steelik, 187 Cal. 361, 376, 203 Pac. 78. A prior acquittal or conviction is not a bar to a subsequent continuance in the conspiracy. United States v. Swift (D. C.) 186 Fed. 1002.

[3] Complaint is made of the admission in evidence of certain literature published and circulated after the arrest of defendants. The court instructed the jury that this evidence was admitted for the sole purpose of showing the character of the organization. Its admission for the limited purpose stated was not error. The character of the organization at a particular time must be determined by inferences to be drawn from proof of its acts and conduct within reasonable limits before and after the time in question. The question is not unlike that of proof of mental capacity at a particular time, in which case it has always been held proper to admit proof of acts and conduct both before and after the time in dispute.

[4] Evidence relative to the attitude of the organization towards churches and religion was erroneously admitted. People v. Flanagan (Cal. App.) 223 Pac. 1014. Both in

quantity and in character, however, this evidence was of less importance than in the Flanagan Case, and it is not believed that its admission resulted in a miscarriage of justice.

[5] At the request of defendants the court instructed the jury as follows:

> "Evidence has been introduced to show and purporting to show that the Industrial Workers of the World advocate the general strike as a means of accomplishing industrial and political ends, and changes of control. The adoption of such a strike for such purposes if unaccompanied by illegal acts would not be violative of law."

The court added to the instruction a statement to the effect that if such general strike be conducted in such a manner "as to amount to unlawful methods of terrorism for the purpose of bringing about a change in industrial ownership or control, or affecting any political change, then the use of the general strike under such conditions is a violation of the Criminal Syndicalism Act." While the addition to the instruction may not add anything to its clarity, it does not contain any incorrect statement of the law.

[6] The instructions given and refused upon the question of intent and guilty knowledge are unlike those of the Flanagan Case, and are substantially the same as in People v. Bailey (Cal. App.) 225 Pac. 752, wherein the judgment was affirmed. A specific instruction to the effect that knowledge of the character of the organization is an element of the crime charged should have been given. People v. Flanagan, supra. See, also, United States v. Tod, 44 Sup. Ct. 260, 68 L. Ed. ——. The court, however, instructed the jury that in order to convict a defendant it was necessary to find that he was "willfully, unlawfully, feloniously and knowingly a member of an organization, society, group and assemblage of persons * * * organized and assembled to advocate, teach and aid and abet criminal syndicalism." Other instructions used the word "knowingly" in a similar connection. The jury must have understood from these instructions that knowledge of the character of the organization on the part of the defendants was essential to a conviction. Johansen, Ross, and Bratland had been members of the organization for periods of time ranging from about 18 months to 4 years. They had been tried on a similar charge prior to their arrest and must have heard the evidence given at such trial to prove the character of the organization. Pederson and Wood had been active members for more than 10 years. In view of the foregoing facts, it is highly improbable that any one of the defendants was ignorant of the criminal character of the organization.

The further contentions of appellants which would merit discussion if presented for the first time are fully considered and overruled in one or more of the following cases: People v. Steelik, supra; People v. Taylor, 187 Cal. 378, 203 Pac. 85; People v. Roe, 58 Cal. App. 690, 209 Pac. 381; People v. La Rue (Cal. App.) 216 Pac. 627; People v. Flanagan, supra; and People v. Bailey, supra. No useful purpose would be served by renewing the discussion of questions which may be considered as settled. From an examination of the whole case, it cannot be said that the errors committed in the trial of the case have resulted in a miscarriage of justice.

The judgments and the orders are affirmed.

We concur: PLUMMER, J.; HART, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7] The petition for a hearing by this court after decision by the District Court of Appeal is denied. We do not approve the following statement contained in the opinion of that court:

> "The case of People v. Martin, 188 Cal. 281, 205 Pac. 121, 21 A. L. R. 1399, is decisive of the question."

We are satisfied with the conclusion of that court that the evidence was sufficient to justify the implied finding of the jury to the effect that the offense charged against these petitioners was voluntarily committed by them within the county of Sacramento. While it is true that petitioners came into that county involuntarily, it is also true that they had ample opportunity to sever their connection with the unlawful organization of which they were members before coming into that county. Having elected not to do this, they cannot be heard to say that the offense of which they stand convicted was not voluntarily committed by them within the county of Sacramento.

All concur.

(66 Cal. App. 307)

PEOPLE v. ERICKSON. (Cr. 731.)

(District Court of Appeal, Third District, California. March 22, 1924.)

1. Insurrection and sedition ⚷2—Mere membership in I. W. W. does not support conviction.

As the Syndicalism Law does not condemn the I. W. W. as an illegal organization per se, mere membership in such organization does not of itself warrant the conclusion of belonging to an organization seeking to accomplish an industrial change by unlawful means.

2. Criminal law ⚷419, 420(1), 448(2), 1186(4)—Admission of hearsay and conclusion held erroneous and prejudicial.

Where there was nothing in the literature introduced in a prosecution for belonging to the I. W. W. expressly advocating violence or unlawful action, hearsay testimony that the organization still taught sabotage, was but a recital of past transactions and conclusion of the person with whom the witness was talking, and was error, in view of Code Civ. Proc. § 1845, which was not cured by Const. art. 6, § 4½, since without such testimony a conviction could not have been had.

Appeal from Superior Court, Yuba County; Ernest Weyand, Judge.

Alfred Erickson was convicted of criminal syndicalism, and he appeals. Reversed, and new trial granted.

R. W. Henderson, of San Francisco, and T. F. Allen, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 22d day of May, 1923, the defendant Alfred Erickson, while going through the town of Marysville on his way to Feather river canyon, was taken from the tender of a passenger train on the Western Pacific Railroad by a night watchman, searched, found to be carrying an I. W. W. membership card, and was thereupon arrested under the Syndicalism Law of this state (St. 1919, p. 281), and on the 29th day of May, 1923, an information was filed against him by the district attorney of the county of Yuba, by which information the defendant was charged with "then and there being, did then and there willfully and unlawfully and feloniously and knowingly did become and was a member of an organization, society, club and assemblage of persons known and designated as the 'Industrial Workers of the World,' and sometimes known and referred to as the 'I. W. W.,' which said organization, society, club, and assemblage of persons was then and there organized and assembled to advocate, teach, aid, and abet criminal syndicalism as a means of accomplishing a change in industrial ownership and control and affecting political changes," etc. The defendant was tried upon the information above set forth, convicted, his motion for a new trial was denied, and the cause is now before this court on his appeal from the judgment of conviction and the order denying his motion for a new trial.

Three questions are presented for consideration upon this appeal, to wit: The constitutional question presented and dealt with in former cases; the question of essential scienter or knowledge, considered and passed upon in the case of People v. Flanagan (Cal. App.) 223 Pac. 1014; and the admission of hearsay testimony.

The case at bar differs very materially from any of the former cases considered by this court, in that none of the literature advocating or suggesting forms of sabotage condemned by the statutes was introduced upon the trial of this action. It is only by conjecture or supposition that such a conclusion could be reached from any of the papers, pamphlets, or books presented to the jury as exhibits. The literature in question purports to set forth the purposes and principles of the I. W. W., and of how its aims and purposes are to be accomplished. This literature makes no express reference to direct action or any manner of violence, whatever may be said of the visionary or impossible schemes set forth and contained therein.

[1] We make this statement because, as said, in substance, in the case of People v. Thornton (Cal. App.) 219 Pac. 1020, every case of this kind must rest upon the character of the evidence introduced therein. The statute does not condemn or prescribe the I. W. W. as an illegal organization per se; hence, the mere fact of membership in such an organization does not, in and of itself, warrant the conclusion of belonging to an organization seeking to accomplish an industrial change by violence or unlawful means. In other words, the character of the organization is a question always to be determined.

[2] There being nothing in the literature introduced in this case expressly advocating violence or unlawful action denounced by the statutes, and, as we have said, only such conclusion could be arrived therefrom by conjecture, the ruling of the court upon the admission of other testimony becomes important.

To show the continuing and present character and the criminal designs and purposes of the organization, a witness, Elbert Coutts, was placed on the witness stand and testified to certain criminal acts of members of the I. W. W. occurring between January 2, 1913, and December, 1917. It appears from the transcript that this witness' membership in the organization ceased with the month of December, 1917. There is no testimony of any witness having actual knowledge of the teachings and acts of the I. W. W. later than December, 1917, set forth in the transcript. The defendants introduced testimony to the effect that the organization had discarded sabotage literature and was no longer seeking or advocating an industrial change by violence or unlawful means. Apparently to bridge this gap and to establish the continuance of the unlawful character of the I. W. W., the following hearsay testimony of Elbert Coutts was introduced over the objection of the defendant:

> "Q. Have you talked with any of the leaders or discussed the I. W. W. with any of the leaders since 1917? A. Well, I couldn't say leaders; I talked with one of the men I knew quite a while, Harry Letour, in Los Angeles, along toward the latter part of February or first of March, 1922, during one of these cases down there.
>
> "Q. Was there anything said about the teaching of the word 'sabotage' or anything of that character by the organization at the present time? A. I was talking with him quite a while, and that was discussed during the conversation.
>
> "Q. Who was this man Letour; was he one of the speakers? A. Some time before that he had been released from Leavenworth, where he was confined for a case tried in Sacramento in 1918 and the beginning of 1919. He was a delegate then; member and delegate.
>
> "Q. Do you know whether or not he was at the time you talked to him? A. He didn't show me a membership card, but showed me a delegate slip at that time there—a sheet of paper, and it had his name on there; very similar to the ones they had during the time I was a member—and told me about his time in Leavenworth, and also stated he was a member at that time.
>
> "Q. What was the date of the delegate's certificate? A. Oh, I don't remember now; I never paid much attention to it. It was familiar to me.
>
> "Q. You didn't know what date it was? A. I don't remember now; he stated to me at that time he was a member.
>
> "Q. How long had you known this man? A. I had known him in 1917 when he was secretary of the I. W. W. in Modesto and met him several years previous to that when he was a member of the I. W. W., and knew him quite well around Modesto and Stockton in 1917 as a member of the I. W. W.
>
> "Q. Now, state what the conversation was. A. At that time he was telling me that I didn't know about the I. W. W.—what I knew about the I. W. W. and what they were doing, that it didn't amount to much of it—and he also told me the I. W. W. still taught sabotage, but they didn't carry it on their literature any more, but carried it on by word of mouth.
>
> "By the Court: That part will go out, what he said, what they were doing. Confine yourself to what he said they taught. A. He said they carried on their teaching of sabotage by word of mouth; they had cut it out of the literature; and he told me also—he says he wasn't afraid to tell me this because it would be hearsay testimony at that time.
>
> "Q. That is what he stated was his conclusion? A. That is what he stated to me was the reason he told me that.
>
> "Q. As I understand, the only change was that now they were not advocating sabotage in their literature, but carried it on by word of mouth? A. Yes, sir."

It will be noted that this hearsay testimony is not a declaration of a conspirator in furtherance of a conspiracy, and is but a recital of past transactions of the organization and the conclusions of the person with whom the witness Coutts was talking. We have carefully examined the case of People v. Gitlow, 195 App. Div. 773, 187 N. Y. Supp. 783, and People v. Lloyd, 304 Ill. 23, 136 N. E. 505, two cases strongly relied upon by the prosecution, and we think two of the leading cases having to do with the subject of the introduction of declarations of conspirators in I. W. W. cases, and we find nothing therein which conflicts with the rule heretofore declared in cases decided by this court. The two cases above referred to raise this declaration of the law:

> "Where a conspiracy is once established, every act and declaration of each member in furtherance of the common design are, in contemplation of law, the act and declaration of all the members and therefore original evidence against each of them."

Nothing in the hearsay testimony above referred to comes within the application of this rule. Nothing said by the individual named Letour was in furtherance of any common design or undertaking whatever; it was purely and simply recital.

In the case of State v. Gibson, 115 Wash. 512, 197 Pac. 611, a case heretofore approved by this court, an almost identical state of facts with those at bar appears:

> "Over appellants' objections the witness was allowed to detail what Hannon had told him concerning the teachings, purposes, and objects of the organization. The witness Fisher testified that he had talked personally to many members of the I. W. W., among others, the Roi sisters, who informed him that they were members of the I. W. W. and had knowledge of the objects and purposes of that organization. Over appellants' objections the court permitted this witness to testify what the Roi sisters had told him concerning the purposes of that organization."

Of this testimony the court said:

> "This was hearsay testimony, and in our opinion the trial court erred in receiving it."

In the case of State v. Pettilla, 116 Wash. 589, 200 Pac. 332, the same question was presented and the same ruling had. The court in this case states when such testimony is admissible and when it is not. We take the following from the syllabus:

> "In a prosecution of I. W. W. members for criminal syndicalism, testimony of witnesses who had talked with persons who they had reason to believe were memebers, either by discovery of membership cards, or by their declarations, or other facts, as to the purposes, objects, principles, and teachings of the or-

ganization, is inadmissible as hearsay; but testimony as to statements, speeches, and declarations made by members or in their presence at recognized meetings of the organization, or proven to have received the sanction of the organization, and as to conversations with persons whose membership is shown to be of such a character as to carry with it the authority of the organization to make such declarations, is admissible."

The same holding is had in the case of State v. Kowalchuk, 116 Wash. 592, 200 Pac. 333.

In the case of State v. Dingman (Idaho) 219 Pac. 760, the Supreme Court of Idaho had occasion to examine the law on this subject, and it is there held that the character of the testimony introduced in this case is inadmissible and comes within the rule excluding hearsay testimony. The Washington cases to which we have referred were also cited and considered in the decision rendered by the Idaho Supreme Court.

In the case of People v. Sullivan, 59 Cal. App. 633, 211 Pac. 467, the court, in considering the hearsay testimony of one Vale, held as follows:

> "This is true of the relation by him of what other persons had told him that they, as members of the I. W. W., had done in the way of acts of sabotage and lawlessness. The ultimate fact which the prosecution was endeavoring to establish was the illegal character, teachings and acts of the I. W. W. This could be shown by literature authorized or issued by it, by witnesses whose past relation to the organization gave them first-hand knowledge, and by testimony of witnesses as to the specific acts of sabotage, arson, and revolution within their own knowledge. People v. Roe, 58 Cal. App. 690, 209 Pac. 381. But to go beyond this and relate purported incidents, not known to the witness, but being based upon statements made to him by others, would clearly be hearsay and as such inadmissible. Authorities cited by respondent do not justify the admission of such evidence."

The same ruling was had in the case of People v. La Rue (Cal. App.) 216 Pac. 6270.

Again, in the case of People v. Flanagan (Cal. App.) 223 Pac. 1014, this court said:

> "Hearsay evidence, of a character similar to that held to have been erroneously admitted in the case of People v. La Rue, supra, being declarations of past acts, was admitted over the objections of defendants. In People v. Irwin, 77 Cal. 494, 504, 20 Pac. 56, 59, it is said: 'Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made.'"

Here the cases which we have above cited are also referred to. It is further stated:

> "The hearsay statements erroneously admitted were not made at any meeting of the organization, or to or by an officer or representative thereof, or in the way of propaganda to further its purposes, but the fact sought to be proved by the declarations were the commission of criminal acts by its members."

The Flanagan Case was reversed for other reasons, but the rule there declared is applicable here. We think that section 1845 of the Code of Civil Procedure is applicable to this case, and that the hearsay testimony heretofore set forth should have been excluded. The rule of exclusion in relation to hearsay testimony and the reasons therefor are very clearly set forth in 10 Cal. Juris, page 1033, beginning with section 288.

Is the error in the admission of hearsay testimony cured in this case by reason of the provisions of section 4½ of article 6 of the state Constitution? We think not. Without this testimony we do not very well see how a conviction could have been had. As we have shown, there was no other testimony showing the criminal character of the organization since December, 1917. As a matter of fact, the testimony of the witness Coutts did not bring the unlawful acts testified to by him down to that date, and granting that the criminal character of the I. W. W., as it existed prior to that date, was sufficiently established, we are not prepared to hold that the presumption of the continuance of such character is entitled to prevail over the presumption of innocence to which every defendant is entitled under the law, and especially is this true when such a long period of time has elapsed between the testimony tending to show such character and the date of the trial, as is evidenced by the transcript in this action.

Objection is also made to the instructions given by the court. These instructions we have examined, and find that they conform to the rule laid down in the Flanagan Case. The court, at the request of the defendant, instructed that knowledge was an essential ingredient of the crime charged.

For the reason hereinbefore given, the judgment and order of the trial court in this cause will be, and the same are hereby, reversed, and a new trial granted.

We concur: FINCH, P. J.; HART, J.

66 Cal. App. 507

MILLIKEN v. BANK OF ITALY.
(Civ. 4776.)

(District Court of Appeal, First District, Division 2, California. April 12, 1924. Hearing Denied by Supreme Court June 9, 1924.)

1. Banks and banking 🔑227(3)—Evidence held insufficient to establish bank's contract to apply proceeds of sale remitted to it in particular manner.

Evidence *held* insufficient to establish contract whereby bank receiving proceeds from sale of hemp agreed to devote one-half of same to payment of a note due from seller to a previous partner and other half to payment of indebtedness due bank from seller.

2. Contracts 🔑24—Submission of written agreement inconsistent with prior oral agreement may be treated as rejection of same and suggestion for new agreement.

One receiving a written instrument purporting to embody terms of a prior oral agreement, but inconsistent with same, is entitled to treat it as a rejection of the oral agreement and a suggestion for a new agreement.

3. Appeal and error 🔑931(1)—Every presumption is indulged in favor of judgment of trial court.

Every presumption is indulged in favor of judgment of trial court.

4. Appeal and error 🔑996—Power to draw inferences rests with trial court.

Power to draw inference rests with trial court and appellate court has no power to state that one of two conflicting inferences should be drawn in preference to the other.

5. Banks and banking 🔑227(3)—Evidence held insufficient to establish delivery of note to bank for indorsement of payments thereon.

In action against bank for breach of alleged contract, whereby it agreed to apply one-half of proceeds of hemp remitted to it for payment of owner's note to former partner, and to indorse such payments on the note, evidence *held* insufficient to establish delivery of same to it.

6. Banks and banking 🔑227(3)—Judgment against bank for failure to apply proceeds of sale remitted to it on note held unwarranted.

In action against bank for breach of alleged contract, whereby it agreed to apply one-half of proceeds of sale of hemp remitted to it to payment of note of seller belonging to plaintiff, fact that plaintiff had accepted of maker of note a conveyance of other property, and entered into an agreement not to take a deficiency judgment in proceedings to be had looking to foreclosure of a mortgage securing note, *held* to preclude any judgment against defendant in the absence of showing as to value of property so received or amount remaining unpaid on note.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by L. E. Milliken against the Bank of Italy. Judgment for defendant, and plaintiff appeals. Affirmed.

Preston & Duncan, of San Francisco, for appellant.

Louis Ferrari, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover moneys alleged to have been received by the defendant for the plaintiff's use. The plaintiff pleaded his cause of action in two counts. In the first count he pleaded a breach of an express contract, and in the second count he pleaded the common count for money had and received. The defendant interposed an answer which contained denials of all of the material allegations. A trial was had by the trial court sitting without a jury. Thereafter the court made findings:

"That the said defendant, Bank of Italy, never entered into any contract with said plaintiff with reference to the disposition or the sale of any hemp produced on Woodward Island by the plaintiff and one H. H. Laughlin, or otherwise, and said defendant, Bank of Italy, never agreed to be bound by any agreement between the said H. H. Laughlin and the said plaintiff or otherwise."

And the court also made a finding:

"That the said defendant has never received the sum of $3,750 or any other sum, as agent for the plaintiff, nor has it ever received any money belonging to plaintiff in any other capacity; that said defendant has never received any money for or to the use of said plaintiff, and that the said defendant never agreed to pay any note or any money to plaintiff, on demand or otherwise."

[1] On this appeal the appellant maintains that each of said findings is not supported by the evidence, and that the only evidence in the record is to the contrary. If the appellant's contention in this behalf is not sustained, the judgment must be affirmed.

For some months prior to December, 1920, the plaintiff and H. H. Laughlin had been copartners engaged in the production of hemp. At least during a part of that time Laughlin in a different capacity had also been engaged in the production of vegetables and seeds. Laughlin had been doing business with that branch of the defendant's bank which is located at Stockton. The record shows that his personal indebtedness to the bank had arisen to the sum of $20,000 or more. The business of the partnership was not prosperous, and in December, 1920, the partnership was indebted to the bank on a promissory note in the sum of $2,500. Shortly prior to the month of December the partners had discussed a dissolution of the partnership. After certain preliminary conversations, Laughlin called at the bank and understood that the bank was willing to advance him the money, and thereupon he went to the plaintiff and offered the plaintiff $7,500 for his half interest in the business. The plaintiff accepted the offer, and when the time came for Laughlin to make the payment the bank informed Laughlin that he had misunderstood the bank officials, and that the bank would not advance the $7,500. When thereafter Laughlin failed to make his payment on the purchase of plaintiff's interest in the partnership the plaintiff commenced an action against Laughlin for damages. As to when that action was commenced, and as to what further proceedings were had in that action, the record does not disclose.

However, in the latter part of December, 1920, the plaintiff and Laughlin discussed a contract on different terms. The partnership owned a plant for the milling of hemp, and it also owned a quantity of hemp which had not been harvested and had not been milled. At the same time Laughlin, in a different capacity, owned a quantity of seeds and onions which were in a warehouse, and the warehouse receipts were held by the Bank of Italy as security. Under the terms of the second tentative agreement the partners, as between themselves, had agreed that the plaintiff would accept, under certain conditions, the promissory note of Laughlin in the sum of $7,500 in payment of plaintiff's interest. The two partners discussed their affairs with their attorney, Mr. John Hancock. After the discussion, Mr. Hancock went to the bank and called on Mr. Ferroggiaro, the assistant vice president of the bank. Mr. Hancock testified:

> "I asked Mr. Ferroggiaro whether or not it would be satisfactory to the Bank of Italy to permit the hemp owned by the partnership to be sold through the Bank of Italy, that is, in the name of the Bank of Italy, or the proceeds thereby to be received by the Bank of Italy, and one-half of those proceeds to be applied to the Laughlin indebtedness to the bank, and any future indebtedness arising from any loan that the bank might make Mr. Laughlin to harvest or mill that hemp, and the other half to be paid to Mr. Milliken. * * * That Mr. Milliken was willing to sell his interest in the partnership for $7,500, if he was given half of the proceeds of the sale of the hemp. * * * Mr. Ferroggiaro said it would be satisfactory. * * * I also explained to Mr. Ferroggiaro that Mr. Miller was representing Mr. Milliken and threatened to sue Mr. Laughlin on his promise to buy the half interest for $7,500, that in order to avoid any litigation we were attempting to buy Milliken out on this basis, providing he was assured that the sales of hemp would be made through the Bank of Italy and he got one-half of all the proceeds. I want to say that at that conversation Mr. Laughlin, the principal, was there, that he agreed, and it was said at that time that the bank would do that. * * * Then I went back to my office and drew the contract and sent it to Mr. Milliken at Fort Bragg.
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> "Subsequent to that time I spoke to Mr. Ferroggiaro about the matter after I was told that the money had not been deposited to the account of Mr. Milliken. Mr. Ferroggiaro then denied having told me and Mr. Laughlin at the time that he had that agreement with us that he would so divide the fund. He said we were mistaken about it. * * * I am not sure whether Mr. Milliken was present when that arrangement was made with the bank. I am not sure; my belief is that Mr. Laughlin and I had that agreement with the bank. I do not remember that Mr. Milliken was there, because I sent the papers in a day or two up to Mr. Milliken. But I know he was in Stockton at the time the arrangement was entered into about this new deal where he was taking Laughlin's note. That was discussed in my office, but I do not remember now that Mr. Milliken was in the bank with Mr. Laughlin and me, but I have no memoranda in my file on that at all. He might have been. I do not remember going to the bank with Mr. Milliken alone.
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> "The first conversation I had with Mr. Ferroggiaro was between the 10th and 15th of December, 1920. I went to the bank and had a conversation with Mr. Ferroggiaro about the refusal of the bank to loan Mr. Laughlin the $7,500. In the conversation we had immediately before the drawing of that agreement we discussed the former conversation that we had. * * * Then I dropped out of the picture and did not have anything further to do with it until some time after that, when either Mr. Milliken or Mr. Laughlin informed me, I cannot say which one, that the bank had not applied the one-half of the money to the Milliken account, and then I discussed it with Mr. Ferroggiaro, but when that was I could not say. It must have been after the proceeds had been received. * * * The conversation between Mr. Ferroggiaro, Mr. Laughlin, and me was had in the course of the discussion between Mr. Milliken and Mr. Laughlin between December 10th and February 15th. The transaction between Laughlin and Milliken was in process of negotiation about being closed. In that conversation I stated to Mr. Ferroggiaro the terms upon which Laughlin and Milliken had agreed. * * *
>
> "Q. Previous to drawing that agreement of February, 1921, you had a conversation with Mr. Ferroggiaro about a lawyer in Stockton named Miller. Had Mr. Milliken at that time had him as his legal representative in the matter? A. I don't know, except Mr. Miller told me that he had instituted suit against Laughlin because of his failure to pay the $7,500. * * * I could not say now that I told Mr. Ferroggiaro that the notes which Mr. Laughlin was going to execute and deliver to Mr. Milliken would be deposited in the bank so the amount could be indorsed on the back of the note. * * * I told Mr. Ferroggiaro the agreement that had been arrived at between the parties. It had not been drawn yet. * * * I told him the amount of the sale, and the fact that Mr. Milliken was going to take Mr. Laughlin's note, and what he wanted to be sure of was that the money would come through the Bank of Italy, and that Mr. Milliken wanted it done that way, and I told him further that Mr. Milliken was interested; that he would get one-half of the proceeds. That was the important thing we dis-

cussed. I think I told Mr. Ferroggiaro in that conversation everything that was to go in that agreement that had to do with the Bank of Italy. I would not say that I told Mr. Ferroggiaro that the written agreement was to provide: 'It is further agreed that the said note for $7,500 will be deposited with the said Bank of Italy so that the payments made as hereinbefore stipulated may be indorsed upon the said note by the Bank of Italy when paid at the time as hereinbefore stated.' I might have and might not. I know I certainly did not call verbally to the attention of Mr. Ferroggiaro everything in that contract. My explanation of that is this: I had not yet drawn the agreement, and I intended to send it to Mr. Milliken, expecting that he would return it so I could take it to the Bank of Italy, but he never sent it back to me. * * *

"In that conversation with Mr. Ferroggiaro and Mr. Laughlin my memory is this: That Mr. Laughlin had to have some immediate money, and my memory is that Mr. Laughlin told Mr. Ferroggiaro that he would need before these proceeds came in about $1,500. Now that refreshes my memory. Then I discussed with Mr. Ferroggiaro the demand that Mr. Milliken had made that he wanted all the proceeds, and that could not be done for the reason that the Bank of Italy had to put up about $1,500, to pay for the work and labor, and which I explained to Mr. Milliken in my letter to him, where I told him that the bank would not finance the farming operations unless it received half of all the proceeds of the sale and, second, it was impossible for Mr. Laughlin to continue business unless he was given the cost of production. That was why we could not give Mr. Milliken all the proceeds, but were willing to give him half. The bank was not to be paid for its advances for milling before Milliken or Laughlin received anything. The question came up how much would the sales amount to, Mr. Ferroggiaro wanted to know, and Mr. Laughlin said approximately $8,000. They wanted to know how much was coming to the bank, and it was supposed to be $8,000, and the bank had to put up some money, I think about $1,500, and was willing to take one-half of all the proceeds, thinking that would cover the advances they were making, and the rest of the half was to go on Laughlin's (Milliken's?) account. I do not remember anything being said about the net proceeds. It was discussed in that conversation that there was no money on hand to mill that hemp to put it in shape to be sold, and that the Bank of Italy was going to advance that money."

The plaintiff also called as a witness Mr. H. H. Laughlin. Referring to the conversation had with Mr. Ferroggiaro in February, 1921, the witness testified:

"All that was said was included by Judge Hancock. That conversation was as given by Judge Hancock. * * * At the time of the conversation between Mr. Ferroggiaro, Judge Hancock, and me, Mr. Milliken and I were making propositions back and forth, and nothing definite had been agreed upon."

The witness further testified that in harvesting the hemp he borrowed from the bank on promissory notes, in addition to the $2,500 above mentioned, further sums aggregating $3,200; that when the hemp was ready for sale he found purchasers, and that the purchasers after receiving deliveries paid the moneys directly over to the Bank of Italy. From the stipulation of counsel it appears that the total proceeds so received were $7,005.59.

Testifying in his own behalf, the plaintiff testified that shortly before January 18, 1921, he had a conversation with Mr. Ferroggiaro at the bank. He said:

"I have a faint recollection that Mr. Hancock was there; I will not state positively whether he was. * * * I asked Mr. Ferroggiaro if in the sale of the hemp that was to be milled that I would like to have all the gross proceeds of the sale placed to my account, on the offer of Laughlin to pay me $7,500. Mr. Ferroggiaro said it would be impossible to pay all the gross proceeds in my account, but they would be willing to place half of them on my account, so I said if that was possible that could be done all right. * * * He said he could only place half of the proceeds of the sale on my account because Mr. Laughlin needed some money to conduct the business, and by taking all of the proceeds he would not have the funds to go on with the milling of the hemp."

The witness testified that he had theretofore done his banking business through Mr. Keyes, who was his personal friend and next door neighbor. He further testified that, when he went to the bank in January, 1921, he spoke to Mr. Keyes, and that Mr. Keyes told him that Mr. Ferroggiaro was handling that business and to see him. The contract had not been drafted at the time he talked to Mr. Ferroggiaro, and therefore he did not have all of the provisions of the contract in mind; he did not discuss with Mr. Ferroggiaro that part of the contract which reads:

"It is further agreed that the warehouse receipts held by the Bank of Italy shall not be delivered to the said Laughlin until said note is paid, and the proceeds from the sale of the said products so represented by warehouse receipts shall be applied in the manner set forth in the foregoing agreement."

He further testified that the same passage was not in the contract at the time Mr. Hancock had his conversation with Mr. Ferroggiaro.

"I expected the bank would put up the money to mill the hemp and then give me one-half of the proceeds irrespective of its claim for money advanced. That was expressed in the contract. I was not concerned at all in what it would cost to mill the hemp; the only thing I was concerned in was the agreement with the bank whereby they were to pay half the proceeds on my note, irrespective of how much money the bank might have in the hemp itself."

The plaintiff read in evidence the deposition of James C. Keyes, the assistant cashier of the defendant bank. In his deposition the witness read a letter received from the plaintiff under date of January 18, 1921. That letter was produced from the files of the bank. It is addressed, "Bank of Italy, Stockton, California. Gentlemen," and therein this plaintiff enjoins the bank from making certain payments. After that letter was received at the bank, the plaintiff went to Stockton. While there he went to the bank regarding his tentative contract of sale to Laughlin. When he went in he called on Mr. Keyes, and upon stating the business in hand Mr. Keyes informed him that Mr. Ferroggiaro had charge of that matter. After the plaintiff left the bank, he returned to Fort Bragg. While at Fort Bragg he received from Judge Hancock a formal written agreement. After he had executed it, he sent the formal written agreement, together with a letter, addressed "Mr. J. C. Keyes, Bank of Italy, Stockton, Calif. Dear Sir." In the letter he requested that the agreement be read and then recorded. At the time of the trial Mr. Keyes was unable to produce the letter, as it was a personal letter, and he did not preserve it. Mr. Preston, who had written the letter for the plaintiff, produced his copy. After Mr. Keyes received the written agreement, he said that he did not read it, but that he informed Mr. Ferroggiaro that Milliken had sent it to him with a request to have it recorded, and the reply was, "The Bank of Italy is not a party to it, go ahead and record it."

In addition to the writings above mentioned the record contains a copy of the promissory note dated February 15, 1921, for $7,500, a chattel mortgage of even date to secure the same, and a formal written agreement which on its face purports to be between L. E. Milliken, the party of the first part, and H. H. Laughlin, the party of the second part; it purports to be an agreement to buy and sell an undivided one-half interest in the partnership; it states the consideration of the sale as being evidenced by the promissory note and secured by a mortgage; it covers six pages of the transcript, and among other covenants the following:

(1.) "It is further agreed that the proceeds from all sales of products, not including hemp, owned by the party of the second part, now situated in the warehouse and upon which the Bank of Italy owns, or has in its possession, warehouse receipts, shall first be applied to the payment of the present indebtedness of the party of the second part, to the said Bank of Italy, on loan against above products, and after the payment of such indebtedness, the remaining proceeds from the sales of said products shall be divided as follows:

(2.) "One-half thereof to be paid to the party of the first part, and applied by the Bank of Italy upon the promissory note for $7,500 hereinbefore referred to, and the remaining one-half thereof to be retained by the party of the second part, for the use in the conduct of the business.

(3.) "It is further agreed that the warehouse receipts held by the Bank of Italy shall not be delivered to the said H. H. Laughlin until the said note is paid, and the proceeds from the sales of the said products so represented by warehouse receipts shall be applied in the manner as set forth in the foregoing agreement.

(4.) "It is agreed that all hemp products on Woodward Island shall be sold in the name of the Bank of Italy, and the proceeds thereof shall be applied by them on the said $7,500 note as follows:

(5.) "One-half thereof to the Bank of Italy and the remaining thereof to L. E. Milliken, party of the first part.

(6.) "It is further agreed that the said note for $7,500 will be deposited with the said Bank of Italy, so that the payments made as hereinbefore stipulated may be indorsed upon the said note by the said Bank of Italy, when paid, at the times as hereinbefore stated." (Numbering ours.)

[2] It will be noted that after the payment of Laughlin's debts secured by warehouse receipts, the foregoing paragraphs numbered by us 1, 2, and 3, had the effect of taking from the possible claims of the defendant and turning over to the plaintiff one-half of all proceeds from sales of Laughlin's crops, although the defendant then held a note of the partnership for $2,500. There is no claim that the defendant ever agreed to such a covenant. Conceding, but not deciding, that Mr. Ferroggiaro, for the defendant, had agreed orally to the rest of the terms of the written agreement of February 15, 1921, when the draft was completed and presented containing the additional terms, Mr. Ferroggiaro was entitled to treat the written instrument as a rejection of his oral agreement and the suggestion of a new agreement. 13 C. J. 281, § 86. Such, apparently, was his view, because, when Mr. Ferroggiaro first saw it, he said the bank was not a party.

[3, 4] As to the other paragraphs there are two separate elements involved which require separate considerations. The plaintiff's theory was that the defendant was to advance the moneys for harvesting, but, before repaying itself, that it was to turn over to the plaintiff one-half of the gross proceeds from the sale of hemp. Such a contract would vary from the ordinary experiences of men. It would not be fair to the defendant. The evidence thereon was oral. Oral admissions are to be received with caution. Every presumption is in favor of the judgment of the trial court. The power to draw inferences from the facts rested with the trial court. This court has no power to state that of two conflicting inferences the trial court should have adopted one inference rather than another. We may not hold, under these circumstances, that the trial court erred because it held, in effect, that plaintiff's witnesses had misunderstood Mr. Ferroggiaro.

[5] The other branch requiring a separate consideration is that the defendant agreed to set aside one-half of the proceeds and indorse

on Laughlin's note payments accordingly. The evidence does not show, and no person who was present at the oral negotiations testified, that Laughlin's note was ever to be in the defendant's possession (and it never was), or that it would ever be presented to the defendant, or that the defendant would make any indorsement thereon. Moreover, the evidence shows that, when the parties were endeavoring to make a tripartite agreement, that from the beginning it was contemplated that the agreement between Laughlin and Milliken was to be in writing. No evidence was introduced showing any excuse for not making the defendant directly a party, or, at least, having it indorse its acceptance. Mr. Ferroggiaro was the officer of the defendant who had charge of the business, and there is no evidence that either Laughlin or Milliken, or their agent, ever caused the written agreement, which it is claimed he was to carry into execution, to be exhibited to him, or that he was ever advised of the terms which had been actually inserted therein.

[6] There is yet another reason why the plaintiff cannot recover in this case. As pointed out above, the plaintiff held a mortgage on the property theretofore owned by the partnership. After the hemp above mentioned had been sold, and the proceeds applied upon the notes held by the bank, the plaintiff returned to Laughlin the promissory note executed by him and accepted a bill of sale conveying Laughlin's interest in the hemp mill. The bill of sale was dated the 9th day of December, 1921. When the plaintiff surrendered to Laughlin the promissory note, he entered into agreement not to take a deficiency judgment against Laughlin in the proceedings to be had looking toward the foreclosure of the mortgage. All of these things had been done, had, and taken before this action was commenced on the 5th day of July, 1922. Now it is the constant theory of the plaintiff that the liability of the Bank of Italy rests in the oral agreement of Mr. Ferroggiaro to carry out the written agreement made between Laughlin and Milliken. However, the facts just adverted to show a decided modification of that agreement.

From the facts above stated several inferences may logically be drawn. It may be reasonably inferred that the value of Laughlin's interest in the hemp mill was a considerable sum, or else that the plaintiff would not have exchanged for it a note of the face value of $7,500. On the other hand, it may be inferred that the value of said interest was not of the full sum of $7,500, or otherwise there would not have been any necessity for a covenant regarding the waiving of the right to take a deficiency judgment. No evidence was introduced from which the trial court could determine the value of the mill, the amount of Laughlin's credit for conveying his one-half interest therein, or what amount, if any, was due by Laughlin to Milliken on the agreement after the bill of sale had been made. The utmost that could be claimed against the Bank of Italy was that the bank should pay on the unpaid balance of the note a sum not exceeding one-half the proceeds of the sale of the hemp, but, until the unpaid balance was ascertained, it could not be known what sum the bank was liable for. It is clear that, if the note had been fully paid, the defendant would have no right, with notice of such payment, to pay, for Laughlin's account, any additional moneys to the plaintiff. Although the plaintiff surrendered the note for $7,500 to the maker, he claims he did not, by the surrender, intend to release the whole of his claim against the defendant. By its judgment the trial court found otherwise.

We may not hold that the trial court drew the wrong inferences from the foregoing facts. Rideout v. City of Los Angeles, 185 Cal. 426, 434, 197 Pac. 74.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(66 Cal. App. 461)

STEWART et al. v. ERSKINE-BOLST.

STEWART v. SAME.

(Civ. 2681.)

(District Court of Appeal, Third District, California. April 8, 1924. Rehearing Denied May 8, 1924. Hearing Denied by Supreme Court June 5, 1924.)

1. Waters and water courses ⚷158(4)—Complaints by lessees against lessor for damages to crops by flooding held good as against general demurrer.

Complaints of lessees against lessors for damages for destruction of crops by flooding by failure to keep water level in ditches four feet below surface of land *held* good as against general demurrer.

2. Waters and water courses ⚷158(4)—Demurrer to complaint for failing to state how water caused damages to crops held improperly overruled.

In action by lessees against lessor for damages for destruction of crops by failure to keep water in ditches below surface of land, *held*, that court should have sustained special clause of demurrer complaining that it was not alleged how failure of defendant caused injury to crops.

3. Appeal and error ⚷1170(3)—Overruling demurrer to complaint for omissions held not reversible error in view of knowledge of parties of issues.

Error in overruling demurrer complaining that complaint failed to allege manner in which failure of defendant to keep water below certain level damaged crops was harmless where it appeared on trial that both parties knew what issues were, in view of Const. art. 6, § 4½, and Code Civ. Proc. § 475.

4. Waters and water courses 🔑158(4) — Clause exonerating from liability for flooding held not to refer to waters in ditches in reclamation district.

A clause in a lease exonerating lessor from damage by flooding *held* not to refer to damage clause by failure of lessor to keep water level in reclamation district four feet below surface level of land, but to refer to floods by river breaking over barriers.

5. Waters and water courses 🔑158(4) — Agreement to keep water level four feet below surface held to presuppose ditches of sufficient capacity to comply.

An agreement by lessor to do everything reasonably necessary to keep water level in district ditches as near as possible four feet below surface level of land presupposes ditches of such capacity and pumping plants of such power as might be reasonably sufficient to comply with intendment of parties.

6. Waters and water courses 🔑158(4)—Expenditure involved held no defense to claim for nonperformance of covenant as to water level in ditches.

Where lessor covenanted to do everything reasonably necessary to keep water level in ditches as near as possible four feet below surface, and enlargement of ditches would have enabled him to do this, fact that such enlargement would have involved considerable expenditure was no defense to claim for damages for breach of covenant.

7. Appeal and error 🔑995—Not province of reviewing court to weigh and determine sufficiency of evidence.

It is not province of reviewing court to weigh and determine sufficiency of testimony, but only to ascertain whether there is testimony upon which trial court or jury may reasonably base conclusion reached.

8. Appeal and error 🔑221—Objection cannot be first made on appeal that erroneous measure of damages applied.

It cannot be claimed for first time on appeal that rule adopted for ascertaining damages below was incorrect where no objection was made to character of testimony introduced to enable jury to ascertain and determine losses suffered.

9. Appeal and error 🔑1062(4)—Party not prejudiced by permitting jury to interpret lease, which it did properly.

A party was not prejudiced because court left to jury interpretation of leases, where jury gave them proper interpretation.

10. Waters and water courses 🔑158(4) — Trial 🔑296(2)—Instruction as to liability of lessor for flooding of land held not erroneous, but, if erroneous, harmless, in view of other instruction.

In action against lessor for destruction of crops by flooding, due to lessor's failure to keep water level in ditches below surface level of land, instruction as to liability of lessor as modified by court *held* not erroneous, but if erroneous harmless, in view of other instruction properly giving law.

Appeals from Superior Court, Solano County; W. T. O'Donnell, Judge.

Actions by D. A. Stewart and another and W. A. Stewart, respectively, against Blanche Erskine-Bolst, formerly Blanche Ryer. Judgments for plaintiffs, and defendant appeals. Affirmed.

Purcell Rowe, of San Francisco, W. U. Goodman, of Fairfield, and Chas. S. Wheeler, of San Francisco, for appellant.

Arthur C. Huston, of Woodland, and Jos. M. Raines, of Fairfield, for respondents.

PLUMMER, J. The two cases above named were heard in the trial court together upon the same testimony which has been presented to this court upon one transcript, and therefore will be heard and determined as one cause of action. The actions are for damages for the destruction of crops. Plaintiffs had judgment, and the defendant appeals.

On the 14th day of June, 1917, the defendant, being the owner of a tract of land embracing several hundred acres situated on Ryer Island in the county of Solano, state of California, made and entered into an indenture of lease with the plaintiffs whereby said lands and premises were demised and let to the plaintiffs for a term of 12 years upon a rental aggregating approximately $250,000. This indenture of lease, among other provisions, contains the following paragraphs constituting the basis of this action, the meaning of which is held to be different by the respective parties, and calling for construction by this court. The first of said paragraphs appears in said indenture of lease in typewritten form, and is as follows:

"Said first party agrees to do everything reasonably necessary to keep the water level in the district ditches bordering on and running through the lands hereby demised, as near as possible, at an elevation of four feet below the surface level of the land."

The second paragraph, just referred to, appears in the printed body of said indenture of lease, and is as follows:

"And in consideration of the premises, it is further agreed by and between the parties hereto that said second parties will have no claim against said first party for damages suffered by them or either or any of them, or their or either or any of their families or effects, by reason of any flood or overflow of water upon or over said premises against said first party, either personally or as a stockholder or a member of said Reclamation District No. 501."

Following the allegations of the complaint and the testimony set forth in the transcript, it appears that during the months of January and February, 1919, the defendant did not comply with the typewritten covenant in the lease in that the water in the ditches referred to was not kept at an elevation of four feet below the surface of the demised lands, but was permitted to rise therein above the surface of said lands, to spread out over the same, and so inundate and saturate the lands in question that crops growing thereon were very greatly injured; that the plaintiffs were thereby prevented from cultivating or planting crops upon other portions of said lands, all to the damage of the plaintiffs in a large sum of money, and as found by the jury in one case in the sum of $20,934 and in the other case in the sum of $23,000.

Upon this appeal the appellant sets forth four grounds for reversal, to wit: First, that neither of the complaints filed by the plaintiffs states a cause of action; second, that the printed paragraph of the lease set forth herein exonerates the defendant from all damages suffered by the plaintiffs; third, that the damages are excessive; and, fourth, errors in instructions given by the court to the jury. The amended complaint in each action sets forth the typewritten clause which we have quoted, in which the lessor covenants to do everything reasonably necessary to keep the water level in the ditches, bordering on and running through the demised premises, as near as possible at an elevation of four feet below the surface level of the land and the allegation that the defendant failed to comply with such covenant, that the plaintiffs have complied with the terms and conditions of the lease covenanted to be performed by them, and then the following allegation as to damages that by reason of said failure of said defendant said plaintiffs have suffered great damage and injury to the crops growing on said lands and premises, etc.

The defendant demurred to both of the amended complaints, the demurrers being identical, the first ground of demurrer being that the amended complaints do not state a cause of action, and then specifically setting forth eight different grounds, only one of which need be here set forth. It reads:

> "How or in what manner the alleged failure of defendant caused injury or damage to the crops of plaintiffs."

The demurrers were overruled, and the ruling of the court is assigned as error.

[1-3] As against the general portion of the demurrer, we think the complaint in each case is sufficient; as against the special cause of demurrer which we have quoted, we are inclined to the view that the trial court should have sustained the same and required an amended complaint to be filed in each case setting forth more clearly and particularly the manner in which the plaintiffs' crops had been damaged, etc. This view of the pleadings, however, does not necessitate a reversal with a direction to the court below to sustain the appellant's demurrers and allow the plaintiffs to file further amended complaints in these actions. The cause went to trial, as appears from the transcript, upon the theory that the defendant had not taken or performed the necessary acts reasonably required by her to be performed under the covenants of the lease prior to the months of January and February, 1919; that, by reason of not having enlarged the district ditches, running through and bordering upon the demised premises prior to the time referred to, their capacity was not sufficiently large to enable the defendant to comply with the terms and conditions contained in the lease, and that by reason of such failure the waters rose in said ditches and flowed out over the demised lands and premises, inundating and saturating the same and materially injuring the crops growing thereon. All of this testimony was introduced without a single objection being interposed thereto or any statement being made by counsel indicating that all of said issues were not properly tendered by the pleadings, or that the defendant was being taken by surprise or did not fully understand the issues tendered and to be met. A few quotations from counsel for appellant will suffice to show that the scope of the issues being tried and to which the testimony was being directed was fully understood. We cull these statements from the record:

> "We are in court under what we had failed to do prior to and up to February, 1919." "We are here to answer this one proposition: Did we do everything necessary in order to keep the ditches that were then there as near as possible at a certain level? If we show that, that is our defense." "We are in court here to determine whether we have followed the terms of our lease."

The testimony also shows that all the parties to the action fully understood the location and character of the lands, the necessity for keeping the water at a certain level below the surface; that to do so it would be necessary to remove the waters falling upon said land during the rainy season, as well as take up and convey away the natural seepage water permeating all lands situated in the Delta district.

The answers filed by the defendant also specifically met the issue as to whether the defendant had or had not complied with her covenant in reference to keeping the water in the ditches at a certain level.

We are now dealing with the pleadings after a full hearing upon all the issues which could have been presented if the amended complaints had been drawn according to the forms approved by the most skillful lawyers or exacting methods of procedure. There is no pretense that the defendant has been misled; there is no showing whatever that any injury has resulted from the defect in the pleadings. Under this state of the case, we think the language of this court in the case of Boyle v. Coast Improvement Co., 27 Cal. App. 714, 721, 151 Pac. 25, 28, directly in point.

"It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue. * * * In the case here the trial proceeded in all respects as though the pleadings sufficiently presented the issue as to there being heirs, and precisely as it would had the complaint contained the allegation which it is insisted it should have contained. Why, then, should the case go back to have the complaint amended, as it is manifest that the proof would be the same. How can it be said that defendant has sustained 'substantial injury and that a different result would have been probable if such error * * * or defect * * * had not occurred?'" This is a quotation from a former decision by this court in the case of Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 321, 147 Pac. 90. In both cases section 475 of the Code of Civil Procedure and section 4½ of article 6 of the Constitution are referred to and relied upon. That section requires that no judgment shall be set aside or new trial granted for any error as to any matter of pleading unless the error complained of has resulted in a miscarriage of justice. Nothing of that kind appears in this case. The two decisions to which we have referred, the cases there cited, the section of the Code of Civil Procedure, and the amended section of the Constitution, we think a sufficient answer to the appellant's objection to the complaints now under consideration.

[4] We come now to the second objection. Many cases have been cited based upon exoneration clauses contained in leases, and the deduction is drawn therefrom that the exoneration clauses in the leases involved in this case overcome and annul any and all obligations contained in the typewritten covenant which we have heretofore set forth. On the part of the respondent it is earnestly contended that the typewritten covenant, if there is any conflict between the two clauses or paragraphs, takes precedence over printed matter contained in the lease, and therefore stands in the indenture as though there were no printed exoneration clause.

As we view this case, there is no conflict between the two clauses or paragraphs, and each of them may stand and be given full force and effect. They refer to different contingencies and conditions. They relate to different waters and to different causes and results.

The evidence shows that Ryer Island, on which the demised premises are located, is entirely surrounded by levees constructed for the double purpose of reclaiming the lands within district 501 and to protect such lands from the flood waters that come down through that section of the country when the rivers spread out over their banks and carry destruction and devastation in their course. As we read the lease, the exoneration clause relates to flood waters as ordinarily understood, to wit: A body of moving water; a flowing stream; a body of water rising, swelling, and overflowing land not usually thus covered. This is the definition given by Webster and approved by several courts. The parties executing the lease under consideration knew and had in mind the liability of the flooding of Ryer Island by the waters of the Sacramento river and its tributaries. They knew that the swelling waters in the river were likely to break the barriers theretofore erected by the district and flood the demised premises, destroying everything in the way of improvements that the plaintiffs might place thereon. This is the kind of flood to which the printed portion of the lease refers. Against such a flood no one could reasonably be required to covenant. The damages arising from floods of this nature are such as every farmer in the delta region is presumed to take into consideration when he begins farming operations upon premises always exposed to such menace. If this is not the kind of flood referred to in the exoneration clause, then, in the event that defendant found that her covenants involved the expenditure of more money than was contemplated all the defendant need to do would be to cease operations, let the waters rise in the ditches, saturate, inundate and overflow the demised lands, and then say, "I am not responsible for the flooding of your lands." This statement clearly shows that the two paragraphs have reference to different and separate causes and effects. The typewritten paragraph refers to a condition and situation inside the levee; the printed paragraph, an exoneration clause, relates to a cause arising and coming from outside the district, rising above the surrounding levees and producing a condition of damage and devastation therein.

We think the foregoing sufficiently shows that the two paragraphs may stand as independent clauses or paragraphs in the lease, and that each of them may be given full force and effect.

[5-7] The question then occurs: Did the defendant do everything reasonably necessary to keep the water level in the district ditches bordering on and running through the demised lands and premises as nearly as possible at an elevation of four feet below the surface level of the lands, and was the jury justified in finding that the defendant had not done so? The covenant in question is not limited in its language as to the capacity of the ditches at the time of the execution of the indenture of lease. It is a covenant to keep the water at a certain level.

This includes everything reasonably necessary to accomplish such purpose. It presupposes the maintaining of ditches of such capacity and pumping plants of such water-hoisting power as may be reasonably sufficient to comply with the intendment of the parties in the execution of the lease. The lease itself sets forth that a considerable portion of the acreage of the demised premises shall be planted to asparagus, and it is reasonable to infer that the parties took into consideration the necessary conditions requisite to be maintained for the profitable cultivation of that plant. The testimony shows, as well as the covenant in the lease, that all parties understood that the successful cultivation of asparagus required the water level in the ditches to be kept at least four feet below the surface level of the land. It, also, satisfactorily appears from the testimony that during the months of January and February, 1919, the waters in the ditches referred to were not kept at the required level, but rose therein to such an extent that a large portion of the demised lands was inundated, saturated, and rendered unfit for the cultivation of crops for a considerable period of time. The testimony also shows that, while the rainfall for the seasons of 1918 and 1919 was excessive, it was not unusual, nor such as does not frequently occur, and was not such a precipitation as might not be reasonably anticipated and guarded against. It also appears that after the execution of the lease and prior to the injury complained of, a period covering approximately 18 months, nothing was done toward enlarging the ditches bordering upon or running through the leased lands and premises so as to render it possible for the defendant to keep the water level as nearly as possible at a certain line or elevation. The testimony of several engineers, as shown by the transcript, is to the effect that the taking care of the rainfall, such as occurred during the season in controversy, was a mere matter of ditch capacity, and that the ditches, as they existed at the time of the injury, were insufficient in capacity and required enlargement in order to properly protect lands leased to the plaintiff in this action. In other words, the question of protecting the lands and safeguarding them from the rise of waters in the ditches as covenanted in the leases is a mere matter of financial expenditure, and not a question of physical possibility or impossibility. It may be true that the expenditures required to properly protect the lands as covenanted aggregate or would aggregate a considerable sum of money, considered in and of itself, and by itself, but, when the further fact is considered that the rental value required to be returned and paid by the lessees to the lessor is graduated according to years, from $10 to $27.50 per acre, aggregating the total sum, as heretofore stated, of approximately $250,000, the cost of protection agreed to be afforded may not be at all out of proportion, when all the circumstances and conditions are considered together. Be that as it may, however, the covenant of lease, as we read it, is to do a certain thing or to perform an act which is in no sense a physical impossibility, but requiring only the expenditure of capital. This, of course, constitutes no defense. We think in this particular the jury, from the testimony introduced, had a right to conclude that the defendant had not done all that she was reasonably required to have done prior to the injury complained of, and that the defendant's failure so to comply with the covenant of lease to keep the water level below, or at a certain elevation, was the proximate cause of the damage to the plaintiffs' crops. When the question of the sufficiency of testimony is presented, it is not the province of the court, as has been often stated, to weigh and determine the same, but only to ascertain whether there is testimony in the case upon which the trial court or jury may reasonably base the conclusion reached. We think there is such testimony in this case, and that determines the question.

[8] The third contention urged by the appellant, that the damages are excessive and that the rule adopted for ascertaining the same is incorrect, meets the same principle of law encountered by appellant's first objection considered in this opinion. The testimony upon the subject of damages was introduced without any objection whatsoever. The rule laid down in the case of Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, appears to have been followed very closely. The whole subject was gone into both upon the direct and cross examination of the witnesses. The whole theory of the case, so far as the question of damages is involved, appears to have been that the proper method of procedure was being followed, and that the testimony introduced and submitted to the jury was the proper testimony to be considered by them in ascertaining what damages, if any, the plaintiffs were entitled to recover. Upon this appeal, it is asked that plaintiff's claim of loss on field No. 2 of $2,885.52, also of the sum of $2,173.29 on fields Nos. 4 and 5, and the further sum of $1,607.25 on fields Nos. 6 and 7, should have been calculated and determined according to the rule laid down in Crow v. San Joaquin & Kings River Canal & Irrigation Co., 130 Cal. 309, 62 Pac. 562, 1058, that the rental value only of said land should have been considered. No such contention was made in the court below; no objection was made to the character of the testimony introduced to enable the jury to ascertain and determine the losses suffered by the plaintiffs upon the particular tracts here enumerated. The contention now is that those lands had not been planted or seeded to crops, and rental value only constituted the loss suffered by the plaintiffs. Whenever the rule laid

down in the Crow Case, supra, applies, we, of course, are bound by that rule, but it is evident that the mere mental value paid by the plaintiffs to the defendants for waterlogged lands would in no sense be adequate in this case. The plaintiffs were deprived of the use of the lands adapted for a particular purpose, and we may conclude from the amount of rent per acre agreed to be paid were peculiarly valuable for agriculture when properly protected. Some such view must have been in contemplation of the parties when the testimony was being introduced upon which it was purposed to ask the jury to fix the amount of damages in these cases. The amount of damages appears to have been very carefully presented and the testimony in relation thereto submitted to the jury upon a state of facts tacitly admitting that, if the plaintiffs were entitled to recover, they were entitled to recover the amount asked for. Under such circumstances, we do not very well see how this court can now sustain an objection to testimony which was not made at the time of the trial or hold that such testimony was improperly admitted and order a new trial when the whole case shows that no one questioned the competency of such testimony to fix the damages in this case at the time of its admission. It is evident that the judgments are not excessive in the amounts claimed by appellant. The difference, if any, would be the rental value of the lands to the plaintiffs and the amount allowed. What that is we have no way of ascertaining and nothing to show the same was introduced in the court below or offered to be introduced or pointed out to us here. We think appellant's third objection insufficient to warrant a reversal of this cause.

The contention is further made by the appellant that the jury awarded damages covering 20 acres of barley destroyed by fire, and for which destruction the plaintiffs collected insurance. Testimony as to the destruction of 20 acres of barley was introduced by the defendant, and also as to the payment of the insurance thereof. It is here sought to have us conclude that the 20 acres of barley referred to were taken into the estimate made by the jury. We have read the testimony carefully, as set out in appellant's brief and also in the transcript, and do not find that there is anything showing that the 20 acres here mentioned were a part of the inundated and replanted lands, but if such were the case it would not materially alter the result, because as to the replanted lands the jury allowed damages only for the lessened production of the crops realized, and not for the amount which was actually obtained. This appears to have been overlooked by the appellant.

[9, 10] It is finally urged that the court below misdirected the jury as to matters of law, one of the contentions under this subdivision being that the court left to the jury the interpretation of the clauses of the leases which we have heretofore considered in this opinion. This contention requires but little comment. It is evident that the jury by its verdict followed the interpretation which we have given, and hence must have followed what we believe to be the law applicable to this case and the consideration of the leases involved herein. Under such circumstances, the defendant is not prejudiced, even though we were to hold that consideration of the leases is a pure matter of law for the court. It is further urged that the court committed prejudicial error by inserting the following words, to wit: "Through no fault of the defendant"—in instruction No. 4 asked by the defendant. The instruction as requested reads as follows:

> "Plaintiffs, in their leases, expressly agreed to keep all ditches clean from weeds at all times. If you find from the evidence that the plaintiffs did not at all times keep all ditches on said premises clean from weeds, and that as a result of such failure, the drainage ditches became clogged up and the flow of the water in such ditches in February and March, 1919, was impeded to such an extent that damage resulted, the defendant cannot be held liable for the injury resulting from such a cause."

This instruction, as given, was made to read as follows by the court:

> "Plaintiffs, in their leases, expressly agreed to keep all ditches clean from weeds at all times. If you find from the evidence that plaintiffs did not at all times keep all ditches on said premises clean from weeds, and that as a result of such failure the drainage ditches became clogged up and the flow of the water in such ditches in February and March, 1919, was impeded to such an extent that damage resulted, through no fault of defendant, the defendant cannot be held liable for the injury resulting from such a cause."

It is evident that the court had in mind, in modifying the foregoing instruction, the fact that the drainage ditches emptied into and discharged their waters into the ditches which we have heretofore been considering, and that unless the defendant kept the waters in such ditches below a certain level the drainage ditch could not discharge waters thereinto. In this view we do not think the modification erroneous, but if so, it was harmless, in view of instruction No. 6, immediately given thereafter, which reads as follows:

> "No damages can be awarded plaintiffs in this case unless it is proven to your satisfaction that there was a breach of the clause of the lease in question on the part of defendant and that such breach caused the damage alleged."

Minor objections are made to some other instructions which do not seem to us to call for comment herein further than to say that upon the whole case we think there were no errors in the instructions prejudicial to the defendant, or which furnish any reasonable cause for urging errors therein.

We think the judgments of the trial court entered in these cases should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 534

Ex parte BROWN. (Cr. 1175.)

(District Court of Appeal, First District, Division 2. California. April 14, 1924.)

1. Intoxicating liquors 🔑279—Judgment sufficient in restraining features to be basis of contempt proceedings.

Portion of judgment in liquor nuisance case, "Defendant and * * * agents * * * are enjoined * * * from using * * * said premises * * * for * * * one year," *held* sufficient, independent of writ signed by clerk, to be basis for contempt proceeding.

2. Intoxicating liquors 🔑279—Knowledge of unserved injunction judgment sufficient for contempt.

Though judgment in liquor nuisance case enjoining defendant was not served on him, his knowledge of its rendition was sufficient on which to base contempt proceedings for its violation.

3. Intoxicating liquors 🔑279—Affidavit on information and belief sufficient as complaint.

Affidavit in nature of complaint for contempt, for violating liquor nuisance injunction, constituting at most a misdemeanor, though based solely on information and belief, without setting out sources thereof, is sufficient, though it could not be used as evidence.

4. Intoxicating liquors 🔑279—Immaterial that commitment was faulty in quotations from writ of injunction.

Where defendant was charged with violating judgment enjoining him from using for any purpose premises which he had been using as liquor nuisance and also the injunction writ issued by clerk thereon, and the contempt for which he was committed consisted of violating of such provision of judgment, it is immaterial that commitment did not follow terms of injunction writ varying from judgment.

Original habeas corpus proceeding by Harry Brown for release from commitment. Writ discharged, and prisoner remanded.

Raine Ewell, of San Francisco, for petitioner.

Ezra W. Decoto, Dist. Atty., Earle Warren, Asst. Dist. Atty., and Carlisle C. Crosby, Deputy Dist. Atty., all of Oakland, for respondent.

NOURSE, J. Petitioner seeks his release under habeas corpus from a commitment for contempt in which he was charged with violating an injunction of the superior court restraining him from using and occupying certain premises in the county of Alameda which had been ordered vacated as a nuisance under the terms of the statutes prohibiting the sale of intoxicating liquors. Three points of attack are made upon the commitment and we will consider them in the order of their presentation.

[1] 1. It is argued that the writ of injunction which the petitioner was charged with violating is ineffective because signed by the clerk of the court and not by the trial judge. The original action was instituted by the district attorney for the purpose of having the premises owned and occupied by the petitioner herein declared to be a public nuisance because said premises were being used by the petitioner for the purpose of selling intoxicating liquors in violation of the prohibition statutes. After trial a judgment was rendered signed by the trial judge and duly entered. Thereafter what is termed a permanent writ of injunction was issued by the clerk of the court. In this the people followed the old practice, which has long since been discontinued in this state, and if this writ of injunction were the only restraining order involved the question presented by the petitioner herein would offer serious difficulties. But in addition to this writ the trial judge, as has been said, signed and entered a judgment which, though it is not to be commended as to form, is sufficient in its restraining features to form the basis of the contempt proceedings. This judgment is a combination of findings of fact, conclusions of law, an order that an injunction should issue restraining the defendant from performing certain acts in regard to the property, an order which in itself restrains the defendant from performing certain other acts in regard to the property, and an order mandatory in form requiring that certain other acts be performed in regard to the property. The portion of the judgment which is of importance to our consideration reads:

> "And the defendant Harry Brown, and each of his agents, servants and employees, and any and all persons acting in conjunction with or in concert with him, or either or any of them, are enjoined, restrained and prohibited from using or occupying or permitting said premises to be used or occupied for any purpose whatever for said period of one year from the date hereof, or until the further order of this court."

[2] The affidavit upon which the contempt proceedings were based charged the petitioner herein with the violation of this portion of the judgment as well as the so-called writ of injunction which was issued by the clerk. In so far as the judgment restrained the petitioner from using and occupying the premises for the period of one year, it was in strict accord with the terms of the act under which the proceedings were instituted and thus constituted a valid restraint against

the use of the premises. It is true, as argued by petitioner, that the affidavit upon which the contempt proceedings were based does not clearly allege service of this judgment upon the petitioner, but it does appear that he had knowledge of the rendering of the judgment and this the Supreme Court, in In re Brambini, 218 Pac. 569, held was sufficient.

[3] 2. It is argued that the whole proceedings charging contempt were invalid because the affidavit on which they were based set forth all the essential allegations on the information and belief only of the affiant. Ordinarily an affidavit made solely on information and belief is ineffective for any purpose unless at least the sources of the information and belief are stated. This rule obtains where such affidavits are to be used as evidence in some judicial proceeding. Where, as here, the affidavit is in the nature of a complaint, the statement of facts upon information and belief and the failure to give the sources thereof has not been held to be fatal. In Selowsky v. Superior Court, 180 Cal. 404, 407, 181 Pac. 652, it was held that an affidavit charging the commission of a contempt need not be more specific in its averments of the facts constituting the contempt than a complaint or an information charging a crime. A contempt of this character is at the most a misdemeanor, and, of course, a complaint charging a misdemeanor may be based upon information and belief. The affidavit under consideration in the Selowsky Case was, to a large extent, based upon information and belief, and, though the point was not expressly decided, these allegations were treated as sufficient. Though the practice is not an approved one, it would seem to follow from that case that an affidavit charging a contempt may be based on information and belief. If such affidavit is sought to be used as evidence against the alleged contemner on the hearing of the contempt proceedings, then a different situation would arise and the rule relating to hearsay would apply. This objection is not open to the petitioner here, as it appears that the affiant was put on the stand and gave his testimony orally at the contempt hearing.

[4] 3. It is argued that the commitment is faulty in its quotations from the judgment and the writ of injunction, but, as has heretofore been pointed out, the petitioner was charged with violating both the judgment and the injunction, and it is therefore immaterial whether the so-called writ of injunction issued by the clerk followed the terms of the judgment signed by the trial judge. This judgment prohibited the occupation and use of the premises for any purposes whatsoever and the contempt for which the petitioner herein was committed consisted of the occupation and use of said premises in violation of the terms of this order.

The writ is discharged and the prisoner remanded.

We concur: LANGDON, P. J.; STURTEVANT, J.

66 Cal. App. 538

WILES v. HAMMER. (Civ. 4004.)

(District Court of Appeal, Second District, Division 1, California. April 15, 1924.)

1. Trial 🔑404(1)—Finding in form of negative pregnant, attempting to negative affirmative allegation, implies truth of allegation.

A finding in the form of a negative pregnant, attempting to negative an affirmative allegation, implies the truth of the allegation.

2. Trial 🔑398—Inconsistent and contradictory findings require reversal.

Where the findings on all the causes of action were for plaintiff, but findings on affirmative defenses were in the form of a negative pregnant, making the findings inconsistent and contradictory, a reversal of the judgment was necessary.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by A. T. Wiles against P. W. Hammer. Judgment for plaintiff, and defendant appeals. Reversed.

Kaye & Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for appellant.

H. E. Schmidt, of Wasco, for respondent.

CURTIS, J. [1, 2] This action is for the recovery of a money judgment against the defendant. The complaint contains three causes of action: The first, upon a contract for the drilling of a well; the second, for the value of certain well-casing; and, the third, for services performed in the development work on wells belonging to the defendant. The answer consists of a denial of the allegations of the complaint and affirmative matter in the nature of an affirmative defense to each of the three causes of action set out in the complaint. Defendant also filed a cross-complaint, but no point seems to be made by appellant regarding any issue involved in the latter pleading. The court found in favor of plaintiff upon all three causes of action set forth in said complaint and awarded judgment in his favor for the amount prayed for, less the amount of a counterclaim set up by defendant in his answer. The counterclaim was no part of, and was entirely independent of, the matters set forth in the affirmative defenses of the answer.

In the findings of fact filed, the court, after finding in favor of plaintiff upon the allegations of the complaint, found also upon the issues made by defendant's affirmative defenses. Upon these issues it is apparent that the court intended to find in plaintiff's favor, but many of the findings upon this branch of the case were prepared by using the statement, "It is not true," and following such statement with a copy of the allegations of the affirmative defense, with the result that the findings thus prepared and signed by the court contained many contradictory and inconsistent statements. Accordingly, we find that in many instances where it was evidently the intention of the court to find in favor of the plaintiff, on account of the erroneous method employed in drafting the findings, the very opposite result was obtained. Take, for instance, the findings upon the issues presented by plaintiff's second cause of action. The plaintiff alleged, and the court found as true, that the plaintiff furnished and delivered to defendant, at defendant's special instance and request, well-casing of the reasonable value of $117.58, no part of which had been paid. In addition to his denial of these allegations of the complaint, the defendant alleged in substance that all well-casing furnished by plaintiff was furnished at plaintiff's own cost and expense, by reason of his careless, negligent, and unskillful construction of two other wells which he had drilled for the defendant, and by reason of the fact that plaintiff had wasted and lost a large quantity of casing belonging to defendant in the worthless construction of these other wells, and that any and all casing furnished by plaintiff was furnished under an agreement on the part of plaintiff to drill for defendant, without further cost to defendant, a good and sufficient well.

The finding of the court upon this allegation of defendant's answer was as follows:

> "That it is not true as alleged in the answer and cross-complaint that all casing furnished by plaintiff was furnished at his own cost and expense by reason of his careless, negligent and unskillful construction of the first two wells, and by reason of the fact that in the construction of said last-mentioned well the plaintiff had wasted and lost a large quantity of casing belonging to the defendant in the worthless and useless wells above mentioned, and that all of the casing furnished by plaintiff was furnished under and pursuant to the agreement of plaintiff above mentioned to finish and complete defendant a good and sufficient well."

It is apparent from the reading of this finding that it does not negative the allegations of defendant's answer above referred to, but is in the nature of a negative pregnant and implies the truth of at least some of these allegations without showing which ones, if any, are untrue. A finding in the form of a negative pregnant, attempting to negative an affirmative allegation, implies the truth of the allegation. Tormey v. Anderson-Cottonwood Irrigation District, 53 Cal. App. 559, 200 Pac. 814; Auerbach v. Healy, 174 Cal. 60–65, 161 Pac. 1157; Southern Pacific Railroad Co. v. Dufour, 95 Cal. 615–619, 30 Pac. 783, 19 L. R. A. 92. We find this condition exists in respect to the findings upon the issues in all three causes of action.

The findings, therefore, being inconsistent and contradictory upon the material issues in the case do not support the judgment.

> "The rule on this subject may safely be said to go this far, at least—that where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way, or the other, is essential to the correctness of the judgment, there the judgment cannot stand. If one part of the contradictory findings would support the judgment, and another part would necessarily upset it, then the judgment must be reversed." Learned v. Castle, 78 Cal. 454–460, 21 Pac. 11, 13.

We regret the necessity of reversing the judgment under these circumstances, especially where the intention of the court to find in plaintiff's favor is so apparent; but, if we give to the findings their proper construction and meaning, no other result can follow.

Judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

(66 Cal. App. 478)

SULLIVAN et al. v. HELBING et al.

(Civ. 4767.)

(District Court of Appeal, First District, Division 1, California. April 10, 1924. Hearing Denied by Supreme Court June 9, 1924.)

1. Fraud ⚷50—Presumption in favor of innocence.

Courts do not infer fraud because of conduct not conforming to complainant's ideas of morality, since law presumes that a person is innocent of wrong; that private transactions are fair and regular; that ordinary course of business has been followed.

2. Fraud ⚷50—Proof essential.

Fraud must be proved.

3. Fraud ⚷17—Full disclosure required.

Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth, and not suppress facts within his knowledge or materially qualify those stated.

4. Fraud ⚷9 — Fraudulent representations may consist of half-truths.

Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is actionable, if used to create an impression substantially false.

5. Fraud ⚷11(2) — Misrepresentation as to rental value held actionable.

In an agreement of exchange, defendants' misrepresentation of rental value of their property amounted to actionable fraud, for matter was one peculiarly within their knowledge.

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6. Fraud 🔑22(1)—Representations held actionable notwithstanding investigation.

Plaintiffs were entitled to relief from fraud practiced on them by defendants' misrepresenting rentals of their property in exchange thereof, though plaintiffs investigated and were deceived by tenant, where they relied on defendants' statements and would not have gone through with transaction, had they known true facts.

7. Fraud 🔑22(1)—Investigation does not raise presumption party relied on own judgment.

That one makes an independent investigation does not necessarily show that he relied on his own judgment rather than on representation of other party, nor does it give rise to presumption of law to that effect.

8. Fraud 🔑23—Purchaser may rely on representation of facts not within his knowledge.

Purchaser may rely on vendor's representations as to facts not within purchaser's knowledge, and vendor cannot escape responsibility by showing that purchaser might have ascertained upon inquiry that representations were untrue.

9. Fraud 🔑31—Remedies available.

On discovery of fraud, party may restore what he has received and proceed in equity to rescind contract and recover what he has parted with; or he may affirm sale and recover damages for deceit, as he is entitled to his bargain.

10. Fraud 🔑59(2)—Measure of damages.

Where injured party affirms the sale, measure of damages will ordinarily be difference between value of the land as it is and what its value would have been if condition had been as represented.

11. Fraud 🔑59(2)—Measure of damages for misrepresentations as to rental value.

Plaintiffs were entitled to recover, as damages in exchange of property in which defendants misrepresented rental value of their property, difference in its value as it was and as it would have been if rent had been as represented.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by John V. Sullivan and others against Andrew Helbing and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Charles S. Peery, of San Francisco, for appellants.

Byrne & Lamson, of San Francisco, for respondents.

TYLER, P. J. Action in tort alleged to have been committed through the making of misrepresentations as to the rental value of certain real property in the negotiations of an exchange.

The appeal is prosecuted from a judgment rendered in favor of plaintiffs for the sum of $2,000 damages for the fraud found to have been perpetrated, after denial of a motion for nonsuit; no evidence having been offered by defendants.

The facts may be briefly stated as follows: Plaintiffs and defendants were the owners of different parcels of improved real property situated in the city and county of San Francisco. On or about the 3d day of May, 1922, defendants made an offer to the plaintiffs through an agent to exchange their respective holdings. The complaint alleges that for the purpose of inducing plaintiffs to make the exchange defendants falsely stated to them that their (defendants') property was under lease to a tenant who was paying as rental therefor the sum of $155 per month. It is admitted that the lease did provide for such rental, and that such lease was secured by a chattel mortgage on certain machinery; but it is charged that the tenant never paid such sum nor any sum greater than $135 per month, the difference in the amounts having been rebated by defendants. It is further charged that the defendants made the false representations concerning the rent for the purpose of leading the plaintiffs to believe that the property owned by defendants had a rental and market value in excess of that which it actually possessed, and that relying on such representation plaintiffs made the contract. The agreement further provided that when the transfers were consummated the rental paid by defendants' tenant for the current month should be prorated between the parties; and in pursuance of this arrangement, and in furtherance of the fraud, so it is alleged, defendants paid to plaintiffs the sum of $150, which sum they represented had been received by them as rent for the month of June, 1922. It is then alleged that neither this nor any other sum had been received by defendants from their tenant as rent for the period stated, but such amount was paid by them from funds otherwise acquired, and that it was so paid for the sole purpose of preventing plaintiffs from discovering the true state of facts, which were only ascertained by plaintiffs after the exchange had been consummated and when they demanded from the tenant the rental of the premises for the month of July, 1922, on which occasion the tenant vacated the premises and never paid plaintiffs any rent whatever. Plaintiffs then sold the machinery covered by the chattel mortgage according to law for the sum of $50, which they applied to the rent due for the month of July, and thereafter brought this action.

The trial court found that the defendants had made the false representations, and that by reason of their acts and concealments plaintiffs had been damaged in the sum of $2,000, for which amount judgment was rendered.

As ground for reversal it is urged that defendants made no false representations, as the premises were as a matter of fact leased under a rental of $155 per month, and that such lease was secured in the manner indicated; that under such circumstances, there being no confidential relations involved, the parties dealt at arm's length through an agent, and that no duty rested upon defendants to disclose to respondents that there had been a rebate in the rent, assuming this to be a material circumstance.

In support of this contention, we are cited to cases to the effect that, in the absence of a confidential relation, a vendor is under no obligation to volunteer information to his vendee which was as readily accessible to both parties, as the law will not undertake the care of persons who will not with the means at hand take care of themselves, and mere silence under such circumstances cannot be construed to be a fraudulent concealment sufficient to support an action for fraud. Bacon v. Soule, 19 Cal. App. 439, 126 Pac. 384; Ruhl v. Mott, 120 Cal. 668, 53 Pac. 304. It is accordingly claimed that the learned trial judge applied an idealistic conception of the law, which might be very commendable in morals but which has no support in law.

[1, 2] In dealing with cases in which one party to a transaction complains of the conduct of the other, courts are not to presume or infer fraud because such conduct does not conform to their ideas of morality. Fraud must be proven. The law presumes that a person is innocent of wrong; that private transactions are fair and regular; that the ordinary course of business has been followed. An inference of good faith rather than of fraud should be indulged, and the presumption against fraud must be overcome by him who alleges improper conduct. Arakelian v. Sears, 53 Cal. App. 653, 200 Pac. 757.

These principles, however, have no application to the instant case. Here defendants expressly represented that under the lease in question the tenant was obligated to pay $155 per month rent. While this representation was literally true, it amounted to a concealment of the true facts, since it was not disclosed that a lesser amount was actually paid and accepted in satisfaction of the obligation.

[3] Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure. 12 R. C. L. Fraud and Deceit, § 71.

[4] Fraudulent representations may consist of half-truths calculated to deceive. Thus a representation literally true is actionable if used to create an impression substantially false. 26 C. J. p. 1100.

[5] Here the representation contained in the exchange agreement, as above indicated, expressly recited that the property was under present rental of $155 per month. This in legal effect amounted to a willful misrepresentation by the vendors, affirming that the rental from the property sought to be exchanged was greater than in truth it was. It amounted to actionable fraud, for the matter was one peculiarly within their knowledge. Hecht v. Metzler, 14 Utah, 408, 417, 48 Pac. 37, 60 Am. St. Rep. 906.

[6, 7] It is true that the evidence shows that the plaintiffs did make some independent investigation and were informed by the tenant that he could pay his rent; but it further shows that they relied upon the statements of defendants concerning the same, and that they would not have gone through with the transaction had they known the true facts. The mere circumstance that one makes an independent investigation or consults with others does not necessarily show that he relied on his own judgment rather than upon the representations of the other party, nor does it give rise to a presumption of law to that effect. Here plaintiffs were deceived by the tenant, who subsequent to the completion of the transaction informed them he had paid no rent. Under these circumstances, plaintiffs were misled through no fault of theirs, and as they also relied upon the representations of the defendants they are entitled to relief from the fraud practiced upon them. 12 R. C. L. Fraud and Deceit, § 111.

[8] A purchaser has the right to rely on the representations of the vendor as to facts not within the purchaser's knowledge, and the vendor cannot escape responsibility by showing that the purchaser might have ascertained upon inquiry that the representations were untrue. Morris v. Courtney, 120 Cal. 63, 52 Pac. 129.

It is intimated in the closing brief of appellants that respondents' remedy was an action for rescission.

[9, 10] Generally, there are two courses open to the injured party: He may on discovery of the fraud restore what he has received, and proceed in equity to rescind the contract and recover what he has parted with; or he may proceed in affirmance of the sale and recover damages for deceit, as he is entitled to his bargain. In the latter case the measure of damage will ordinarily be the difference between the value of the land as it is and what its value would have been if the condition had been as represented. 3 Sedgwick on Damages (9th Ed.) 1027, 1029; 39 Cyc. 2116; Page v. Wells, 37 Mich. 415; Estell v. Myers, 54 Miss. 174; Morse v. Hutchins, 102 Mass. 440. Quite frequently, though not always, the value of land is made

to depend upon the amount of rent that it will produce, the rent being some evidence of value; and usually when the land is purchased for investment this is the controlling inducement.

[11] Here there is evidence in the record to show that the rental value of the property during the period in question was from $125 to $135 per month. There is also evidence to show that the effect of the rental value of this particular property controls in a measure its market value, and the difference in value as it is and what its value would have been if the rent was as represented amounts to $2,000. The trial court so found, and we are of the opinion that the findings are fully supported by the evidence.

The judgment is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

(66 Cal. App. 491)

ROSSITER v. THOMPSON. (Civ. 4352.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1924. Rehearing Denied May 9, 1924. Hearing Denied by Supreme Court June 9, 1924.)

1. Contracts ⚷137(2)—Provision of contract between doctors, requiring one to absent himself from his practice for stated time, if illegal, held not to invalidate whole.

Provision of contract, whereby plaintiff doctor was employed to attend practice of another during absence, which required the one to surrender and abandon his practice in that place for period stated, and to allow plaintiff sole and exclusive management, if void, under Civ. Code, § 1673, does not invalidate entire contract, in view of section 1599.

2. Contracts ⚷108(2)—Contract between doctors, whereby one assumed practice of another during enforced absence, held not illegal.

Contract between doctors, whereby one was to assume and attend practice of another during an enforced absence for an agreed percentage in net returns, *held* not illegal.

3. Appeal and error ⚷1071(6)—Failure to find as to existence of particular provision in action on contract held not prejudicial.

In action for breach of contract between doctors, whereby one was to attend the practice of another during enforced absence, failure of court to find whether agreement required the one party to absent himself entirely from city and abandon the practice during the time covered *held* not prejudicial, since such provision, if existent and illegal, would not have invalidated the whole contract.

4. Appeal and error ⚷1071(6)—Failure to make finding, which, if made, would be adverse to complaining party, not reversible error.

Failure to make finding, which, if made, would have been adverse to complaining party, does not constitute reversible error.

5. New trial ⚷99—Denial of new trial, because of newly discovered evidence merely cumulative and contradictory, not error.

Denial of new trial sought on ground of newly discovered evidence which was cumulative and contradictory, *held* not error.

6. Appeal and error ⚷981—New trial ⚷99—Within trial court's discretion whose action not disturbed, except for abuse thereof.

The granting of a new trial on the ground of newly discovered evidence is within trial court's discretion, which will not be disturbed, except for abuse of discretion.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Frederick M. Rossiter against Elmer H. Thompson. Judgment for plaintiff, and defendant appeals. Affirmed.

Fredericks & Hanna, of Los Angeles, for appellant.

Swaffield & Swaffield, of Long Beach, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of plaintiff and against defendant, arising out of an action brought on an alleged breach of contract.

Each of the parties is a physician and surgeon. From the record herein it appears that for several years prior to October 1, 1918, defendant had been engaged in the practice of his profession in the city of Burbank; that for a period of some seven or eight months prior to said date plaintiff had been practicing medicine in the town of La Brea; that at about that time defendant either had received, or was about to receive, a commission in the medical corps of the United States Army; and in anticipation of such appointment defendant initiated negotiations with plaintiff looking to an arrangement whereby plaintiff would abandon his medical practice at La Brea and take over defendant's medical practice at Burbank. The result of the negotiations was that an oral agreement was entered into between the parties, which, according to the finding of the judge of the trial court, was as follows:

"That on said 14th day of October, 1918, said parties entered into an agreement wherein and whereby plaintiff agreed to surrender and abandon his said residence and practice in said town of Brea and to take up his residence in said city of Burbank, and defendant agreed to employ plaintiff to take and assume full management and control of said defendant's practice and to maintain, carry on, and conduct the same for the period of one year, beginning October 14, 1918; and it was further agreed that plaintiff should receive as compensation a portion of the income derived from said practice computed as follows, to wit: The necessary operating and running expenses connected with said business, together with plaintiff's house rent, and also together with a sum of money sufficient to pay such income tax as should be levied upon the income derived during said period should be first deducted from the income of said practice during said period, and of the balance remaining plaintiff should receive 90 per cent. and defendant 10 per cent.; that by the terms of said agreement it was further agreed that defendant should not be obligated to render any services in the prosecution of said practice for one year, and should be privileged to remain away from said practice for the entire term of said agreement; and that defendant would allow plaintiff to remain and continue in the full management and control of said practice for said period and upon the terms above mentioned."

The terms of the agreement were complied with by each of the parties to the agreement until on or about the 14th day of January, 1919, when (again to quote the findings of the trial court): "defendant wrongfully and in violation of the terms of said agreement, and without any cause therefor, resumed the management, control, and conduct of his said practice, and wrongfully and without any cause therefor discontinued the said employment of plaintiff, and wrongfully and without any cause therefor excluded plaintiff from said practice and from the management, control, and conduct thereof, and wrongfully and without any cause therefor excluded plaintiff from participation in any of the income from said practice, and continued to so wrongfully and without cause exclude plaintiff from said practice and from the management, control, and conduct thereof and from participation in any of the income of said practice, from said 14th day of January, 1919, for the balance of the term of said agreement."

[1] Defendant's first contention is that the complaint does not state facts sufficient to constitute a cause of action. The basis of the objection is that, in addition to stating what is concededly unobjectionable as a cause of action, the complaint contains matter which it is claimed precludes plaintiff from a recovery of any judgment against defendant. The language of the complaint to which appellant's attack is directed is as follows:

> "That on or about the 14th day of October, 1918, it was agreed by said parties that plaintiff should surrender and abandon his said residence and practice in said town of Brea and take up his residence in said city of Burbank; that plaintiff should assume and undertake the burdens and responsibilities of and conduct and carry on the said practice of defendant for the ensuing year, and give to the same such time and effort as should be necessary, and that defendant should absent himself from said city of Burbank and the immediate vicinity thereof, and abandon his said practice and patients for said period of time, and allow and permit plaintiff to remain in the sole and exclusive management and control thereof for said period of time, so far as concerned the activities and professional efforts of defendant."

Appellant urges that the allegation that it was agreed "that defendant should absent himself from said city of Burbank, * * * and abandon his said practice and patients for said period of time" presents a situation inimical to the provisions of section 1673 of the Civil Code, by which any contract whereby any one is restrained from exercising a lawful profession "is to that extent void." The contract between plaintiff and defendant was one of employment, the compensation for which was based upon a percentage of the remuneration received for the work which was to be done. The apparent intention of the parties was that the employee was to do all the work and the employer was not expected to be present even for the purpose of overseeing it. The language of the contract that the employer "should absent himself * * * and abandon his practice" was more in the nature of a privilege extended to the employer than that it was mandatory or compulsory that he should do so. The employer was "to allow and permit plaintiff to remain in the sole and exclusive management and control thereof for said period of time, so far as concerned the activities and professional efforts of defendant." In the very nature of things it would not be expected that an employer would abdicate all authority in the premises which might ensue from an enforced absence from the place where the work was to be performed. The terms of the contract, if strictly followed, might preclude the employer from visiting his family residing within the territorial limits of the city of Burbank, or even go so far as to prevent the employer from passing through the city on a train or an automobile. Such an absurd result, of course, was never contemplated by the parties. The principal and controlling feature of the agreement was "that plaintiff should assume and undertake the burdens and responsibilities of and conduct and carry on the said practice of defendant for the ensuing year." The provision that defendant should absent himself and abandon his practice was merely incidental to the main object of the agreement. The contract was composed of several severable parts. If it be assumed (without necessarily deciding the point) that that part of the agreement by which defendant was "restrained from exercising a lawful profession" was in contravention of the provisions of section 1673 of the Civil Code, and was "to that extent void," yet the remainder of the contract having to do with the employment of plaintiff by defendant, being complete in itself, and not in any manner relating to or dependent upon the objectionable feature of the agreement, and not in violation of any law, may stand.

In the case of City Carpet, etc., Works v. Jones, 102 Cal. 506, 36 Pac. 841, there was a sale of a business, including its good will, within the counties of San Francisco, Alameda, and San Mateo. The statute to which reference has been made permits a sale of "the good will of a business * * * within a specified county." In holding that the covenant was divisible, and that it might be enforced as to that part which was not in violation of the terms of the statute, the court said:

> "In this case three counties are named in the contract, and I see no difficulty in upholding it as to the county in which the business was conducted, and declaring it void as to the other two counties. The boundaries of each are definite, and fixed by law. Neither includes any part of the others. If the city and county of San Francisco had alone been named, the contract would have been good. How the naming of the counties of Alameda and San Mateo in addition, such addition being void, could affect that which otherwise is valid, the void part being capable of exact ascertainment and separation, I do not comprehend, and especially when such separation not only does no violence to the language of the statute, but does justice between the parties and promotes the public interests, and conforms to the obvious intention of the statute, and it is only to the 'extent' that the contract departs from the provisions of the Code that it is declared void."

So in the case at bar the void part of this contract (assuming it to be such) is "capable of exact ascertainment and separation"; and "such separation does no violence to the language of the statute," and certainly does justice between the parties.

In the case of Ragsdale v. Nagle, 106 Cal. 332, 39 Pac. 628, it is held (syllabus) that—

> "Where a contract for the sale of a good will of a business, and to refrain from carrying on a similar business, goes beyond the scope of the law in certain particulars, it is nevertheless valid in all those particulars in which it falls within the provisions of the law."

Section 1599 of the Civil Code provides that—

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

And the following cases are in point with reference to upholding that part of the contract herein to which there can be no statutory objection: Brown v. Kling, 101 Cal. 295, 35 Pac. 995; Hedges v. Frink, 174 Cal. 552, 163 Pac. 884; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; Treadwell v. Davis, 34 Cal. 601; Jackson v. Shawl, 29 Cal. 267; Hogue-Kellogg Co. v. Baker, 47 Cal. App. 247, 190 Pac. 493; Porter v. Fisher, 4 Cal. Unrep. 324, 34 Pac. 700.

[2] Appellant's second contention is that the contract as set forth in the findings is illegal. No authorities are cited to support the claim, and this court is unable to discover any defect therein which would result in a legal declaration of the nature of that suggested by appellant.

[3] It is next urged by appellant that there is a material variance between the pleadings and the findings, and that the court erred in not finding upon the issue as to whether or not there was any agreement that defendant should absent himself from the city of Burbank and abandon his practice and patients during the time covered by the contract.

[4] It will be remembered that it was plaintiff who pleaded the fact in question. Defendant answered, denying that such fact was a part of the agreement. The most that defendant could expect would be a finding in accordance with the averments of his answer. The substance of the allegations contained in the answer is that no such agreement was made. Taking defendant's allegation at its full face value, defendant is not hurt because the court failed to find thereon, for the reason that such a finding would have eliminated all question as to the legality of the contract. This was an oral agreement. The findings of the court purport to set forth the entire agreement that was entered into between the parties thereto. Necessarily everything not included within the court's statement of what the oral agreement consisted is presumed not to have been agreed to by the parties; therefore, if any finding had been directly made on the allegation, it would necessarily have been that no such agreement was made. But, assuming that, had the court found directly on the matter, the finding would have been against defendant's contention, then the agreement would simply have contained a clause which would not have materially assisted defendant for the reason, as heretofore stated, that the inclusion of such alleged objectionable matter in the agreement at most renders the contract invalid only "to that extent." The rule is well settled that, if an omitted finding would have been adverse to a defendant, such omission will not constitute an error sufficient to authorize a reversal of the judgment. Winslow v. Gohransen, 88 Cal. 452, 26 Pac. 504; Southern Pac. R. R. Co. v. Whitaker, 109 Cal. 274, 41 Pac. 1083; Reed v. Johnson, 127 Cal. 541, 59 Pac. 986, and cases there cited; Gerth v. Gerth, 7 Cal. App. 737, 95 Pac. 904, and cases there cited; Furlong v. White, 51 Cal. App. 265, 196 Pac. 903; U. S. Trading Corp. v. Newmark Grain Co., 56 Cal. App. 191, 205 Pac. 29.

Appellant further complains that the evidence was insufficient to justify the finding by the trial court as to the amount of damages sustained by plaintiff, or that defendant wrongfully and in violation of the agreement resumed the management and control of his practice and excluded plaintiff therefrom. But an examination of the record on appeal clearly shows that there was ample evidence to warrant the conclusion reached by the judge of the trial court in regard to each of such matters.

[5, 6] Appellant's final contention is that

the court erred in refusing to grant defendant's motion for a new trial on the ground of newly discovered evidence. The evidence which defendant claimed had been discovered after the case had been tried was cumulative in character, and went only to the point of contradicting the testimony of plaintiff. The showing as to diligence in discovering such evidence before the close of the trial was weak and altogether unsatisfactory. In circumstances such as were presented at the time the motion for new trial was considered the decision rested entirely with the discretion of the judge of the trial court. The rule is unquestioned that, unless such discretion is clearly shown to have been abused, the conclusion by the trial court is final. There is nothing in the record herein which would indicate other than that the motion for new trial was accorded a full and fair hearing on its merits and that the decision thereon by the judge of the lower court was entirely free from any suspicion of prejudice or improper conception of his legal duty in premises.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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66 Cal. App. 391

MORTON v. ALBERS BROS. MILLING CO.

(Civ. 4385.)

(District Court of Appeal, Second District, Division 2, California. March 28, 1924.)

1. Contracts 🔑238(2) — Unexecuted oral agreement altering written contract by extending time for performance void.

Under Civ. Code, § 1698, an unexecuted oral agreement altering a written contract by extending the time for performance is void.

2. Principal and agent 🔑101(1)—Agent cannot change contract or waive provision intended for benefit of principal under general authority to perform.

The authority of an agent to perform a contract already made by his principal does not include authority to change the contract or to waive any of its provisions, especially where the provision is one intended for the benefit of the principal.

3. Principal and agent 🔑119(1)—Agent presumptively employed to acquire and not to give up interests.

The presumption is that an agent is employed to acquire interests, not to give them up.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. Morton against the Albers Bros. Milling Company. From a judgment for plaintiff, defendant appeals. Reversed.

Hickcox, Crenshaw & Trude, of El Centro, for appellant.

C. L. Brown, of El Centro, for respondent.

FINLAYSON, P. J. This is an action for damages for the alleged breach of a contract to purchase milo maize. The jury returned a verdict for plaintiff, and from the judgment entered thereon the defendant appeals.

Some of the milo was delivered, and payment therefor was made by defendant. It is claimed by plaintiff that he was ready and willing to deliver the balance within the time provided for by an oral extension of the time for delivery, but that defendant wrongfully refused to accept it. Thereafter plaintiff sold the undelivered milo in the open market for $29 per ton. This action was brought to recover the difference between that and the contract price.

The facts of the case, as revealed by the pleadings and proof, are substantially these: On September 16, 1920, at Brawley, in this state, plaintiff and defendant executed a written contract which, so far as it is material to the questions presented, reads:

> "W. Morton has this day sold, and the Albers Bros. Milling Co., a corporation, of El Centro, California, has this day bought 250 tons of good No. 1 marketable milo now being grown or located Mead and Arnold Ranches, to be sacked in Standard, new jute bags at the purchase price of $50.00 per ton, said milo to be delivered f. o. b. cars main line points by December 1st, and seller further agrees to keep said milo insured to the time of its delivery, in said Albers Bros. Milling Co.'s favor to an amount equal to that paid on same by said Albers Bros. Milling Co. The seller hereby acknowledges receipt of $1.00 on account of purchase price of said milo. Said Albers Bros. Milling Co. agrees to pay the balance on said purchase price of said * * * upon its delivery; should the delivery not be made within the time specified herein, it shall be optional with said Albers Bros. Milling Co., when delivery is made, to take said milo at the price stated herein, or at the market price at the time of said delivery."

It is claimed by plaintiff that on November 25, 1920, and while he had 250 tons of milo on deposit in warehouses at Calipatria and Rockwood ready for delivery, he and a Mr. Louis Prenot, the assistant manager of defendant's Los Angeles branch who then was visiting in the Imperial valley, entered into an oral agreement whereby the time for delivery was extended to December 25, 1920. The testimony given by plaintiff in support of his claim, reduced to narrative form, is substantially as follows: About November 25, 1920, I went to the office of B. F. McCormick [a buyer for the defendant] and there found Mr. Prenot, who held up his hands and said: "Morton, we cannot take your corn." I said "Why?" and he said, "We haven't the money to pay for the corn and can't get it." I said, "It puts me in bad shape. I bought a ranch in Nevada and I expected this money to help me make the payments on it and it is going to put me in bad. I have to make a payment the first of the year." He said, "If we can get some time on the corn we can take it. If you will give us until the first of the year we will take the corn." I said, "I can't do that, I have to have my money on the first, but I will extend the time to the 25th of December." He said, "Morton, you are a prince. If everybody understood this situation and looked at conditions like you do we would all get by." I said, "Mr. Prenot, I think we ought to have a little contract to that effect," and he said, "Very well." He turned around and dictated a contract to Harry Cuthbertson [defendant's local manager in the Imperial valley], who wrote in pencil on a piece of paper that they were to have an extension to the 25th of December. This writing was never signed by either party. Mr. Prenot instructed Cuthbertson to get a typist to type this contract so we could sign it. Cuthbertson went out and came back, saying he couldn't find a stenographer, that he had gone to lunch. Mr. Prenot then said, "Well, let it go and to-night we will fix it up and leave it here with Frank [B. F. McCormick] in the morning." I said, "All right, that is fair enough." I never got the written contract for the extension. The following day I met Mr. Prenot and I asked him about it. He said they were too busy the night before and overlooked it, but "We will fix it up. I represent a $7,000,000 concern and we cannot afford to go back on our contract." I said, "All right," and let it go at that. They were to pay me for the corn as it was shipped, and they were to have until the 25th of December in which to clean up the lot, the whole works. There was no change in the contract as to the class of corn they were to receive. On November 30th, at Brawley, defendant caused tests to be made of the milo which I had stored in the Calipatria warehouse. The tests showed that there was one lot which had a moisture content of less than 14 per cent. and another which showed a moisture content of 14.7 per cent. After the tests were made Mr. Prenot stated that he would take the lot which was within the moisture test [the lot which showed a moisture content of less than 14 per cent.] as soon as they could get cars, and pay me for it, but that they would turn down the rest. Prenot told me he would not take any except the No. 1 marketable milo, as shown by the tests. Two or three days later [i. e., about December 2d or 3d] I came to El Centro to see Mr. Prenot. I asked him what he meant by having made this [oral] agreement with me and then turning it down. He said his hands were tied—he was working for a corporation and he could not do otherwise. They [meaning, doubtless, defendant's board of directors or managing officers] would not stand for it. I said, "Why didn't you tell me you could not do it?" He said he thought he could get it by. I said, "Mr. Prenot, I am going to bring suit to make you people pay me the difference on that corn. I hate a lawsuit, and hate trouble, but I am not going to take that loss." He said, "I will take it up with the company and see if we cannot yet fix this matter up. We don't want trouble." I said, "All right," and I didn't say anything more after that.

The written contract, it will be recalled, provides for the delivery of "good No. 1 marketable milo." A licensed government grain inspector, called as a witness for the defendant, testified that "good No. 1 marketable milo should have a moisture content of 14 per cent. and under," and that "any milo which contains over 14 per cent. moisture is not No. 1 milo." In fairness to plaintiff, who is a farmer and grower of corn, it should be added that he testified that he did not know that corn "should have a certain percentage of moisture"; that he "didn't know anything about it before," and that it "was new to us corn growers." This notwithstanding, the fact remains that the testimony of the licensed government grain inspector was not contradicted. Though plaintiff testified it was "new to us corn growers," he did not pretend to say that milo could be "good No. 1 marketable milo" and yet show a moisture content in excess of 14 per cent.

On or about the 8th or 10th of December, 1920, plaintiff, claiming that he had until December 25th under the oral extension of time within which to complete delivery, caused tests to be made of the milo. It was the same milo which was in the warehouse when defendant caused the tests of November 30th to be made. The milo must have "dried out" in the interim, for the tests which plaintiff caused to be made on or about December 8th or 10th showed a moisture content at that time of less than 14 per cent.

Plaintiff's case was tried by him upon the theory that his oral agreement of November 25th with Mr. Prenot was a valid agreement for the extension of the time for delivery, and that it was binding upon defendant. It also was plaintiff's contention in the trial court, as it is here, that because of his arrangement with Mr. Prenot it was permissible for him to cause tests of the undelivered milo to be made at any time between December 1st, the date fixed by the written contract as the limit of the time for delivery, and December 25th, the time fixed by the oral agreement, and that if such tests were made, and if, when made, they showed a moisture content of less than 14 per cent., then defendant would be legally obligated to accept the milo and to pay for it, notwithstanding the tests and the tender of the milo were made subsequent to the time fixed for delivery by the written contract. Indeed, it seems to be conceded, tacitly at least, that plaintiff's right to a recovery, if any he have, is wholly dependent upon the oral agreement between him and Prenot for an extension of the time for delivery.

Running all through appellant's brief, although most obscurely expressed, if indeed it be expressed at all, is the notion that the agreement for the extension of time is invalid. That this undeveloped idea lurks in the background of appellant's several contentions is shown by the following: During the trial plaintiff, testifying as a witness on his own behalf, was asked by his counsel if he had caused a test of the milo to be made as early as December 8th and not later than December 10, 1920. To this question defendant's counsel objected as follows:

> "Objected to as incompetent, irrelevant and immaterial, for this reason: The contract, as stated here [the written contract of September 16, 1920] is a contract for delivery of corn on a certain date, and the contract has been introduced in evidence. The condition of the corn at the date of delivery [sic] is not material, because the character of the corn, or of any commodity, may change. It may be better or it may be worse, as the case may be. Under this contract they had a right to have a certain character or class of corn, to wit: No. 1 marketable maize, delivered to them on or about a certain date. They [defendant's agents] accepted delivery at the warehouse of that which was known as the Cramer lot on November 30th. They rejected the other. Now, they [plaintiff] cannot come in here and introduce evidence showing the condition of the corn under the contract at a later day, because it may have been better or it may have been worse, and it is immaterial which it was."

The objection was overruled, and the witness was permitted to testify that he did cause a test to be made between the 8th and 10th of December. The witness testified that the test made on that date showed a moisture content under 14 per cent. By another question propounded to plaintiff on his direct examination he was asked if, subsequent to the oral agreement, he held the corn for defendant under that agreement until the 25th of December. This question was objected to upon the ground, among others, that it was incompetent, irrelevant, and immaterial. The objection was overruled, and the witness was permitted to answer the question in the affirmative. Assigning as error the rulings of the court on the objections to the questions last mentioned, appellant's brief presents the point as follows:

> "The position taken by the defendant and appellant in this case, which we believe to be correct [is that] any test of the milo made after it was to be delivered under the contract [the written contract of September 16, 1920] was ineffectual and of no avail, as the price was rapidly falling and the defendants were only required to take so much of the milo as measured up to the standard stated in the contract. The foregoing questions and answers were a successful attempt by the plaintiff, over the repeated objection of the defendant, to get before the jury that the milo, some ten days after the date of delivery, would test according to contract. This was error, as the evidence in this case shows that milo under certain conditions would dry out rapidly, and especially the test they got before the jury made on the 9th or 10th of December, if it was the same milo, which was not proven, was made under conditions that would not be the same as the milo left in the sacks in the warehouse and therefore was not competent or material."

Referring to another similar objection, appellant, in its opening brief in this court, says:

> "The defendant had refused to take the milo on November 30th or December 1st, and if the plaintiff was right it was his duty then to sell it, not to hold it in the warehouse while the price of milo was rapidly going down, and have tests made of it from time to time, and finally sell it when it became marketable."

We have been at pains to state appellant's contentions thus fully in order that it may clearly appear that, though appellant's counsel have not attacked the validity of the oral agreement upon any specific legal ground, its validity is nevertheless necessarily involved in the points presented to us for our determination. We shall proceed, therefore, to consider whether the oral extension of time for delivery was binding upon defendant, for that seems to be the decisive question in the case and one which is inescapable if all implications of appellant's several points are to be passed upon and determined.

[1] With respect to the validity of the oral agreement, respondent is confronted with two and only two alternatives: Either he must take the position that the arrangement which he testified he made with Prenot was an unexecuted oral agreement altering a written contract by extending the time for performance, or he must contend that it was a parol waiver of a provision inserted in the written contract for the benefit of the buyer. If the first alternative be adopted then it must be held that the oral agreement is void under section 1698 of the Civil Code. Henehan v Hart, 127 Cal. 656, 60 Pac. 426; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88; Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 755, 103 Pac. 938. If the second alternative be espoused then, while there seems to be authority for the proposition that section 1698 does not prevent a valid oral waiver of a written provision inserted for the benefit of the party waiving it (Fairbanks, Morse & Co. v. Nelson, 217 Fed. 218, 133 C. C. A. 212), there is no evidence that Prenot had authority to waive any provision of the written contract. Indeed, Prenot himself, according to respondent's testimony, personally notified the latter on or about December 2, 1920, that he had no authority to grant the extension. This Pre-

not did, in effect, when, in reply to respondent's inquiry as to what he meant by making the new agreement and then "turning it down," he said that "his hands were tied," that "he was working for a corporation," and, that "they [presumably the officers of the corporation] would not stand for it."

[2, 3] Prenot was not a general officer. He was only an assistant manager for appellant at one of its branch offices. It possibly may be inferred from the evidence that he was authorized to do certain things which were necessarily incident to the performance of the written contract, such, for example, as seeing to it that proper tests were made to determine whether the milo measured up to the requirements of the contract. But authority in an agent to carry out or to perform a contract already made by his principal does not include authority to change the contract or to waive any of its provisions, especially where, as here, the provision is one which was intended for the benefit of the principal. Presumptively, an agent is employed to acquire interests, not to give them up. Gerrish v. Maher, 70 Ill. 470; Hutchings v. Munger, 41 N. Y. 155; Thomas v. Anthony, 30 Cal. App. 217, 157 Pac. 823. See, also, 2 C. J., pp. 645–646.

The judgment is reversed.

We concur: WORKS, J., CRAIG, J.

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66 Cal. App. 499

RED RIVER LUMBER CO. v. NULL.

(Civ. 2680.)

(District Court of Appeal, Third District, California. April 11, 1924. Hearing Denied by Supreme Court June 9, 1924.)

1. Adverse possession 🔑71(2) — Deed of homestead land, executed by husband only, color of title.

Deed of land on which there was a homestead, though void because not joined in by wife, is color of title.

2. Quieting title 🔑10(1)—Right of recovery must be based on title in plaintiff.

Plaintiff's right of recovery in action to establish its right to remove standing timber and to quiet its title thereto must be based on title in it, not on weakness of defendant's title.

3. Adverse possession 🔑27—Evidence as to occupation and control sufficient to show title under color of title.

Evidence of regular patrolling for purpose of guarding against trespassing and fires and to see if there was any timber that should be taken off and of taking off dead and down timber, and of fighting fires, *held* to sufficiently show such occupation and control, as to give title by adverse possession to the standing timber, to one having color of title, and paying taxes separately assessed on the timber to him.

4. Logs and logging 🔑3(7)—Deed of right to cut and remove is conveyance of timber.

A deed of right to cut and remove timber is a deed of the timber.

5. Adverse possession 🔑6—Standing timber subject for.

Standing timber, like minerals, is subject for separate adverse possession.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by the Red River Lumber Company against E. M. Null. Judgment for plaintiff, and defendant appeals. Affirmed.

McCoy & Gans, of Red Bluff, and Carter & Smith, of Redding, for appellant.

Carr & Kennedy, of Redding, for respondent.

FINCH, P. J. In this action the plaintiff prayed for a decree establishing its right to remove the timber standing and growing on the lands described in the complaint, in accordance with the terms of a written conveyance of such timber to plaintiff, and quieting its title to said timber. The defendant denied plaintiff's right to the timber upon that part of the described lands hereinafter referred to as the homestead and disclaimed any interest in the timber upon the remainder. The court gave judgment as prayed for in the complaint, and defendant appeals.

During the year 1879 J. C. La Tour and his wife, Arrena La Tour, resided upon the lands in controversy. November 26th of that year La Tour executed and recorded his declaration, in due form, claiming such lands, and other lands, as a family homestead. He and his wife continued to reside on the land covered by the homestead until the year 1889, when they removed to another place where they thereafter resided. April 11, 1901, La Tour executed and delivered to his wife a deed purporting to convey to her the lands described in the complaint and containing the following clause: "The condition of this deed is such that it is to be recorded at or after my death, and then to be in full force and effect, otherwise to be null and void." The deed was recorded October 30, 1906. May 29, 1905, La Tour executed and delivered his deed purporting to convey to M. C. Thatcher, "his heirs and assigns, the sole and exclusive right to cut, fell, remove and carry away all, or so much as said second party may desire, of the trees standing or down wood and timber growing, being, standing or down, or hereafter to grow, be or stand, except what cedar timber first party may require for making posts or rails for keeping up the fence upon the within described land, and such dead timber as first party may need for fuel to use in dwelling house on all those certain lots (describing the lands set out in the complaint) for and during the full period of twenty-five years from and after the date hereof, * * * together with the right to enter on said premises, and every part thereof, and to pass over and across the same, in such manner and with such appliances as shall be deemed by said second party convenient in the cutting or removing of any of the trees, down or standing wood or timber, and to do such other and further acts and things on said premises as shall be convenient or reasonably necessary to the full and complete enjoyment by the said party of the second part, or his assigns, of the rights hereby granted, to said trees, standing wood and timber." La Tour died in October, 1906. June 13, 1907, Arrena La Tour conveyed the land to C. A. La Tour, the son of herself and J. C. La Tour, the deed containing no reference to the sale of the timber to Thatcher. February 18, 1911, C. A. La Tour conveyed the land to his wife, this deed also being silent as to the deed to Thatcher. May 22, 1912, Thatcher executed and delivered to plaintiff his warranty deed purporting to convey the timber on the land in accordance with the terms of the deed of J. C. La Tour to him. April 29, 1915, C. A. La Tour and his wife conveyed the land to defendant. The deed contained the following clause:

> "Subject to that certain deed of right of way dated May 29th, 1905, and recorded May 31, 1905, in book 83 of deeds, page 590, records of said Shasta county; also subject to whatever rights and privileges may have been conveyed by that certain deed dated May 29th, 1905, and recorded June 2d, 1905, in book 83 of deeds, page 613"—the Thatcher deed.

[1] Admittedly the deed from J. C. La Tour to Thatcher was void, there being a homestead on the place at the time the deed was executed and the wife of the grantor not joining in the execution thereof. The deed, however, constituted color of title. Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421; 2 C. J. 186; Goodrich v. Mortimer, 44 Cal. App. 576, 186 Pac. 844. Respondent contends and the court found that plaintiff and its predecessor in interest, Thatcher, had acquired title by adverse possession. The La Tours never claimed any interest in the timber after the execution of the deed to Thatcher. C. A. La Tour negotiated the sale of the land to defendant. He testified:

> "I told Mr. Null, when he was talking about taking the place over, * * * that the timber belonged to the Thatcher Lumber Company or Mark Thatcher. * * * He said that he understood that. * * * I never claimed the timber."

The defendant testified:

> "I came here and examined the record myself, * * * and found the state homestead. I also went over the records myself for abandonment of state homesteads, and found no abandonment of this land. * * * Chris La Tour may have told me, or he may not have told me, I think he did tell me, however, the timber had been sold to the Thatchers for 25 years. * * * I have no recollection that I told La Tour anything about the state homestead; that was his affair; I was looking out for my side of it; he was looking out for his. * * * Really I did not make La Tour's side of the trade; * * * I traded for myself."

The deed to defendant was prepared by his attorney. C. A. La Tour testified that after the delivery of the deed the defendant said to him:

> "Chris, I know you rather see me prosper than the Red River Lumber Company; * * * I am going to claim the timber on those three 40's in section 2, * * * because your mother had a state homestead."

[2] From the foregoing it clearly appears that C. A. La Tour, acting for himself and his wife in the sale of the land, did not intend to sell the timber to defendant, a fact of which the defendant had full knowledge at and prior to the transfer. If this were a suit to reform the deed so as to express the true intention of the parties, further consideration of the case would be unnecessary, but plaintiff's right of recovery in this action must be based upon title in itself. It then becomes necessary to determine whether there is sufficient evidence to show title by adverse possession.

M. C. Thatcher and other owners of timber pooled their interests and operated a sawmill in the vicinity of the La Tour land under the name of the Thatcher Lumber Company. He testified that after the purchase of the timber in dispute he went over the La Tour land twice a year during the years 1905 and 1906; that in 1907 he hauled therefrom 2,000 shakes and "had some logs cut and hauled"; that in 1908 he "went over the land several times during the summer and the same during 1909, 1910, and 1911, and 1912"; that his purpose in going over the land was "to see that there was no trespassing, that there were no camp fires, to see if there was any timber that should have been taken off"; that he claimed to own the timber during those years; that in 1910 C. A. La Tour "wanted to buy some timber for shakes," but that the witness "did not agree to it"; that his brother and nephew, who were interested with him in the operations of the Thatcher Lumber Company, "between 1905 and 1912, went upon and over or worked upon this timber on this land." H. W. Knapp, one of Thatcher's associates, testified:

> "We had a mill ditch that headed on this land, and we had to make weekly trips, sometimes two or three a week, to the head of this ditch, and in most every case was over most all of the land; part of it, probably 40 or 50 times a year, I was on that land, on that one piece; not to look it over every time."

He testified that in 1907 it was necessary on two occasions to have employees fight fires, started by operations of the company, to keep them off the La Tour and other lands; that during the years 1908 to 1912, inclusive, he went over the land two or three times a year to "look out for dead timber, down timber and forest fires" and trespassers. A. C. Thatcher testified that he hauled two loads of logs off the land for the company in May, 1907, using a steam tractor and two trucks; that he "widened out" an old shake road over which to haul the logs; that he fought fires in 1907 and 1908 and that the latter fire was not caused by the operation of the company. Alexander Thatcher testified that from 1905 to 1912 he rode over the land "as much as once a month of each year" from the first of April to the last of October, that he was handling cattle and "aimed to look after the timber" and "watch for fires"; that in 1907 C. A. La Tour "informed us * * * a big tree fell out on the edge of his meadow * * * and we ought to remove it." Earl S. Thatcher testified that during the latter part of October, 1907, "at two different times" he hauled logs off the La Tour land for the company. The land described in the conveyance to Thatcher and in that to defendant is in part timber land and in part meadows. Only a part of the land is fenced. C. A. La Tour resided on the premises during some of the summer months. The evidence justifies the following statement contained in the opinion of the trial court:

> "The lands in question * * * are rough, mountainous timber lands valuable chiefly, if not solely, for the timber thereon, which consists of a heavy growth of pine, fir, and spruce with a heavy growth of underbrush. From the time that M. C. Thatcher secured the deed to said timber on May 29, 1905, the said M. C. Thatcher and members of the firm of Thatcher Lumber Company and its employees began and continued during each year thereafter and to May 12, 1912, a period of nearly seven years, to patrol said lands, upon which said timber is situated, for the prevention of trespassing and for the protection of said timber from fire; that in 1907 a road was built over a part of said lands by Thatcher, and that Thatcher cut and removed therefrom 2,000 shakes, and also cut and hauled logs therefrom; that in 1908 a fire threatened said timber upon said land, and Thatcher, with a crew of men from the Thatcher Lumber Company, fought said fire for the purpose of preventing the fire reaching and destroying the timber upon the lands in question; that from time to time, as fires occurred and threatened to invade the said lands, bodies of fire fighters were used by Thatcher in preserving said timber from destruction. The timber upon said land was separately assessed to M. C. Thatcher for the year 1905, and each year thereafter up to and including the year 1912, and the taxes levied upon said timber during each of said years was paid by Thatcher.
>
> "That from the time of the execution of said deed to Thatcher and up to May 12, 1912, neither James C. La Tour, Arrena La Tour, or any other person occupied said lands, or any part thereof, or claimed the timber thereon, save and except the said M. C. Thatcher and the Thatcher Lumber Company and Chris A. La Tour; but that said Chris A. La Tour at no time since the execution and delivery of the deed to M. C. Thatcher claimed or asserted ownership of said timber; that since May 12, 1912, the date of the deed to plaintiff herein, the said plaintiff has by its agents patrolled said lands, herein concerned, for the purpose of preventing fires and trespassing, and that said timber for each year from 1912 to the inception of this action have been assessed separately to said plaintiff and the taxes paid thereon by plaintiff; although the defendants in this action had the said land, together with the timber thereon, assessed to him after he acquired his deed thereto and paid the taxes assessed thereon."

[3] The facts herein are similar to those in the case of Cousino v. Western Shore Lumber Co., 179 Cal. 1, 6, 175 Pac. 406, 408, except that in that case the defendant claimed title to the land as well as to the timber thereon. The court said:

> "The lands, as we have seen, were timber lands. The defendant, who was thus the occupant of said lands, was a lumber company, and the ordinary and eventual use to which said lands were to be put was that of the cutting, logging, and milling of the timber thereon; and this being so, we think the possession of the defendant, as indicated by its foregoing assertion of control over said property, based as it was upon a claim of title founded upon a written instrument, was sufficient to constitute adverse possession for the required statutory period under subdivision 3 of section 323 of the Code of Civil Procedure."

A lumber company does not ordinarily cut timber from all of its holdings at the same time, and prior to the time at which it commences such cutting upon a given parcel of land the usual occupation and control thereof are of the character here shown. It must be held that the evidence sufficiently shows title by adverse possession in the plaintiff.

[4, 5] Appellant contends that the deed to Thatcher does not purport to convey title to the timber in dispute, but only "the right to cut, fell, remove and carry away" trees and timber. In Bolland v. O'Neal, 81 Minn. 15, 83 N. W. 471, 83 Am. St. Rep. 363, the conveyance under consideration granted "the right, privilege, and permission" to enter upon the lands described in the instrument and "cut and remove from said lands * * * all the pine timber standing or being thereon." The court said:

> "It was in effect a conveyance of the pine, with the privilege to go upon the premises within a stipulated time and remove it. * * * Such a deed is a conveyance of an interest in real estate."

Title to timber standing upon land is capable of being severed from the title to the land itself. Bibbs v. Peterson, 163 Cal. 758, 127 Pac. 62; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436; Gazos Creek Mill, etc., Co. v. Coburn, 8 Cal. App. 150, 96 Pac. 359. In Fairbanks v. S. F. & N. P. Ry. Co., 115 Cal. 579, 583, 47 Pac. 450, 451, it is said:

> "For the purposes of adverse possession, and the invocation of the statute of limitations, there may be cleavage of corporeal real estate horizontally as well as vertically."

This rule has been held applicable in cases of minerals, oil, gas, and buildings. 1 R. C. L. 738; 2 C. J. 227. No reason appears why the same rule should not govern in the case of standing trees. There are no equities to support defendant's claim of title to the timber in controversy. He knew that La Tour did not intend to sell it to him, and it may fairly be said that the judgment awards him everything that he purchased.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

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66 Cal. App. 677

LAKE VIEW NO. 2 OIL CO. v. WHITE et al. (Civ. 4353.)

(District Court of Appeal, Second District, Division 1, California. April 23, 1924. Hearing Denied by Supreme Court June 19, 1924.)

1. Appeal and error 🔑994(3)—Appellate court bound by trial court's decision on question of fact raised by testimony not inherently improbable.

Where the trial court found defendant's testimony, which was not inherently improbable to be true, the appellate court was bound by the trial court's decision upon question of fact raised by such testimony.

2. Corporations 🔑428(5)—Knowledge of directors acting in good faith as to terms of contract offered to corporation was notice to corporation.

Where two directors of an oil corporation were not conspiring together to dissuade or to prevent the corporation from accepting or performing a lease contract offered by a third person, the knowledge of those directors of the terms of the contract gave notice and information to the corporation to the same extent, as knowledge of any other director would have been notice.

3. Corporations 🔑319(7)—Evidence of corporation's financial stringency held admissible on issue of director's fraudulent misrepresentation to stockholders.

Evidence of corporation's financial stringency *held* admissible on the issue of director's alleged fraudulent misrepresentation to stockholders of inadvisibility of purchasing an oil lease from a third person, which he afterwards purchased.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Lake View No. 2 Oil Company against Floyd G. White and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., and Shenk, J., dissenting.

E. R. Young and C. E. Spencer, both of Los Angeles, for appellant.

Seward A. Simons and B. J. Bradner, both of Los Angeles, for respondents.

CONREY, P. J. The defendant Floyd G. White, at a time when he was the secretary and a director of the plaintiff corporation, acquired 10,000 shares of stock in the Interstate Oil Company, a corporation, and thereafter as owner of said shares of stock, received dividends from said Interstate Oil Company. The plaintiff, claiming to be the real owner of said shares of stock, brought this action to recover the same, together with the amount of said dividends. Plaintiff alleged that said defendant acquired said property through and by reason of the connivance and assistance of defendants C. H. White and D. W. Wickersham, who were, respectively, president and treasurer, and were directors of plaintiff, at the time when defendant Floyd G. White acquired said shares of stock, and during the time when the transactions occurred which led to his acquisition of said shares of stock; defendant Floyd G. White being during all of that time secretary and a director of plaintiff. Plaintiff alleged that said property and profits were acquired by defendant Floyd G. White secretly, and that he and his codefendants, pursuant to agreement between themselves, concealed from plaintiff certain facts relating to the transactions in question, and thereby made it possible for defendant Floyd G. White to obtain for himself the said property and profits which lawfully and equitably belonged to the plaintiff.

Answering the complaint, the defendants denied substantially all of those allegations from which it could be inferred, or from which the conclusion could be derived, that the defendants agreed or conspired together to defraud the plaintiff, or that the defendant Floyd G. White, by and with the assistance of his codefendants or either of them, or at all, abused his position as secretary, or as director of the plaintiff, or that he thereby secretly or at all acquired any property or profits which lawfully or equitably belonged to the plaintiff. Upon the issues of fact so presented the case was tried. The findings of fact upon these issues were in favor of the defendants. Accordingly judgment was entered that the plaintiff take nothing by this action. From that judgment the plaintiff appeals.

The case for the plaintiff, with respect to the principles of law upon which it relies, rests upon certain well-known doctrines which are amply supported by authority, and which, in substance, are to the effect that the directors and other officers of a corporation are trustees and fiduciaries of the stockholders, and are held to the highest degree of good faith in their dealings, and must serve only the interests of their beneficiaries; that they are not permitted to make profits for themselves out of the trust estate; that they will not be allowed through use of knowledge gained in their official capacity to make secret profit for themselves out of the funds or other assets of the corporation; that these obligations must be observed in the highest good faith; and that, when they have been disregarded by the officer, he cannot make the excuse that he was free from any intent to injure the corporation. Since these principles are well established and are not disputed by respondents, we accept them for the purposes of this case without discussion, and without quotations from any of the numerous decisions in which they have been discussed. The decision of this appeal depends upon the disposition to be made of appellant's contention that certain of the findings are not supported by the evidence.

In August, 1912, Pentland Union Oil Company was the owner of a lease of 80 acres, comprising the west half of the northwest quarter of a section of land in Kern county. This lease was what is commonly known as an oil lease, under which the lessee was obligated to drill wells on said land for the production of oil, and was entitled to the oil so produced, subject to certain conditions, including payment of rent in the form of royalties to the owner. At the same time the said Pentland Company owned the equipment of a well, known as well No. 1, on the south half of said property. In the record of this case the south half of the property is designated as the south 40, and the north half as the north 40. On the 30th day of August, 1912, the Pentland Company entered into a contract with the Lakeview No. 2 Oil Company, under which the lease, as to the south 40, was transferred to the plaintiff. The wells on the south 40 were given odd numbers and those on the north forty were given even numbers, and are so designated in the record. The terms of the lease were such that the lessee, the Pentland Company, had obligated itself, its successors and assigns, to complete at least one well on the north 40 within one year from September 11, 1911, and continuously to drill in such manner as to complete one well in every year subsequent to said date until eight wells had been completed on the north 40. The lessee likewise agreed to complete at least one well on the south 40 within one year from June 11, 1912, and continuously to work in drilling new wells at the rate of at least one well in every year thereafter until eight wells had been completed on the south 40.

The contract of August 30, 1912, contained terms obligating Lake View No. 2 Oil Company to take charge of the drilling of well No. 1 on the south 40 and well No. 2 on the north 40 and to make payments and accountings from time to time as set forth in the contract. It appears from the contract that the parties intended to obtain, if possible, from their lessor, the Sun Park Oil Company, a segregation of the land and lease, so that thereafter the several rights of either party would not be jeopardized by a failure of the other party to comply with the terms of the lease as to its half of the land. But this contract further provided that, "if the Sun Park Oil Company does not segregate said land, and does not allow each party hereto to attorn to it directly and drill each quarter section separately, then the parties hereto agree to at all times fully comply with the terms of said lease, each to protect the other and, in case either party, their successors or assigns fail to live up to the terms of said lease, then either party shall have the right to go on to the other party's property and comply with said lease and all the expenses incurred by it in complying with the lease for the benefit of the other party shall be billed to the other party" and be paid by it.

Said agreement was followed by a supplemental agreement of date September 14, 1912, between the same parties and a third party. But this supplemental agreement need not here be described. The changes made by it in the terms of the principal contract do not affect the questions which we shall have to discuss. It appears that the Sun Park Oil Company at all times refused to segregate the land or lease. Therefore both parties to the contract of August 30, 1912, continued to be mutually interested in preserving the integrity of the entire lease so far as necessary to prevent its forfeiture.

On the 20th day of August, 1913, the Pentland Company entered into a contract with one H. C. Russell, whereby the Pentland Company agreed to assign to Russell all of its right in and to the north 40, and also to assign to Russell all of the Pentland Company's interest in said agreement of August 30, 1912, and in the supplemental agreement of September 14, 1912 (with exceptions not necessary for us here to consider). In consideration thereof Russell agreed to pay to the Pentland Company a purchase price of $75,000 as follows: $11,000 payable in monthly installments of $1,000 (together with interest on a part thereof), and the remaining $64,000 to be paid out of the proceeds derived from production of oil on said premises.

In November, 1913, the Interstate Oil Company, a corporation, was organized under the laws of California. On the 17th of that month Russell presented to this company an offer to sell and convey to it his said contract with the Pentland Company in consideration of the issuance to him of 10,000 shares of the capital stock of said Interstate Oil Company, the repayment of all sums theretofore advanced by Russell on said contract and the performance of the contract by said company. This offer having been thereupon accepted, Russell executed to the Interstate Oil Company an assignment of said contract, and a certificate was issued to him for 10,000 shares of the capital stock of said company. Thereafter Russell transferred his said certificate of stock to defendant Floyd G. White. Upon surrender of that certificate a new certificate for the same shares was issued to White, who ever since has been the record owner thereof, as shown on the books of the company. As found by the court, the Interstate Oil Company has paid Floyd G. White $22,000 of dividends on said shares of stock.

In stating its cause of action, appellant alleged facts which in substance amount to the charge that Russell was an irresponsible person who took the contract of August 20, 1913, as a dummy for Floyd G. White; that Russell was unable to pay and did not pay anything for the contract; that the funds of appellant were used by the defendants to pay said monthly installments named in the Russell contract to the extent of $8,000 thereof; that other funds of appellant were used to pay expenditures made in the drilling of another well on the north 40 in connection with and in performance of obligations assumed by Russell under the terms of his contract in the development of wells on the north 40; that the defendants caused Russell to offer to assign to appellant his said contract without compensation to Russell therefor, but that the defendants concealed from appellant that its funds were being used to meet the payments required by the Russell contract, and in other ways misrepresented the facts concerning said Russell transaction, with the intention that appellant would thereby be influenced to refuse to accept said contract; that in fact appellant by reason of said concealments and misrepresentations, and not knowing that appellant was in fact making said payments and was in fact the owner of said contract, refused to accept from said Russell an assignment of said contract; that prior to said offer made by Russell to assign his contract to appellant the defendants agreed among themselves to endeavor to dissuade and prevent appellant from accepting or performing said contract, and likewise agreed among themselves to organize a new corporation and to cause said contract to be transferred to it in consideration of stock to be issued in the name of Russell, but in truth and in fact for said Floyd G. White, and to use the funds of the plaintiff in promoting said corporation to be organized and to enable it to carry out said contract; that the Interstate Oil Company was organized in pursuance of said plan or scheme and agreement, and Russell assigned his said contract to the Interstate Oil Company, which, in consideration thereof, issued to Russell 10,000 shares of its stock; that Russell had paid nothing for or on account of said contract; that Russell thereafter, at the instance and request of Floyd G. White, indorsed said certificate to said White; that said White did not nor did any one for him ever pay any consideration to Russell for said stock; and that the facts that Russell did not own any stock or claim any interest therein, and that said stock was in reality being issued to and obtained by Floyd G. White, were concealed from the plaintiff and remained unknown to the plaintiff until on or about June 17, 1919.

It is admitted, or is established so that there is no contrary contention, that, when the Russell contract was negotiated, both Floyd G. White and Russell intended and expected that the contract would be assigned to the plaintiff if the plaintiff would accept it, and that Russell would make such assignment without demanding any compensation therefor; that Russell was unable to pay and did not pay anything for the contract or in performance of its obligations; that in consideration of Russell's assignment of the contract to the Interstate Oil Company a certificate for 10,000 shares of stock of that company was, on or about the 20th day of November, 1913, issued to Russell, who thereafter assigned the same to Floyd G. White.

But the court also found and determined in its decision of this case that it is not true that Floyd G. White acquired said Russell contract for or on behalf of the plaintiff. The court likewise found that said contract was never the property of the plaintiff; that the defendants did not at any time agree that they would endeavor to dissuade or prevent the plaintiff from accepting or performing said contract, and never agreed among themselves to cause said contract to be transferred to said new corporation in consideration of stock to be issued in the name of Russell, but in truth and fact for said Floyd G. White; and that it is not true that the defendants, or any of them, agreed to use the funds of the plaintiff in promoting said corporation to be organized to enable it to carry out said contract; that in fact the defendants did not, nor did any of them, use said funds for such purpose; that in the month of October, 1914, for a good and valuable and sufficient consideration, Russell sold said stock to defendant Floyd G. White, and indorsed and delivered the certificate thereof to him, and thereupon the said Floyd G. White "became the owner of said stock by these means." The court further found that the payments made out of the funds of appellant, as aforesaid, were not made secretly; that, on the contrary, said payments were paid into the bank (where the contract was held in escrow) with the knowledge of the plaintiff, and were made in the usual course of the plaintiff's business for its own protection and entered on the books in the regular course of business, and an account thereof was made and kept in the usual way; that said payments continued to be made by the plaintiff until the close of said escrow, pursuant to an arrangement with the Interstate Oil Company, under a running account covering the said payments required to be made by said contract, and any disbursements in the drilling of any wells located upon the said north 40 acres covered by said contract; that from time to time the said Interstate Oil Company paid to the plaintiff all advances made by the plaintiff pursuant to their mutual arrangement. The findings contain a statement showing the state of accounts between said companies for the full fiscal year following the 20th day of September, 1913, and show that within that period of time all payments and advances made on account of said Russell contract had been repaid to the plaintiff by the Interstate Oil Company; that in the month of March, 1915, the facts as to the acquisition of the south 40 acres by the plaintiff and the north 40 acres by the Interstate Oil Company were fully laid before all the stockholders of the plaintiff and the plaintiff itself, and that the rights acquired by the Interstate Oil Company in said north 40 acres have at all times been acquiesced in by the plaintiff.

[1] Appellant contends that the evidence is insufficient, and in particular is insufficient to sustain the findings referred to in the last preceding paragraph hereof.

Floyd G. White testified directly that he purchased the shares of stock from Russell in October, 1914, in consideration of money paid by him to Russell at that time, together with the cancellation of notes which Russell had given him for moneys previously loaned. Appellant insists that for various reasons discussed in the brief this testimony is inherently improbable. This argument, no doubt, was made to the superior court, upon which devolved the duty to weigh the evidence. Since it is in no way impossible that this testimony was true, and since that court found that it was true, we in this court are bound by that decision upon that question of fact.

[2] The fact being thus established that in the transaction between Russell and the Interstate Oil Company the defendant Floyd G. White did not acquire or attempt to acquire said shares of stock for himself in the name of Russell, or at all, it then readily follows that the evidence is sufficient to prove that the defendants did not conspire together to dissuade or prevent the plaintiff from accepting or performing the Russell contract, or to cause it to be transferred to the new corporation, and thereby enable White to acquire said shares of stock in that corporation, as alleged in the complaint. It is not claimed that defendants C. H. White and D. W. Wickersham ever made any profit out of the Russell contract, or shared in any way in the illegal profit alleged to have been made by Floyd G. White. These conclusions having relieved C. H. White and D. W. Wickersham from any complicity in the alleged fraud upon the plaintiff, it follows that their knowledge of the terms of the Russell contract at the time when the same was made gave the same notice and information to the plaintiff corporation that would be given by the knowledge of any other directors of the corporation. The minutes of the corporation, of the meeting of the board of directors, at the time when Russell offered to transfer his contract to the plaintiff show that at that time (August 22, 1913), after receiving Russell's offer in writing, the board of directors instructed the secretary to send to the stockholders a circular letter calling for their opinion as to whether or not they would favor the purchase of the contract. We have examined those minutes and the circular letter itself, together with the testimony of the witnesses concerning what occurred there, and the further testimony concerning the visit which defendant Floyd G. White made to sundry stockholders in Michigan and in Wisconsin. In these transactions Floyd G. White contends that he was endeavoring to persuade the corporation to accept Russell's offer, whereas the plaintiff contends that, while pretending to favor such acceptance, he was subtly instilling into the minds of the stockholders doubts and opposition, which led them to advise the rejection of Russell's offer. Here, again, we are confronted by the fact that there is evidence tending to sustain the court's finding in favor of the defendants upon these issues of fact, and that therefore we are bound by the determination of those facts as found in the decision of the trial court. It is contended that the evidence shows without conflict that Floyd G. White did not tell the disinterested members of the board (meaning thereby the directors other than the defendants herein) that Russell had not paid out anything to procure the contract, nor that Floyd G. White, secretary of appellant, with its attorney, had carried on all of the negotiations, nor that Russell was a mere nominal holder of the contract for the purpose of transfer to the plaintiff, nor that the $11,000 payment could be made in installments. The circular letter which was sent to the stockholders, and the testimony relating to this phase of the case, is not sufficient to compel the conclusion that any conscious or intentional misrepresentation was made, either by misstatement of fact or by withholding

from the directors or stockholders knowledge which should have been received by them. The circular letter itself referred to various facts which might well have been received by the stockholders as argument favorable to the acquisition of the Russell contract. Upon the other hand, it stated that the proposition "calls for an expenditure of $75,000—$11,000 cash, and the balance of $64,000 to be paid out of production of wells," etc., and indicated the probability that the acceptance of the contract would make it necessary for the stockholders to respond to two assessments—one for three cents per share, payable immediately, and one for two cents per share in four or five months. But it was pointed out that in case of favorable production of oil the second assessment might not be necessary. As a whole, read from end to end, together with the conditions then existing as shown by the evidence, it does not appear that this letter was an unfair or misleading document. Without further extending our statement of the testimony—which testimony is very voluminous—it must suffice to say that we think the evidence is sufficient to sustain the findings.

[3] It is contended that certain rulings of the court on matters of evidence were erroneous and prejudicial to appellant. The first group of exceptions relates to evidence admitted in relation to the financial condition of appellant in August, 1913, as well as at some later dates. Exception No. 8 relates to the admission of some evidence in connection with the circumstances which led to the contract of August 30, 1912. Exception No. 10 refers to a ruling which limited appellant's examination of the witness Wickersham concerning a report made by him as treasurer to the stockholders of appellant in March, 1919. Exception No. 11 refers to testimony of Wickersham stating the amount in which he was a guarantor on notes and accounts of appellant in 1913. Exception No. 14 refers to a ruling admitting in evidence Defendant's Exhibit D, which consists of certain figures and data taken from the books of appellant. Exceptions numbered 15, 16, and 17 refer to certain testimony of the witness Blight, who was a public accountant and bookkeeper, who kept the books of appellant.

In view of the conclusions at which we have arrived, and which we have stated, concerning the main issues of the case, we are of the opinion that it is not necessary to critically examine the merits of these rulings. It is not at all probable that the matters which were the subjects of these rulings had any controlling influence upon the court's decision wherein it determined that Floyd G. White did not acquire the said 10,000 shares of stock in the name of Russell or in any manner, except that nearly a year later he purchased the same from Russell for a substantial consideration; or upon the further decision wherein the court determined that the defendants did not fraudulently conspire together for the purpose of obtaining said stock for the defendant Floyd G. White.

The general argument made by counsel with relation to the testimony to which the exceptions relate is that the court was erroneously receiving evidence tending to show that appellant could not finance the Russell contract—although it had in fact financed it to some extent—and that the admission of this evidence must have had an effect upon the court by causing it to conclude that the plaintiff sustained no loss through the transfer of the Russell contract to the Interstate Oil Company. We think that this evidence had an appropriate bearing upon the question concerning the reasonable fairness of the representations made to the stockholders. It might well be that, although appellant paid out some money on the Russell contract and for the commencement of another well on the north 40 before that contract and the work had been taken over by the Interstate Oil Company, nevertheless this was a strain upon the resources and credit of appellant, which it was necessary to relieve at an early date. This was accomplished through the intervention of the Interstate Oil Company through its purchase of the Russell contract and under the arrangement made between that company and appellant. This is shown by the statement set out at page 438 of the transcript. It there appears that beginning in January, 1914, and during the months thereafter, appellant received from the Interstate Oil Company large sums of money, so that by August of that year the balance of the account ran against appellant. The highest balance of credit in favor of appellant at any time was $4,358.59 at the end of December, 1913. By March it had been reduced to less than $1,000, and thereafter never was as much as $3,000. It is unreasonable to contend that appellant was unaware of these facts and was not chargeable with notice of the circumstances connected therewith.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

66 Cal. App. 553

MUNDORFF v. RAMM et al. (Civ. 2671.)

(District Court of Appeal, Third District, California. April 16, 1924. Hearing Denied by Supreme Court June 14, 1924.)

1. Guaranty 🔑26—Mental competency of guarantor of note held question for jury.

In action against guarantor of note, whether guarantor was of unsound mind because of habitual drunkenness and delirium tremens, when contract was entered into, *held* for jury.

2. Guaranty 🔑24(1)—Guarantor's administratrix could defend note on ground of mental incompetency without formal rescission.

Guarantor's administratrix could defend action on note on the ground that guarantor was mentally incompetent to enter into the contract without first formally rescinding the contract, the guaranty being purely one of accommodation, and there being nothing to return as prerequisite to the right to rescind under Civ. Code, § 39, and section 1691, subd. 2.

3. Appeal and error 🔑1066—Insufficiency of evidence for submission of one defense held harmless in view of proof of other defense.

In action against guarantor of note, insufficiency of evidence to justify submission of question whether guaranty was conditional *held* harmless in view of proof that guarantor was mentally unsound.

4. Appeal and error 🔑1066—Instruction not warranted by pleadings held harmless in view of reliance on another defense.

In action against guarantor of note in which principal reliance was on defense based on guarantor's mental incompetency, error in instructing on undue influence, though issue was not made by pleadings, *held* harmless.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Howard F. Mundorff against Pearl E. Ramm, administratrix of the estate of Charles H. Ramm, deceased, and others. From judgment for named defendant, plaintiff appeals. Affirmed.

M. F. McCormick, of Fresno, and F. J. Heid, Jr., of Tulare, for appellant.

George Cosgrave and Lindsay & Conley, all of Fresno, for respondent.

HART, J. This action was instituted by the plaintiff against the defendants to recover on a promissory note, alleged to have been executed by the defendants in favor of the plaintiff on the 1st day of September, 1920, for the sum of $25,000, interest payable at the rate of 6 per cent. per annum.

The cause was tried before a jury by whom a verdict was returned in favor of Pearl Ramm, etc., and judgment as to her was entered accordingly. The defendants Knox, Noroian, and Hagopian defaulted, and judgment on their default was entered against them for the full amount of the note sued on. A motion for a new trial as against the verdict in favor of said Pearl Ramm, etc., was made and denied. This appeal is by the plaintiff from the judgment in favor of said Ramm.

The note declared upon is set out in full in the complaint. It provides for the payment thereof in installments as follows: $10 000 on or before the 1st day of January, 1921; $7,500 on or before the 1st day of April, 1921; and $7,500 on or before the 1st day of September, 1921. Said note provides that interest on the principal shall be payable semiannually, and that if default be made in any installment of principal or interest, the whole amount of said principal and interest shall become immediately due and collectible.

The complaint alleges:

> "That at the time of the making, execution and delivery of the aforesaid promissory note, to wit, on the 1st day of September, 1920, and as a part of the same transaction, and as the consideration and inducement upon which and for which the plaintiff delivered to said E. J. Knox the consideration for said promissory note, the defendants George Noroian and Albert D. Hagopian, together with Charles H. Ramm, made, subscribed and caused to be indorsed and delivered upon the back of said promissory note their written instrument of guaranty in words and figures as follows, to wit: 'For value received, I hereby guarantee the payment of the within note and any renewal of the same, and hereby waive protest, demand and notice of nonpayment thereof.'" (Signed by the last above-named defendants.)

It is alleged that there became due on the principal of said note on the 1st day of January, 1921, the sum of $10,000, and likewise there became due the sum of $7,500, "but that neither of said installments of principal has been paid and on March 1, 1921, the interest on the whole amount of principal of said promissory note became due; that no part of said installment of principal due and no part of said interest due has been paid, and pursuant to the terms of said promissory note plaintiff has and does hereby elect to declare the whole amount of principal and interest immediately due and collectible."

It is further alleged that Charles H. Ramm died intestate in the county of Fresno on the 11th day of January, 1921; that thereafter, and on the 31st day of January, 1921, the defendant Pearl E. Ramm, after due proceedings, was appointed administratrix of the estate of said deceased, and that, on the 18th day of February, 1921, she duly qualified as such administratrix; that on the 19th day of March, 1921, plaintiff duly filed, in legal form, a claim against said estate founded on the note in suit. It is further alleged that 10 days had elapsed since the date of the filing of said claim, and that the said administratrix had taken no action thereon, neither rejecting nor allowing the same within 10 days from and after the filing thereof, and that plaintiff, therefore, proceeds upon the presumption that said administratrix has rejected said claim. Code Civ. Proc. § 1496.

The answer, besides interposing formal denials to the averments of the complaint, sets up several defenses which are in the nature of pleas by way of confession and avoidance, viz.: (1) That Charles H. Ramm, at the time that he executed and so became a party to the obligation on which it is herein sought to hold and bind his estate, was mentally incompetent to transact business; (2) that the consideration inducing and moving said Charles H. Ramm to sign and execute the instrument of guaranty "has wholly failed," in that said Ramm executed said obligation wholly upon the condition that one W. S. Munger would, prior to the delivery to plaintiff of said note, execute the said instrument of guaranty jointly with him (said deceased); that "the makers of said note delivered the same to plaintiff, the payee named therein, with said instrument of guaranty indorsed thereon, without having first procured the execution of said instrument by said W. S. Munger; that plaintiff had knowledge of said condition upon which said Charles H. Ramm executed said instrument, prior to the delivery of the same to plaintiff; * * * that the maker of said note promised and agreed with said Charles H. Ramm that if said Charles H. Ramm would execute said instrument, the execution thereof by one W. S. Munger would be procured prior to the delivery thereof to plaintiff, and in the case of the failure of said Munger to execute the same, said note, with said instrument of guaranty indorsed thereon, would not be delivered to plaintiff; that without said promise and agreement on the part of the maker of said note, said Charles H. Ramm would not have executed said instrument; * * * that, notwithstanding his said promise and agreement, said maker fraudulently and without right delivered said note to plaintiff, the payee named therein, with said instrument of guaranty indorsed thereon, without first having obtained the execution of said instrument by the said W. S. Munger."

A third special defense is set up, to wit: That the execution of the guaranty by Charles H. Ramm was by mistake, "which mistake plaintiff knew at the time or suspected," etc. This defense, however, is based upon the facts set out in support of the preceding special defense to the effect that Charles H. Ramm executed the guaranty solely upon the condition that said Munger would join in the execution of the same obligation prior to the delivery of the note, with said guaranty indorsed thereon, to the plaintiff.

At the trial there was little reliance predicated upon the two last defenses referred to above. The defense of mental incompetency was principally relied upon in resistance to recovery upon the guaranty as against the estate of the deceased. At any rate, the evidence was mainly addressed to that issue, and thus we may assume that it was upon that issue that the verdict was planted.

The plaintiff contends that the verdict is not sufficiently supported by the evidence. It is also likewise claimed that the court erred in instructing the jury upon the question of failure of consideration for the alleged reason that there was no evidence introduced in support of the defense based upon that ground. Another instruction is assailed on the same ground. The contention is also made that there was no rescission of the contract, as required by section 1691, subdivision 2, Civil Code. The first point necessitates, of course, an examination herein of the evidence upon the issue of the alleged unsoundness of mind of the deceased, Charles H. Ramm, at the time he executed the obligation upon which this action is founded.

The note and guaranty in suit arose out of the following transactions: One E. J. Knox and the plaintiff, respectively maker and payee of said promissory note, were in the year 1919, and for some time thereafter, partners under the firm name and style of Knox-Mundorff Company, and as such were engaged in the general automobile and auto supply business in the city of Fresno. The capital for the launching of this business (approximately $30,000) was obtained from one Ney Wolfskill. After the partnership of Knox and Mundorff was formed and the business for the carrying on of which it was formed was started, Wolfskill advanced the firm, as a loan, the sum of $20,000. In the month of August, 1920, Wolfskill brought an action to recover said $20,000 and to secure judgment for the same, at the same time causing an attachment to be levied upon the business and assets of the Knox-Mundorff Company. An indemnity bond was given by the company to the sheriff for the purpose of securing a release of the attachment lien. Judgment was secured by Wolfskill against the partnership for said $20,000; but the same, for some reason not explained in the record, had not been satisfied at the time of the trial of this action.

About the time of the release of the firm property from the attachment lien, as above indicated, Mundorff and Knox, by a written agreement, dissolved their partnership. The latter took over the entire business in consideration of the payment by him to Mundorff the sum of $30,000 in promissory notes —one, unsecured, for $5,000, and the other for the sum of $25,000, the note in suit.

At the time the note and the guaranty in suit were executed, the plaintiff was in the state of Colorado, and the transactions herein referred to were conducted by his attorney in fact, C. L. Russell, an attorney at law. The latter testified that on the day of the execution of the guaranty he went to the office of an attorney in Fresno, expecting to meet W. S. Munger and Albert Hagopian and there secure their guaranty of the payment of the note; it being provided in the contract between the plaintiff and Knox, so Russell said, that said Munger and Hagopian were to become guarantors of the payment of said obligation; that upon reaching said law office he saw the deceased and Noroian sitting in the waiting room engaged in conversation. He had never seen the deceased before, but while he was still in the waiting room he overheard the two men just named discussing the matter of executing an instrument guaranteeing the payment of the note in suit. Russell thereupon approached Hagopian and Ramm and asked them if they were there to execute a guaranty of said note. They replied that they were there for that purpose; that there were to be five signers to that note, to wit, Knox, W. S. Munger, Albert Hagopian, George Noroian, and the deceased. Russell replied to them that he did not know before that all those parties were to join in the execution of the guaranty, but said:

> "That will be satisfactory to us, but we are not requiring anybody under our contract to sign this note but Albert Hagopian and Mr. Munger."

Russell stated that Munger was not present and was told by Knox that he (Munger) had concluded not to join as one of the guarantors; that Ramm and Noroian insisted that they had other matters to attend to and that they would like to have their signatures taken to the guaranty so that they could give attention to said matters; that thereupon Ramm and Noroian, in the presence of Knox, Ney Wolfskill, a Mr. Tupper, an attorney connected with the law office referred to, and the witness, signed the guaranty. Russell testified that he did not hear the deceased state that the condition upon which he proposed to and did sign the guaranty was that W. S. Munger was also to become a joint obligor thereon; that the deceased never at any time said to him or in his presence that he did not want the note, with the instrument of guaranty indorsed thereon, delivered to the payee named therein until said Munger had signed the guaranty. Russell admitted, however, that some 10 or 12 days after the deceased, Noroian, and Hagopian executed the guaranty, the following undated document was delivered to him by one of the attorneys at whose office the above transaction took place; said document having been procured at his (witness') request:

> "We, Charles H. Ramm, Geo. Noroian and Albert Hagopian, the undersigned, do hereby state that we are the indorsers upon that certain promissory note in the sum of $25,000.00, dated September 1, 1920, signed by E. J. Knox as maker and payable to the order of Howard F. Mundorff.
>
> "And we hereby jointly and severally state and represent that our said indorsements were in no manner contingent upon the representation or fact that Warren C. Munger would also indorse said note, and we further represent and state that the indorsement of each and all of us thereon is in all respects valid whether the said Warren C. Munger, or any other person, does or does not indorse the said note."

Asked how he came to request that the foregoing writing be executed and delivered, he explained that, as above stated, he did not understand that Noroian and the deceased or any persons other than Munger and Hagopian were to become guarantors, and that when he learned that Noroian and the deceased were to join in the execution of the instrument, and after they did do so, he concluded that he would be better satisfied to have the above writing as a matter of precaution.

The foregoing statement of Russell's testimony is given herein solely for the reason that, as will later appear, it has more or less bearing upon the point involving a challenge of the correctness of the action of the court in giving one of the instructions above referred to.

There was a large number of witnesses who testified upon the question of the mental condition of the deceased prior to and subsequent to the date of his execution of the guaranty. The larger number of these testified for the defense. A minute examination herein of their testimony will not be attempted. A general statement of the testimony, with occasional brief excerpts therefrom, will be sufficient.

Charles H. Ramm died on the 12th day of January, 1921—a trifle over four months after the execution by him of the guaranty involved in this litigation. He died from the effects of prolonged and excessive use of intoxicating liquors and while in a state of delirium tremens, which itself indicates the abnormal use of such liquors for a long period of time. It was shown that he had for many years been a habitual user of intoxicants. A number of witnesses—intimate acquaintances—testified that, for a period of two years or more prior to his death, the deceased was constantly under the influence of liquor to an extent that rendered him irrational and wholly irresponsible. His conversations were incoherent, generally irrational, and, when near the border line of delirium tremens, which occurrences were for a long period in frightful contiguity, his declarations and statements were of a grandiose character. He had visions of the acquisition of colossal fortunes, sometimes in the form of a gold mine buried beneath his vineyard, which was without foundation; there not being the slightest evidence of mineral deposits of any character in said land. He declared to his friends that he proposed to purchase an airplane, and made other equally as extravagant statements having absolutely no foundation for their support. He on one occasion spoke to an acquaintance about erecting an apartment house involving a large expenditure of money, but within a few days thereafter, on being asked by said acquaintance when he intended to start work on the structure, replied, in effect, that he had never thought of erecting such a building and had never told said acquaintance or any other person that he had in view or contemplated the erection of an apartment house. He was in the habit of telling acquaintances, with apparent seriousness, that he had made investments involving the expenditure of thousands of dollars, when the truth was that he had made no such investments. When in a state bordering upon delirium tremens he had the wildest visions of unreal happenings, things, and persons. He claimed to have seen spirits of the dead and that some had actually ridden with him in his automobile, and, as is characteristic of the delirium tremens, he insisted that he had been in the company of and pursued by demons of the most horrible description.

Mrs. Ramm testified that during nearly the whole of the period of their married life he was an incessant drinker of intoxicants; that he was in a state of drunkenness much of that period; that he got so he would drink any kind of liquor, or, if he could not get liquor at some particular time, he would drink any other stimulant of which he could get possession; that on one occasion, when he had no wine or other liquors at home, he drank a quantity of vinegar. She further testified that he always carried liquor in his automobile, and that in September, 1920, had 500 gallons of wine delivered to him at his home. "He would go out in the morning," she said, "and bring this pitcher in the house practically full, and he would take it in the library, and set it on the library table with a glass or a cup, and he would drink it during the day, and it would be empty in the evening. In the evening he would go to the garage again and have it filled, bring it in the house and drink it during the night. The next morning the pitcher would be empty, and of course, would be filled the same way." She stated that the pitcher he used in bringing the wine to his house would hold a gallon and a half. She further testified that "toward the end of the year (1920) he still continued drinking that wine in the way I said, and he would bring it in in the morning and he would be in a paralyzed condition during the whole day." She stated that in the year 1920, and particularly in the fall of that year, he told her in the most serious manner about big deals he had made and from which he insisted he had realized large profits; whereas, the truth was, she said, no such deals had been made by him, or, for that matter, no business deals of any kind or character had been made by him at the times referred to. "He would have different visions of things and always seeing horrible things," Mrs. Ramm continued. "He would see people all cut to pieces, see four-legged human beings and see animals with human heads and all kinds of things." She declared that he squandered his money so recklessly that she was compelled to take charge of his affairs so as to protect herself and child. Mrs. Ramm related many other instances, all occurring within a brief time of each other, in which her husband exhibited like evidences of a seriously disordered mind. She stated that he suffered from such hallucinations as are above described both prior and subsequent to the 1st day of September, 1920, and down to the date of his death.

The other witnesses for the defense—some 14 in number—described Ramm's mental condition in substantially the same way as it was described by Mrs. Ramm. One witness testified that he would drink anything in the nature of intoxicants that he could get hold of—whisky, wine, brandy, and even jackass brandy and straight alcohol. Nearly all of the witnesses, having known him well for a considerable period of time and seen and talked with him on many occasions in the year 1920, declared that it was their opinion that during said year his mental condition was such that he was mentally incompetent to transact any kind of business. In fact, one of the witnesses stated that some of the time he thought that the deceased had no such thing as a mind, although there were times when he seemed to be in pretty good condition. The witness said, however, that the deceased kept growing worse all the time. The foregoing statement comprehends a brief résumé of the testimony of the lay witnesses, although it should be said that these witnesses in describing the mental condition of the deceased gave detailed instances of evidence of mental aberration and gave a full explanation of the reasons which they thought justified them in expressing the opinion that the deceased was mentally unsound to the extent that he was without volition or intelligence sufficient to carry on a business transaction properly.

Dr. Clarence J. Tillotson, a practicing physician for 31 years, knew the deceased and was his family physician. He knew him prior to and in the spring of the year 1920, when the deceased left Dinuba in Tulare county and went to Fresno county. He testified that he saw him two or three times a week and rendered him professional services during that time. After the deceased left Dinuba and down to the time of his death, the doctor saw him two or three times a month. The doctor testified:

> "My relation with Charley Ramm was one of particular friendship. In the year 1918 I left Dinuba for one year. I was in the service. I came back in 1919. Up until that time I had

known that he drank considerably, but after that time, after my return, his mental condition was very badly deranged. He was in a state of alcoholic paresis. He was disconnected in his reasoning and in his talk and he was unable to give a connected story of anything. He also had a great many visions and hallucinations about making money very easily. * * * He was unsteady, at times his tongue was thick, and his ideas were mixed and confused. In my judgment he was not competent to handle business affairs after the beginning of 1920. I came home in 1919, and from that time on, in my opinion, he was not competent to do business. Throughout the year 1920 his condition did not improve. I saw him about a week before he died, and at that time his condition was very much worse than it had been any time. The most of any business transactions that he was engaged in that he discussed with me was that he wanted I should buy some stock in various concerns that he was interested in; he had a story about a gold mine; I never paid very much attention to these stories, but it seemed that he had it in his mind that all he had to do was to go out on certain portions of some of the ranches and he could dig all the gold they needed. He told me this. That was just before he came up here (referring to Fresno)."

The doctor described alcoholic paresis as "a gradual dissolution of the mental faculties by long continued use of alcoholics. Some of the symptoms of paresis in relation to large wealth or expectations of wealth are that usually those people have a great imagination as to accumulating wealth with very little effort."

[1] The defense introduced no direct testimony as to the mental condition of the deceased on the day upon which he joined in the execution of the guaranty in suit. There was, though, the testimony of several gentlemen who were present when that transaction took place. They testified for the plaintiff that the deceased appeared to understand what he was doing and so far as they were able to observe showed no signs of such deficiency in his mentality as would justify the conclusion that he was not capable of understanding the business he was then attending to. It was further shown that the deceased, through a real estate agent, sold his farm for $120,000 in September, 1920, and that deceased and his wife executed the papers negotiating the sale and a conveyance of the property; but Mrs. Ramm attended him and was present on all occasions when that transaction was under negotiation and finally consummated and took active part therein. But it is clear that the case, as made, is one which this court is not at liberty to take from the jury, even if it be conceded that the testimony of the witnesses for the plaintiff who were present at the time of the execution of the guaranty may properly be regarded as substantially negativing the testimony introduced by the defendant. Upon the issue of unsoundness of mind, the most that can be said of the situation as presented here is that there exists thereon a substantial conflict in the evidence.

Although the illusions, delusions, and hallucinations of the deceased, as indicated above, are the characteristics or the result of a mental malady (delirium tremens) which, when taken in time and religiously attended to, is subject to the curative power of appropriate therapeutic treatment, yet, when such occurrences have become common and cover a long period of time, all due to the inordinate prolonged use of intoxicants, they will afford well-nigh unimpeachable. if not conclusive, evidence of substantial impairment of the mentality, or, indeed, of insanity. But it is not necessary to look further than to the uncontradicted testimony of Dr. Tillotson for sufficient justification for the conclusion which it is to be assumed the jury arrived at, to wit: That, at the time of the execution of the transaction in question, the deceased was mentally incompetent. Paresis, with which the doctor testified that the deceased was afflicted, is the destruction of the brain cells, and, as that witness declared, is progressive. This testimony is itself sufficient to support the verdict. But when considered in connection with the other testimony in the case tending strongly to show that the deceased was for a long period of time mentally unbalanced, from the excessive use of intoxicating liquors, it is manifest that a very strong case of mental incapacity was made out.

The rule uniformly laid down in the cases in which an act of a party is challenged on the ground that, at the time he performed or executed the act, he was insane or mentally unsound to such a degree that he could, at the time, have had no appreciation or rational understanding of the nature or quality of his act, is that evidence is admissible as to his mental condition before and after the act was performed for the purpose of showing what his mental condition was at the precise time of doing the act, and that when there is, upon its face, substantial or credible evidence that he was insane before and near the time of the doing of the act and that such condition existed after the act, evidence of those facts will, on review, be held sufficient to uphold a verdict or finding of insanity, notwithstanding that there may be evidence tending to show that he was, at the time of performing the act, sane and mentally capable of transacting business in his usual or accustomed way. Some of the cases laying down and applying the rule thus stated are: Estate of Tibbetts, 137 Cal. 123, 69 Pac. 978; Estate of Huston, 163 Cal. 166, 169, 171, 124 Pac. 852; Estate of Jones, 166 Cal. 108, 135 Pac. 288; Estate of Martin, 170 Cal. 657, 151 Pac. 138; Estate of O'Connor, 51 Cal. App. 339, 196 Pac. 792.

In Estate of Jones one of the grounds of contest of the will of the deceased was that he was insane at the time of the making thereof. It appeared that—

> "At the very time of making the will, the persons present were those who, it is claimed, exercised the undue influence. They all, without exception, testified that the testator was then of sound and disposing mind. There was no direct evidence to the contrary as to his condition at that time. It is argued that for this reason the verdict on this issue is contrary to the evidence.

The court held against that contention upon the proposition that the evidence of the insanity of the deceased before and subsequent to the date of the execution of his will was sufficient to uphold the verdict

In Estate of Martin it is said: "Direct and uncontradicted testimony that at the time of the execution of his will the testator was of sound and disposing mind, is not conclusive upon the question of his then mental condition," there being, as here, as also in the case of Estate of Wilson, supra, evidence of the unsoundness of mind of the party whose act was assailed on the ground of mental incompetency before and after the performance of the act.

[2] The contention that "no defense was established because neither Ramm nor his administratrix rescinded the obligation" is devoid of merit. Counsel cites section 39 of the Civil Code as authority for the contention. That section merely provides that the contract of any "person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code." But said section does not provide, nor is it subject to such a construction, that the defense of unsoundness of mind may not be set up as in avoidance of a contract or the effect thereof without a previous rescission of the same. The defendant is not seeking affirmative relief. There is no ground here for asking such relief. She is not asking that anything be returned to her. The act of her husband in signing the guaranty was purely one of accommodation. He received nothing of value as a consideration for that act. There was therefore nothing for him or his administratrix to return to the plaintiff as a prerequisite to the right to a rescission. Section 1691, subd. 2, Civ. Code. She has merely interposed a defense as in avoidance of the enforcement of the obligation against the estate of the deceased on the ground that he was, at the time he signed the guaranty, without mental capacity to make a contract. This course she had the legal right to take under the circumstances of the situation presented here without first formally rescinding the contract. Pomeroy, Equity Jur. (2d Ed.) § 872; Toby v. O. P. R. Co., 98 Cal. 490, 498, 33 Pac. 550, Field v. Austin, 131 Cal. 379, 63 Pac. 692; Simon Newman Co. v. Lassing, 141 Cal. 174, 178, 74 Pac. 761; California Reclamation Co. v. New Zealand Ins. Co., 23 Cal. App. 611, 138 Pac. 960; Dunlap v. Plummer, 1 Cal. App. 426, 82 Pac. 445.

[3] The given instruction addressed to the special defense based upon the claim that deceased signed the guaranty solely upon the condition that W. S. Munger would also sign the instrument was not entirely without pertinency, although, in view of the ample showing made upon the defense of mental incompetency, there was no real necessity for giving it to the jury. The testimony of Russell, plaintiff's agent in the transaction, disclosed several facts which were not lacking in significance in connection with the defendant's claim as indicated by said defense, viz.: (1) That the contract between Knox and plaintiff as to the making of the note provided that the same should be indorsed by Hagopian and Munger; (2) that Russell had never heard of deceased in connection with the transaction, and, in fact, had never seen him until the day the guaranty was signed; (3) that when the deceased informed Russell that he intended to sign the guaranty, either he (deceased) or Noroian stated at that time that five persons were to sign the guaranty (three besides the deceased and Noroian) and named Munger as one of the five; (4) that, some 10 days after the guaranty was signed by the deceased. Russell procured the written document signed by Ramm and the other guarantors, stating, among other things, that they did not sign the guaranty on the condition that Munger would sign it before the note, with the guaranty, was delivered to plaintiff; that Russell testified that this document was desired by him as a "matter of precaution." We are not prepared to say that those facts would be sufficient to support a verdict in favor of the defendant on that issue; nor are we willing now to say that, taken with certain other circumstances, slight in character, it is true, but apparently corroborative thereof, those facts would not support a verdict upon said defense for the defendant. But, in any event, if it should be conceded that there was not sufficient evidence to justify the submission of the instruction to the jury, it is clear that, in view of the vast amount of evidence supporting the defense of mental unsoundness of the deceased, a miscarriage of justice has not and will not result from the giving of the instruction under present consideration.

[4] The instruction upon the subject of undue influence should not have been given. There was no such issue made by the pleadings. It is true that the testimony, rather incidentally than through any purposed attempt to make undue influence an issue, revealed a few circumstances which might well generate a suspicion that undue pressure to some extent was brought to bear upon the deceased, while under the influence of liquor,

to induce him to sign the instrument; but they were not sufficiently potent in probative power to justify a verdict predicated upon that issue. The instruction, however, involves nothing more than an abstract statement of the rule applicable in cases in which an instrument in writing is sought to be set aside on the ground that the party making it was unduly influenced to enter into the engagement evidenced thereby. The language of the instruction does not assume that there existed in the case any evidence tending to establish that deceased was unduly influenced to sign the guaranty. We think that, in view of the fact that the principal reliance of the defense was on the issue of mental incompetency and of the large amount of evidence presented in support of that issue, the instruction was innocuous in its effect upon the rights of the plaintiff. See Bosqui v. Sutro R. Co., 131 Cal. 390, 401, 63 Pac. 682. Indeed, it would be an uncomplimentary commentary upon the intelligence of the jury to hold that the instruction influenced them in the consideration of their verdict, when it must have been obvious to them that the only substantial testimony in the case tending to support the case of the defendant was that which was addressed to the issue of mental incompetency. At any rate, considering the record as a whole, we would not be justified in holding that a miscarriage of justice was produced by the giving of the instruction.

The contention that the court erred in denying plaintiff's motion for a directed verdict is fully answered by the above consideration of the evidence and the conclusion therefrom following that the verdict is amply supported, evidentially.

We have examined with care the rulings upon questions of the admissibility of certain evidence of which the plaintiff here complains, and thus have been carried to the conclusion that, while one or two of the assignments thus advanced against the legal integrity of the verdict may, in strictness, be subject to criticism, they are not of sufficient force to justify a reversal.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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67 Cal. App. 120

GORE v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4841.)

(District Court of Appeal, First District, Division 1, California. May 2, 1924.)

1. Master and servant ⚷405(4)—Finding injury was not cause of death sustained.

Evidence in compensation case *held* to sustain a finding that death of employee was not caused by injuries in employment.

2. Master and servant ⚷403—Burden of proof on compensation claimant.

Under the Workmen's Compensation Act, § 19d, the burden is on a compensation claimant to prove the claim.

Proceedings under the Workmen's Compensation Act by Mrs. Maggie Gore, for the death of Charles H. Gore, her husband, claimant, opposed by the Quaker Hill Gold Mines Company, employer, and the State Compensation Insurance Fund, insurer. Claimant petitions for a review of an award of the Industrial Accident Commission refusing a death benefit. Affirmed.

Thomas C. Butler, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Petition for writ of review for the purpose of having the lawfulness of the findings of fact, decision, and award of the respondent, Industrial Accident Commission, denying a death benefit in favor of petitioner, the widow of a deceased employee of respondent Quaker Hill Gold Mines Company, inquired into and determined.

It appears from the petition that the deceased, Charles C. Gore, was the husband of petitioner; that on August 3, 1920, while in the employ of said mining company, he fell from a ladder, and received injuries consisting of a slight bruise of the right elbow, which, however, did not interfere with his employment. Subsequently, on November 29, 1920, while at work, he again sustained a fall, causing a further injury to the elbow. He still continued in his employment until January 7, 1921, when he was obliged to quit, so it is claimed, on account of these accidents.

The State Compensation Insurance Fund was the insurance carrier for the employer. No payments of compensation having been made to Gore, he filed an application in writing on April 12, 1921, for compensation under the provisions of the Workmen's Compensation Act, and made the mining company and State Compensation Insurance Fund parties defendant therein. On May 26, 1921, the matter came on for hearing before the Commission. No claim was made by Gore in this proceeding of any negligence or misconduct on the part of the employer. Two months thereafter, on July 6, 1921, a compromise and release agreement was entered into by and between the employer and employee, and filed with the Commission for approval, in the sum of $1,000, in satisfaction of the liability assumed by the employer and on account of any claims existing by reason of injuries sustained by Gore in the course of his employment. This agreement was disapproved by the respondent Commission. The State Compensation Insurance

Fund then began paying $20.33 per week, workmen's compensation benefits, although the matter was not fully determined, and it paid the same up to the time of the applicant's death.

In April, 1923, being dissatisfied with the treatment he was receiving, Gore came to San Francisco, where he died on April 23, two days after his arrival.

On April 26, 1923, petitioner filed an application for death benefits, based upon the claim that her husband's demise was due to the injury he had received. This matter came on for hearing May 10 following, at which time it was consolidated with the undetermined application made by the deceased for compensation for his injury. It was not contended under this application that there was any negligence or misconduct on the part of the employer; on the contrary, it was stipulated otherwise.

[1] Upon the reports of the physicians who examined deceased immediately preceding his death it appeared that the injury which deceased had received to his elbow had nothing to do with his death. The report of the autopsy surgeon found that death was due to general tuberculosis, involving the lungs kidneys, bladder, and prostate, with chronic pleurisy and chronic peritonitis. It further appeared from the report that a tuberculous fistula of the elbow of deceased existed, but in the opinion of the surgeon the tuberculosis of the lungs was the most likely original source of the disease, which had spread to the other organs; that the injury had caused a localization of the tuberculous process in the elbow, but that it was hardly possible that the condition of the elbow was related to the cause of death. Other medical reports were to the same effect.

Upon the conclusion of the hearings the Commission found that death was the result of chronic pulmonary tuberculosis and chronic tuberculosis of the left kidney and the genito-urinal tract; that such condition was not caused by either of the injuries received by the deceased, and, further, that such injuries did not aggravate or exacerbate the tuberculous condition, and that neither was the cause of death, nor were they the cause of any disability beyond the period for which the employee received compensation, and that no further compensation was due. Accordingly it was ordered that the applicant take nothing by reason of her asserted claims.

A petition for a rehearing was filed upon the grounds that the evidence did not justify the findings, and that the findings do not support the order or award. This petition was denied, and, we think, rightfully so, as we are of the opinion that the evidence fully supports the findings of the Commission.

[2] The burden was upon appellant to prove her claim. Section 19d, Compensation Act; St. 1917, p. 831. This burden was not met by her. There is no medical testimony in the record to show that the injuries to the elbow caused the death of Gore, but, on the contrary, it was shown by abundant evidence that his death was caused by chronic tuberculosis, and that such injuries did not aggravate or exacerbate this condition. This being so, the Commission was fully justified in denying a death benefit.

The award is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

66 Cal. App. 577

SCOTT et al. v. SCIARONI. (Civ. 2672.)

(District Court of Appeal, Third District, California. April 16, 1924. Hearing Denied by Supreme Court June 12, 1924.)

1. Pleading 🔑129(2)—Answer, denying injury to plaintiff because of defendant's negligence, admits injuries.

In malpractice suit, answer denying that plaintiff was disfigured or injured by reason of any negligence of defendant admits alleged injuries by failure to deny them.

2. Trial 🔑139(1) — When nonsuit may be granted, stated.

Court may grant nonsuit only when plaintiff's evidence, giving it all value to which legally entitled and indulging in every legitimate inference therefrom, without regard to conflicting evidence, is of insufficient substantiality to support verdict for plaintiff.

3. Appeal and error 🔑241—Respondent cannot urge grounds not stated in granted motion for nonsuit.

Defendant, on plaintiff's appeal from judgment of nonsuit, cannot urge grounds for nonsuit not stated in motion for nonsuit.

4. Trial 🔑159—Insufficiency of complaint not statutory ground for nonsuit.

Insufficiency of complaint is not statutory ground for nonsuit, Code Civ. Proc. § 581, subd. 5.

5. Physicians and surgeons 🔑18(9)—Evidence of "fault" held for jury.

In malpractice suit, defendant's admissions that he left radium on too long and that it was his fault that plaintiff was in condition she was, in connection with proof of long-continued intense pain suffered and failure of burned part to heal, *held* sufficient expert evidence to require submission of case to jury; "fault" being synonymous with "negligence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fault.]

6. Evidence 🔑213(4)—Positive admissions of distinct facts during attempt to compromise admissible.

Code Civ. Proc. § 895, as to inadmissibility of offer of compromise, which is not admission that anything is due (Code Civ. Proc. § 2078), does not render positive admissions of distinct facts, during attempt to compromise, inadmissible.

7. Appeal and error 🔑997(2)—Argument as to weakness of declarations and admissions as evidence not considered on appeal from judgment of nonsuit.

Argument that declarations and admissions are weakest kind of evidence goes only to credibility of witnesses and weight of evidence, which cannot be considered on appeal from judgment of nonsuit.

8. Appeal and error 🔑843(3)—Error in sustaining objections to questions which can be readily reframed not considered.

Alleged error in sustaining objections to questions to witnesses, which can be readily reframed to eliminate objectionable features, need not be considered on reversal of judgment of nonsuit.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by Hazel Scott and husband against George H. Sciaroni. From judgment of nonsuit, plaintiffs appeal. Reversed.

Ernest Klette, W. M. Conley, Lindsay & Conley, and Phillip Conley, all of Fresno, for appellants.

M. G. Gallaher and Gallaher, Simpson & Hays, all of Fresno, and Hartley F. Peart, of San Francisco, for respondent.

FINCH, P. J. At all times mentioned in the complaint the defendant was a physician and surgeon, engaged in practice in the city of Fresno. During June and July, 1920, he prescribed and applied radium treatment for fibrous tissue growths upon the hands, knees, and Achilles tendons of plaintiff Hazel Scott. The complaint alleges:

> That the defendant "did so carelessly, negligently and unskillfully give and apply said radium treatment * * * as to cause burns and sores upon the ankles, hands, knees, and Achilles tendons of both legs of said plaintiff; * * * that by reason of said negligence * * * the said plaintiff, Hazel Scott, has during all of the times herein mentioned, suffered, and does now suffer, great pain and anguish, and is permanently disfigured and injured, and will continue to suffer great pain and anguish in the future; that by reason of said negligence on the part of the said defendant and said injuries so caused thereby, the said plaintiff, Hazel Scott, was confined to her bed for a period of about six months; that the said injuries * * * have at all of the times herein mentioned interfered with the work, and does now interfere with the work, of the said Hazel Scott; and that she is unable to move about without great pain and suffering."

[1] The answer admits the application of the alleged radium treatment; admits, by failure to deny, the alleged injuries; but denies that such injuries were the result of any negligence on the part of the defendant. For example, in the second paragraph of the answer appears the following:

> "Defendant * * * denies that by reason of any negligence of the defendant, plaintiff Hazel Scott is permanently disfigured and injured, or disfigured, or injured at all."

This is not a denial of the alleged permanent injury and disfigurement, or that the same were caused by the alleged treatment, but only a denial that they resulted from any negligence of defendant. At the close of plaintiff's case, on motion of defendant, the court entered a judgment of nonsuit.

The case was tried in April, 1922. Dr. Mott, who is a particular friend of defendant and occupied offices with him, testified as follows concerning the condition of Mrs. Scott's injuries at the time of the trial:

> "The burns over the Achilles tendon, it is a raw sore, it is an ulcer, sore that weeps. I mean, there is a serum or exudate that comes from it more or less continuously and tender to the touch. * * * The burn has been painful and has been sloughing. * * * I think time will effect a recovery. * * * One leg is shorter than the other. Q. To what do you attribute that shortness? A. To the destruction of the Achilles tendon. Q. * * * Is there any possibility of it ever being remedied? A. Some time it may. * * * Q. Did he (defendant) say anything about the nurse having followed directions? A. I believe he told me that she left the radium on too long. * * * I couldn't swear whether he told me that himself or not. I said I thought he had."

The defendant testified that on one occasion he prescribed an application of radium for 3 hours, and that his technician, referred to by other witnesses as his nurse, applied it for 4 hours and 20 minutes, and that if radium is applied "considerably too long * * * the healing is all the more difficult." Mrs. Scott testified that the excessive application was made to the tendon of the left leg, the one on which it is claimed the permanent injury was inflicted; that she suffered intense pain from the injury continuously for nearly a year; and that she still suffered therefrom at the time of the trial. Relative to the effect of the treatment, she testified that the defendant said:

> "That he considered it was his fault; not exactly his fault, but the fault of his nurse, and him not applying it. * * * He said that he should have been more careful with letting his nurse handle it, and he should have applied it himself."

Plaintiff Charles Scott testified:

> That defendant "said he was very sorry she had been burned, and he realized it was his fault, and while he didn't have anything to do with applying the radium any more than directing his nurse, that he was responsible for everything she did in that office."

Ernest Klette, one of plaintiffs' attorneys, testified that defendant said:

> That "it was his fault that she was in the condition she was; that he had written to the insurance company to that effect."

The defendant testified:

> "Radium has a peculiar effect on tissues of the body, and especially so in diseased tissues. In the application of radium to a diseased area it causes a destruction of the cells. * * * Now that is nothing more or less than you might call it, a form of burn, though it is quite different than a burn where you apply hot iron. * * * In applying a hot iron to the tissue, you immediately destroy the tissue; but in the application of radium you so disturb the cell that it dies after a certain period of time, * * * varying from a few days to a week or three or four weeks. * * * It requires sometimes six weeks and maybe two months for these things to heal."

In this case radium was applied to the abnormal growths on both hands, both knees, and the tendons of both legs. Healing seems to have followed in the usual time and manner, except in the case of the left leg, where the application was made for a longer time than was prescribed, and at that place there continued to be "a raw sore, * * * an ulcer, sore that weeps," at the time of the trial, nearly two years after the treatment.

[2] Evidence in conflict with the foregoing is purposely omitted because it cannot be considered in determining whether the defendant was entitled to a judgment of nonsuit. A court "may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff." Estate of Caspar, 172 Cal. 147, 150, 155 Pac. 631, 632.

[3, 4] Respondent contends that the judgment of nonsuit was properly entered on the ground of insufficiency of the complaint in various particulars. There are two answers to this contention: First, the grounds now urged were not stated in the motion for a nonsuit; and, second, insufficiency of the complaint is not a statutory ground for granting a nonsuit. Code Civ. Proc. § 581, subd. 5; Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352.

[5] Respondent urges that a physician and surgeon is not a warrantor of cures; that the result of the treatment alone is not sufficient proof of negligence or want of skill; that "whether or not a defendant physician and surgeon has been negligent or careless can only be tested, ascertained, and determined from testimony given by physicians and surgeons practicing the same methods as the defendant"; and that in this case "there is no such indispensable expert evidence that the treatment of plaintiff Hazel Scott by defendant was in any way responsible for the injuries of which plaintiffs complain." For the purposes of this case, at least, all the foregoing propositions except the last may be conceded. The defendant himself is an expert in the methods of treatment employed by him. The testimony as to defendant's admissions that he "left the radium on too long" and that "it was his fault that she was in the condition she was in," when considered in connection with proof of the long-continued intense pain suffered and the failure of the burned part to heal, constitute sufficient expert evidence to require the submission of the case to the jury. If the defendant had admitted that the injury complained of was caused by his negligence, it would hardly be contended that the evidence was insufficient to go to the jury. In the sense in which the word "fault" was used in the foregoing admissions, it is synonymous with "negligence." Indiana Union Traction Co. v. Long, 176 Ind. 532, 96 N. E. 604; Garland v. Hewes, 101 Me. 549, 64 Atl. 914; Sorensen v. J. I. Case Threshing Mach. Co., 129 Wis. 366, 109 N. W. 84. It was in that sense that the word "fault" was used in Rudd v. Byrnes, 156 Cal. 636, 642, 105 Pac. 957, 960 (26 L. R. A. [N. S.] 134, 20 Ann. Cas. 124), where it is said:

> "The court should have allowed evidence of plaintiff's statements to the effect that the injury resulted from his own fault. They were declarations of a party, against his interest."

Respondent contends that the admissions of defendant "are not sufficient to supply the necessity for expert medical testimony," citing Loudon v. Scott, 58 Mont. 645, 194 Pac. 488, 12 A. L. R. 1487. In that case it is said:

> "There was not any expert testimony to the effect, that, upon the admitted facts, the action of Dr. Scott in causing the anæsthetic to be administered * * * indicated the exercise or want of ordinary care, skill or diligence, as is required in malpractice cases. * * * But it is the contention of appellants that they met the requirements of the rule fully by introducing the admissions made by Dr. Scott, to the effect that he knew that Loudon's intemperance had reduced his vitality and greatly increased the danger incident to the administration of an anæsthetic, and that he knew it was dangerous to cause the anæsthetic to be administered to Loudon on July 18, but because of his knowledge of the patient's physical condition he felt justified in proceeding at that time. That this does not amount to an opinion or admission that the treatment—the administration of the anæsthetic under the circumstances—was not in conformity to the requirements of good surgery, or indicated a want of ordinary care, skill, ability or diligence, is so obvious as to require no comment. No presumption of negligence arises from the fact that it was dangerous to administer the an-

æsthetic to Loudon on July 18, for the evidence discloses that the element of danger is present in every instance where a patient is anæsthetized."

The distinction between the case cited and the one here under consideration is patent. In the Montana case the defendant had acted in accordance with his best judgment, and the evidence failed to show that he did not act reasonably. He made no admission of fault or negligence. Here the defendant admitted, according to the testimony, that the injuries complained of were caused by his fault.

[6] Some of the foregoing admissions were made by the defendant during an attempt to compromise. Section 895 of the Code of Civil Procedure provides that an offer of compromise and failure to accept it cannot be given in evidence. This does not mean that an admission made during an attempt to compromise is not admissible in evidence against the party making it, but only that the offer itself is not admissible. The basis of the rule prescribed by section 895 is expressed in section 2078, which reads: "An offer of compromise is not an admission that anything is due." Admissions made in negotiations for a compromise, "except as they are admissions of distinct facts, * * * are regarded as hypothetical admissions, from which it is not proper to draw any inference of liability, and therefore are not to be received in evidence." Smith v. Whittier, 95 Cal. 279, 297, 30 Pac. 529, 534. In Wigmore on Evidence, § 1061, it is said:

> "If a plain concession is in fact made, it is receivable, even though it forms part of an offer to compromise."

The admissions here in question were of distinct facts, stated positively and not hypothetically, and therefore admissible in evidence, even though made in the course of an attempted compromise.

[7] Respondent argues that declarations and admissions are the weakest kind of evidence. The argument goes only to the credibility of the witnesses testifying to the admissions and the weight of the evidence, questions which do not arise on a motion for a nonsuit. The question here is whether the evidence, assuming its absolute verity, is legally sufficient to support a judgment for plaintiffs.

[8] Appellant contends that the court erred in sustaining defendant's objections to certain questions propounded to defendant by counsel for plaintiffs. Some of these questions assumed, contrary to the fact, that the witness had testified that he had been negligent in the application of radium. Others were speculative as to what would have been the condition of Mrs. Scott if there had been no application of radium. The questions can be reframed so readily to eliminate the objectionable features that it is thought unnecessary to further consider the matter here.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

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67 Cal. App. 96

BRISACHER v. BAIER et al. (Civ. 2665.)

(District Court of Appeal, Third District, California. April 30, 1924.)

1. Corporations 🔑30(5)—Finding of plaintiff's employment to carry on advertising campaign for sale of corporation stock sustained.

Evidence *held* to sustain a finding of plaintiff's employment to carry on a campaign of advertising for the sale of stock in a corporation, by the promoters thereof.

2. Corporations 🔑30(5)—Finding that attorneys' services were rendered at request of one of promoters sustained.

Evidence *held* to sustain a finding that defendants were associated in promoting a corporation, and that services rendered by attorneys in obtaining a lease and option for a corporation were rendered at the instance and request of one of them.

3. Corporations 🔑30(5)—Promoters personally liable for contract made by them pertaining to organization.

Corporation promoters are personally liable for contracts made by them, or by agents authorized by them, preliminary to its organization.

4. Corporations 🔑30(5)—Promoters held liable for attorneys' services to a corporation.

Promoters of a corporation were liable for services of an attorney in preparation of minutes and by-laws and application to commissioner of corporations for permission to sell stock in such corporation, where corporation was organized for promoters' benefit with a nominal board of directors, and never functioned, and services were rendered under instructions given by promoters before incorporation.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Action by Emil Brisacher against Philip Baier and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lindsay & Conley, of Fresno, for appellants.

Robbins, Elkins & Van Fleet, of San Francisco, for respondent.

YOUNG, Justice pro tem. Plaintiff recovered judgment in this action for $3,081.50 against the defendants Philip Baier, E. A. McCord, and F. H. Smith, and Ed. L. Harper, who defaulted. The action was dismissed as to the defendant A. J. Pearce, who was not served. The cause was tried by the court sitting without a jury. The defendants Baier, McCord, and Smith appeal.

The complaint contains two causes of action, one of which is based upon the claim of plaintiff for services alleged to have been performed by him for defendants and for money advanced for their account, and the other cause of action is based upon an assigned claim of Robbins, Elkins & Van Fleet for legal services alleged to have been rendered by them for the defendants.

In reference to plaintiff's individual claim, among other things it was in effect found by the trial court that plaintiff, at the special instance and request of the defendants, and each and all of them, rendered services to them as advertising engineer of the value of $495.11, and advanced and paid out for the account of said defendants, and each and all of them, $1,086.40 for newspaper advertising, photographs, printing, and incidental expenses, which amount of $1,086.40 the said defendants and each of them agreed to repay to plaintiff.

As to the assigned claim, among other things, it was in effect found by the trial court that the defendants were engaged in a joint venture and promotion in obtaining a lease and option to purchase in the name of the defendant Philip Baier a certain grape juice and grape syrup factory, together with the lands upon which the same is situate, near Kingsburg, Fresno county, Cal., and the incorporation of a corporation under the name of Golden States Products Company, to take over said lease and option to purchase the said factory, and to purchase, operate, and manage the said factory, and that Robbins, Elkins & Van Fleet, at the special instance and request of the defendants and each and all of them, rendered legal services as attorneys and counselors at law for the defendants, and each of them, in connection with obtaining said lease and option, and negotiations concerning, and the preparation of various drafts of said lease and option, in consulting with said defendants in reference to said lease and option, and the formation of the corporation referred to, and the incorporation and organization of said corporation, Golden States Products Company, and that said services were of the reasonable value of $1,500.

Appellants contend that there is no evidence to support the finding of the trial court that the services rendered by plaintiff were rendered at the instance and request of appellants, or that the money advanced by him was advanced at the instance and request of appellants and paid out for their account.

It is conceded by appellants that as to the services rendered by Robbins, Elkins & Van Fleet in the formation of the corporation Golden States Products Company, they authorized the same, but they contend that the evidence does not support the finding of the trial court that the services rendered by said attorneys in connection with obtaining the lease and option were rendered at the instance and request of appellants, and further that the evidence does not support the finding that the services rendered by the said attorneys after the formation of the corporation were rendered at the instance and request of appellants.

The Golden States Products Company, a copartnership, consisting of Ed. L. Harper and several other members, owned a grape juice and grape syrup factory, together with the lands upon which the same is situate, near Kingsburg, in Fresno county, Cal. The business conducted by this copartnership in connection with the factory had been a failure, and the copartnership was heavily in debt. The members of the partnership, especially Harper, were desirous of disposing of the property, or of effecting a reorganization of the business. The latter part of January, or the first part of February, 1921, Harper received information to the effect that Philip Baier, one of the appellants, might be interested in the purchase of the factory, and sought an interview with him on the subject. Harper also heard that appellant Smith had been making inquiries about the grape juice manufacturing business, and called upon him at his office in Fresno. Smith informed Harper that Mr. Baier and himself were contemplating the building of a grape juice factory. A day or two later, Baier, Smith, and McCord met with Harper and a conference was had upon the subject. Baier informed Harper that he would like to obtain an option to purchase said factory if satisfactory terms could be agreed on. Other meetings were held between these parties, at some of which meetings there were also present Guthrie, Truss, and Pearce. It was determined that Baier and some of the others should go to San Francisco to meet the members of the copartnership and discuss the matter of obtaining an option to purchase the factory. On February 27, 1921, Baier, Guthrie, Truss, and Pearce went to San Francisco and met members of the copartnership in the office of Robbins, Elkins & Van Fleet. Mr. Elkins of this firm had been the attorney of Mr. Harper for some time, and it was at the suggestion of Mr. Harper that the meeting was held in this office, and that Mr. Elkins was invited to participate in the conference. The matter of obtaining an option to purchase running in the name of Mr. Baier was agreed upon, and Mr. Elkins understood he was employed by Mr. Baier and his associates to meet with Mr. Maurice E. Harrison, the attorney representing the copartnership, to work out the details of the option and to prepare a draft of the same. Several drafts of the option were prepared before one satisfactory to all parties was had. Finally, on March 30, 1921, at a meeting in Fresno at which Elkins, Baier, McCord, Smith, Harper, and Pearce were present, the final draft of the option which had been executed by the members of the copartnership was accepted by Mr. Baier, and the first payment called for by its terms was paid to a person in the Bank of Italy in Fresno, authorized by the members of the copartnership to accept the payment and deliver the option to Mr. Baier. Of this payment, Baier, Smith, McCord, Pearce, and Harper each paid $2,000. Mr. Elkins was then instructed by these associates, or some of them, to prepare the papers for the formation of a corporation under the name of Golden States Products Company, and also to prepare the necessary application to the commissioner of corporations for permission to sell stock of the corporation. Mr. Elkins proceeded with this work as directed. The plan of appellants and their associates for making further payments on the option in the purchase of the factory was to sell stock to raise the money therefor. A scheme of advertising was agreed upon, and plaintiff, an advertising engineer, was instructed to prepare a salesman's kit, so called, and to carry on advertising in the newspapers in the San Joaquin Valley. Mr. Elkins prepared the papers for the formation of the corporation, and the corporation was organized. Appellants were not among the incorporators. There consisted of Mr. Harper, Mr. Elkins, and others selected by Mr. Elkins to act as dummies. Plaintiff proceeded to carry out his instructions in reference to advertising. The effort to sell stock failed, and the appellants never became members of the corporation. In the advertising matter for sale of stock, they had been featured as directors of the corporation.

[1] Plaintiff's individual cause of action is based upon his claim that he was employed by each and all of the appellants and their associates. We are of the opinion that the evidence supports the claim of plaintiff. Harper testified that at a meeting had with appellants on March 25, 1921, the matter of carrying on a campaign of advertising was discussed, and that he suggested the name of plaintiff as the man to do this work, and that appellants and each of them told him to engage plaintiff and have him start to work at once; that he, on the following day, acting under this authority, employed plaintiff to do the advertising upon which his claim is based. Plaintiff testified in his own behalf to the effect that Mr. Harper called at his office on March 26, 1921, and told him that he arranged with Mr. Baier, Mr. Pearce, Mr. McCord, and Mr. Smith to promote this enterprise, and outlined the complete details of their plans, and asked him to prepare immediately a salesman's kit, and prepare certain letters and make ready to carry on the necessary advertising. It also appears that while the work was in progress he met with Harper and the appellants and had discussions in reference to the advertising. Appellants admit that the value of plaintiff's services as found by the trial court is reasonable. The matter of plaintiff's employment by appellants and their associates was clearly a matter of fact for the trial court to determine, and there is substantial evidence supporting its findings as to the same.

[2] The right of recovery on the assigned claim of Robbins, Elkins & Van Fleet is based upon the claim that appellants and their associates were joint adventurers and promoters, and that Mr. Baier, acting for himself and others, employed Mr. Elkins to render the services sued on. Appellants Smith and McCord testified to the effect that they were not associated with Mr. Baier until March 30, 1921, the day the option was accepted by Baier, and it is therefore contended by them that they are not liable for services rendered by Mr. Elkins prior to that date.

Mr. Baier testified to the effect that he did not employ Mr. Elkins to represent him in obtaining the option, and that he understood that Mr. Elkins was acting as the attorney for Mr. Harper.

It is our opinion that the claim that appellants and Harper and Pearce were joint adventurers and joint promoters is fully supported by the evidence. Harper testified that he had been told by appellants in several meetings held between them prior to February 27, 1921, that the appellants were all together in the deal. This, coupled with the fact that each of them was present when the option was finally accepted by Baier, and each then and there paid a part of the first payment called for by the option, justified the trial court in finding that they had been interested together in the deal from its inception. As to the employment of Mr. Elkins, the testimony of Elkins, Harper, and Sinton, all witnesses in the case, is to the effect that Mr. Baier instructed Mr. Elkins in the meeting held in the office of Mr. Elkins on February 27, 1921, to co-operate with Mr. Maurice E. Harrison, the attorney for the copartnership, in the preparation of the option, and that Mr. Baier told Mr. Elkins to protect his interest in the matter. Mr. Elkins also testified that in other conferences had with Mr. Baier that Mr. Baier had asked his advice pertaining to the option and as to his liability thereunder.

[3] The rule of law under which the liability of appellants arises is clearly announced in the opinion of the court in the case of Strause v. Richmond Wood Working Co., 109 Va. 724, 65 S. E. 659, 132 Am. St. Rep. 937, as follows:

> "Upon the soundest reasoning, the tendency of the courts in recent years is to an adherence to the doctrine, that those dealing with promoters should be left with the double security of the promotor and the company when one is formed, unless it clearly appears that the lia-

bility of the promoter was not intended, or that it was intended to be released when the liability of the corporation began."

In Hersey v. Tully, 8 Colo. App. 110, 44 Pac. 854, it is said:

> "Promoters of a corporation are personally liable for the contracts made by them, or by agents authorized by them, preliminary to its organization."

This rule is also supported in the cases of Ijams v. Andrews, 151 Fed. 725, 730, 81 C. C. A. 109; Leake v. City of Venice, 50 Cal. App. 462, 195 Pac. 440.

[4] The last point that calls for consideration is the contention of appellants that they are not liable for the services rendered by Mr. Elkins after the incorporation of the Golden States Products Company. It is contended by them that these services were performed for the corporation, and hence the corporation and its stockholders are liable. These services consisted of the preparation of minutes and by-laws and the application to the commissioner of corporations for permission to sell stock. When it is remembered that the corporation was organized for the benefit of the promoters with a nominal board of directors, and that the corporation never functioned, and that Mr Elkins performed these services under instructions given by the appellants before the incorporation, we think the obligation of the appellants to pay for these services arises under the rule above mentioned as to the liability of joint adventurers and promoters.

We are of the opinion that the evidence supports the findings of the trial court, and the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

66 Cal. App. 609

FRAZIER v. SOUTHERN COUNTIES GAS CO. (Civ. 4007.)

(District Court of Appeal, Second District, Division 1, California. April 18, 1924.)

1. Appeal and error 🔑1010(1)—Finding of fact by trial judge, supported by substantial evidence, not disturbed on appeal.

A finding of fact by a trial judge, supported by substantial evidence, cannot be disturbed on appeal.

2. Corporations 🔑432(12)—Finding that corporation is bound by acts of agent having implied authority held supported.

Where a district superintendent of a corporation had a duty to attend to business which was the foundation for the purchase of pipe, and in another similar transaction had acted in a similar way with the apparent consent of the corporation, in purchase of pipe in which he had at least implied authority, finding that the corporation was bound by his acts *held* supported by the evidence.

3. Trial 🔑397(3)—No duty to make finding on issue not presented by pleadings.

In an action by a seller against a buyer to recover payment for pipe, where the issue of fraud of the seller was not presented by the pleadings, there was no duty on the trial court to make a finding in connection therewith.

4. Appeal and error 🔑931(4)—In absence of finding by trial judge as to fraud, presumption is that suggestion of fraud was not favorably received.

In an action by the seller of pipe against the buyer to recover the price, where no fraud of the seller as against third parties who were to pay part of the price was pleaded, and there was no finding of a trial court as to fraud, and the evidence with reference thereto was conflicting, no relief can be given for such fraud on appeal.

5. Sales 🔑213—Selection of pipe and preparation for use held a "present transfer."

Under Civ. Code, § 1140, as to time of passing of title, where the workmen of a buyer of pipe selected and separated pipe from that which was not acceptable to it, and measured the pipe to be used, and removed threads from it preparatory to using it as contemplated by the interested parties, there was a "present transfer" of title to the pipe.

6. Sales 🔑384(4)—Twelve dollars for storing pipe refused by buyer not error.

Where the seller of pipe, which had been selected and prepared for use by the buyer, notified it to remove the pipe from his premises, on failure to remove it was not error to award the seller $12 for keeping the pipe 12 months.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by F. O. Frazier against the Southern Counties Gas Company. From judgment for plaintiff, defendant appeals. Affirmed.

O. C. Sattinger and Le Roy M. Edwards, both of Los Angeles, for appellant.

W. H. Thomas, of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment entered against the defendant in the sum of $310.35 on account of certain gas pipe alleged to have been sold by plaintiff to the defendant and for which no payment was made.

[1] Appellant urges as a reason for the reversal of the judgment that the evidence was insufficient to support the finding of fact that the contract of sale was made as alleged in the complaint. An examination, however, of the record discloses the fact that there was substantial evidence to justify such conclusion on the part of the judge of the trial court, and the rule is so well settled as to require no citation of authority

that in such circumstances the finding of the trial court cannot be disturbed on appeal.

[2] The contract in question was entered into between plaintiff and a district superintendent of the defendant, and it is claimed that there was no authority on the part of such agent to conclude the contract. The evidence shows that it was part of the recognized duty of the district superintendent to attend to the very business which was the foundation for the purchase of the pipe, and that in another transaction, which was a part of, or at least closely connected with, the particular transaction which brought about the purchase of the pipe which is the subject of this controversy, the same agent had acted with the plaintiff in conjunction with other interested parties in a similar way, apparently with the knowledge, consent, and approval of the defendant. In this connection there was evidence to the effect that plaintiff had originally negotiated with the superior officer of the agent, and had made with such superior officer a tentative contract entirely different from the one alleged in the complaint; but the finding of the court, by which this court is bound, and which finding was supported by other substantial evidence, is to the effect that the final contract was entered into between plaintiff and the district superintendent of the defendant, and that such agent had at least implied authority in the premises. It must therefore follow that the defendant's specification to the effect that the agent was acting without authority in the premises must fail.

[3, 4] It is also suggested that because the gas pipe was second hand, and for the reason that certain neighbors of plaintiff who were to receive the benefit of the pipe being laid in front of their several properties in order that they might make gas connections therewith were to contribute to the cost of the pipe on the assumption that it was new pipe, and that because of such deceit plaintiff was to make a secret profit on the transaction, the contract would be unenforceable. It is true that there was some evidence introduced on the trial which might justify such a conclusion. On the other hand, there was evidence from which the court would have been warranted in finding that plaintiff's conduct was blameless and entirely free from either legal or moral criticism. No fraud was pleaded by the defendant as against plaintiff; neither was there any finding by the court on the subject. Such being the case, the presumption must be that the suggestion of plaintiff's fraud in the matter was not favorably received by the judge of the trial court. Besides, no such issue having been presented by the pleadings, there was no duty resting on the court to make a finding in connection therewith. Burton v. Mullenary, 147 Cal. 259, 81 Pac. 544; Glassell v. Glassell, 147 Cal. 513, 82 Pac. 42; Moran v. Ross, 79 Cal. 159, 21 Pac. 547. There being no finding on the question of fraud, and the evidence with reference thereto being conflicting, this court is powerless, were it so inclined, to afford the defendant any relief.

[5] It is also contended by the appellant that the trial court applied an erroneous rule of damages—the basis for such claim being that the pipe was not delivered to the defendant, and consequently, instead of plaintiff being entitled to recover a judgment for the agreed price of the pipe, the damages should have been for the difference between the contract price of the pipe and the value of the pipe to the seller. In this regard the findings of the trial court are "that in conformity therewith (the contract) the plaintiff did sell and deliver to the above-named defendant, under the specific terms of said agreement," the pipe in question. The transcript on appeal shows that, although the pipe was physically on the property of the plaintiff, the defendant took possession thereof to the extent of sending its workmen to select and segregate the pipe desired by the defendant from the pipe which was not acceptable to it, which was followed by defendant's taking measurements of the pipe which was to be used; and on the following day other employees of the defendant removed the threads from the designated pipe preparatory to using it as contemplated by all the interested parties. The question of the time when title to personal property passes is treated in section 1140 of the Civil Code, by which it is declared that "the title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

In the case of Todd v. Lyon, 55 Cal. App. 67, 202 Pac. 899, where the authorities are collected, the principle is announced that the question of the sale of personal property is to be ascertained from the intention of the parties, which is to be determined by the judge from all the facts and circumstances of the case; and, where goods are identified, and the price to be paid therefor depends upon some unit of measurement or invoicing thereafter to be made, the transfer is complete. See, also, 35 Cyc. 192; Jensen v. Carlenzoli, 54 Cal. App 656, 202 Pac. 452. In the instant case, as found by the court, the parties agreed "upon a present transfer"; the pipe sold was clearly identified by its selection and its segregation from other pipe, by the defendant, which was followed by acts showing the defendant's ownership. The intention of the parties was thus determined to be a present change in title to the pipe, and the trial judge by his findings so declared. The evidence amply supports the finding thereon, and, as before stated, the rule is that such finding cannot now be disturbed by this court.

[6] Appellant's final complaint against the judgment is that the court erred in awarding the plaintiff the sum of $12 for storage of the pipe. It appears that, after defendant had selected and segregated the pipe, and had removed the threads therefrom, it left the pipe scattered over the ground in full view of plaintiff's living room window; that thereafter plaintiff notified the defendant to remove the pipe, which the defendant failed to do. Plaintiff thereupon moved the pipe to the rear of his garage, and piled it up in a neat pile, where it remained until the action was tried. The damages allowed by the trial court as a reasonable sum for the storage of the pipe on plaintiff's premises was the sum of $1 per month. The rule with reference to plaintiff's right to recover for such storage is laid down in 35 Cyc. p. 599, as follows:

> "The expenses incurred by the seller by reason of the breach of the contract may generally be recovered as part of the damages, such as extra expense incurred by reason of defendant's representations that he is ready for delivery, followed by repudiation, expense of resale, and expense for the keep of animals for a reasonable time in anticipation of a resale"—citing cases.

In the case of King v. Globe Grain & Milling Co., 58 Cal. App. 105, 208 Pac. 166, a recovery was permitted by the plaintiff in a case of this nature on account of warehouse charges.

In the instant case, if it be assumed that on the failure of defendant to remove the pipe, after having been notified by plaintiff to do so, plaintiff would have had the right to place the pipe in a warehouse, then there would seem to be no good reason why the defendant should not here be obliged to pay the reasonable charges for storage of the pipe on the premises of plaintiff.

We find no error in the record. The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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66 Cal. App. 442

NIELSEN v. DAVIDSON. (Civ. 4726.)

(District Court of Appeal, First District, Division 2, California. April 5, 1924. Rehearing Denied May 2, 1924. Hearing Denied by Supreme Court June 2, 1924.)

1. Appeal and error 🔑1010(1) — Finding of fact supported by evidence not disturbed.

Trial court's finding of fact supported by some evidence will not be disturbed.

2. Guaranty 🔑24(1)—Defendant's attempt to revoke guaranty after it had been acted upon held ineffectual.

Defendant's attempt to revoke a contract guaranteeing payment of notes given by his associates in purchase of a creamery was ineffectual after it had been acted upon, and purpose for which it was executed had been obtained by his associates.

3. Guaranty 🔑5 — Contract not invalidated though bank's assumption of notes required it to exceed limitation prescribed by Federal Banking Act.

A contract guaranteeing payment of notes conditioned on a bank's purchase thereof was not invalidated though requiring bank to exceed limitation prescribed by U. S. Comp. St. § 9761; such violation being a question which concerned federal government alone.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. T. Nielsen against A. Davidson. Judgment for plaintiff, and defendant appeals. Affirmed.

Herbert Choynski and F. W. Nightingill, both of San Francisco, for appellant.

Egerton D. Lakin, of Palo Alto, and Alexander McCulloch, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued the defendant to recover upon a written contract guaranteeing the payment of two promissory notes in the sum of $6,250. Plaintiff owned the University Creamery in the city of Palo Alto, and, in December, 1919, agreed to sell it to Allen and Carter for the sum of $25,000, plus the inventory of stock in trade. Pending the running of the statutory notice fixing the day of sale the bill of sale was executed and deposited in escrow with the First National Bank of Palo Alto. During this time the buyers requested Nielsen to accept two promissory notes to cover one-half of the agreed purchase price. Plaintiff agreed to accept the promissory notes providing they should be satisfactory to the First National Bank, and emphasized the fact that it would be necessary for the cashier of said bank to assure him that the notes were as good as cash, as he was selling the creamery for cash. This was agreed to, and one of the purchasers brought the defendant Davidson to the First National Bank of Palo Alto and introduced him to the cashier. The whole transaction was explained to Davidson, and during the course of the conversation he explained that he was a silent partner in the creamery; that he did not want his name known, but would guarantee the notes and would write a letter to that effect. On December 5th he sent to the cashier of the bank the letter which is the basis of this action, and in which he stated that he understood that the plaintiff wanted an agreement with the bank whereby at any time he might cash the two notes, and that his letter might be treated as an agreement of guaranty for the purposes mentioned in the event that the bank should see fit at any time to purchase or carry the notes. This letter was supplemented by a letter from the defendant's bank in San Francisco to the effect that he was good for the payment, and these were shown to the plaintiff by the cashier of the First National Bank, who thereupon assured the plaintiff that the notes were good, and that the transaction might be completed in accordance with his wishes. Upon such assurance plaintiff consented to the bank's delivery of his bill of sale to the purchasers. The sale was thus completed in the first part of December, 1919, and the purchasers took possession. Some time in August of the year following the defendant herein endeavored to revoke his guaranty. The notes had been made payable to the First National Bank of Palo Alto, and when the defendant attempted to cancel his guaranty the bank assigned the notes to plaintiff herein, who commenced this action. He recovered judgment for the full value of the notes, and the defendant has appealed upon a bill of exceptions.

[1] The parties concede that the letters referred to are sufficient to constitute a written guaranty on the part of the appellant. It is argued in support of the appeal that the guaranty is conditional upon the bank's either purchasing or carrying the notes. Conceding this to be true, the trial court found, as alleged in paragraph VIII of the complaint, that the notes were sold, assigned, and transferred to the bank for the full sum of $12,650. There was some evidence to support this finding, and this is a sufficient answer to the first point urged by the appellant.

[2] The second point presented is that the guaranty was revoked. It is true that the appellant attempted to revoke this guaranty long after it had been acted upon, and the purposes for which it had been executed had been obtained by his associates. As soon as the sale was consummated the guaranty became irrevocable so far as the respondent herein was concerned.

[3] The further contention is urged that the court erred in refusing to admit evidence showing the amount of the subscribed capital stock and surplus of the Palo Alto bank. The point is that the face value of these two notes exceeded 10 per cent of the capital stock and surplus of the bank, and that accordingly the bank was prohibited from purchasing the notes under the provisions of U S. Compiled Statutes, § 9761. Aside from the fact that this matter was not put in issue by any of the pleadings, it is a sufficient answer to the appellant to say that any violation of the federal banking act was a question which concerned the United States alone. Appellant's point is that, as the guaranty in suit is conditional upon the bank's either purchasing or carrying the notes, and as the bank could not carry both notes if in excess of 10 per cent. of its capital and surplus, then perforce the bank could not fulfill the conditions of the guaranty, and the whole, therefore, must fall. But such is not the penalty of the Federal Banking Act. At the instance of the United States the bank might be subjected to the forfeiture of its charter, and the officers might be required to personally make good the amount of the excess; but none of these matters may be urged by the debtor upon a loan or obligation in excess of the statutory limitation.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

66 Cal. App. 370

PEOPLE v. HADLEY. (Cr. 1031.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1924. Hearing Denied by Supreme Court May 26, 1924.)

1. Indictment and information ⇐146—On demurrer, facts well pleaded taken to be true.

On demurrer to information, material and issuable facts, well pleaded without inconsistency or conclusions of law, and not contrary to facts judicially known, are taken as true.

2. Public service commissions ⇐28—Finding of Railroad Commission on fact question not subject to review.

Under Public Utilities Act, §§ 1, 67, findings of Railroad Commission on questions of fact are final, and not subject to review.

3. Carriers ⇐10—Railroad Commission may order cessation of operation of stages, right of which was in possession when statute became effective.

Notwithstanding that prior to time Auto Stage and Truck Transportation Act became effective defendant was in lawful possession of right to operate stages over named route, in absence of determination by Railroad Commission that public rights and interest would be advanced by such operation, defendant could not lawfully exercise the right.

4. Public service commissions ⇐27—Supreme Court only authorized to review orders of Railroad Commission.

Under Public Utilities Act, § 67, no court other than the Supreme Court has jurisdiction to review, reverse, correct, or annul decision or order of Railroad Commission, and only relief which aggrieved party may have from such order is through writ issued by Supreme Court.

5. Judgment ⇐564(1)—Order denying writ of review not accompanied by opinion held final adjudication and res judicata of matters presented.

Where Supreme Court having sole jurisdiction under Public Utilities Act, § 67, to review decision or order of Railroad Commission, denied writ of review, but without opinion, its order was final adjudication of correctness and validity of decision reviewed and res judicata of matters presented.

6. Carriers 🔑10—Finding of operation as transportation company as defined by statute held to be finding of operation on public highways.

Finding by Railroad Commission of defendant's operation as a transportation company, as defined by St. 1917, c. 213, and amendments thereto, *held* equivalent to finding that vehicles were operated on public highways.

7. Carriers 🔑10—Order of Railroad Commission in language of statute not invalid.

An order of the Railroad Commission, enjoining the operation of stages over regular routes, and fixing termini in language of St. 1917, c. 213, *held* valid as against objection that charges in information did not follow findings and order of Commission.

8. Carriers 🔑21(4)—Objection to information that there was no allegation that order of Railroad Commission was duly given or made held untenable.

Objection to information charging violation of order of Railroad Commission, in that it did not conform to Code of Civil Proc. § 456, because there was no allegation that Commission's order was "duly given or made," *held* untenable, since information in pleading the determination by Commission set forth facts conferring jurisdiction.

9. Carriers 🔑21(4)—Charge that stages were operated for compensation not conclusion.

Charge in information for violation of order of Railroad Commission, under St. 1917, c. 213, that stages were operated for compensation, which followed language of statute, *held* not objectionable as alleging conclusion of law.

10. Criminal law 🔑633(1)—Mode of prosecution of act not previously declared penal strictly pursued.

Where act not before subject to punishment is declared penal, mode pointed out for prosecution thereof must be strictly pursued.

11. Public service commissions 🔑19(4)—Disobedience to order of Railroad Commission held in nature of contempt.

An alleged disobedience of an order of the Railroad Commission is in the nature of contempt.

12. Contempt 🔑54(2)—Affidavit in contempt proceeding constitutes complaint.

Affidavit in a contempt proceeding constitutes the complaint.

13. Contempt 🔑40—Nothing indulged in favor of validity of contempt proceedings.

Proceedings in contempt are of a criminal nature, and nothing may be indulged in favor of their validity.

14. Contempt 🔑54(4)—Without statement in affidavit that contempt committed court without jurisdiction.

In absence of statement of facts in affidavit showing in themselves that contempt has been committed, court is without jurisdiction.

15. Contempt 🔑23—Party must have actual notice of order or personal service of it before being charged with violation.

To punish for contempt because of violation of court order it is essential that party charged either have actual notice of making of order or that personal service of it be had upon him prior to time he is charged with violation, and failure to charge previous knowledge or service is fatal defect.

16. Public service commissions 🔑19(4)—Allegation of service of order of Railroad Commission prior to date of alleged disobedience essential to prosecution on information.

In prosecution for violation of order of Railroad Commission, allegation of service on defendant of certified copy of Commission's order prior to date of alleged disobedience was essential to maintenance of action, and without proof of such service court was without jurisdiction, though St. 1917, c. 213, does not in terms require such notice, the provisions of Public Utilities Act, § 61, being applicable.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Information by the People against O. D. Hadley for violation of an order of the Railroad Commission. From a judgment for defendant on demurrer the People appeal. Affirmed.

See, also, 221 Pac. 389.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Ernest R. Utley, Dist. Atty., of El Centro, for the People.

Robert G. Hill, of El Centro, for respondent.

Hugh Gordon and Carl I. Wheat, both of San Francisco, for Railroad Commission as amicus curiæ.

HOUSER, J. This is an appeal by the people of the state of California from a judgment in favor of defendant on a demurrer to an information which charged defendant with the violation of an order of the Railroad Commission of this state.

An examination of the information herein discloses that the facts alleged, material to a decision of the questions which this court is called upon to decide, in substance, are: That prior to May 1, 1917, defendant was operating a certain automobile stage line in this state and within the county of Imperial; that thereafter and within the following year he ceased to operate said stage line, and that he did not again resume such operations until some time in the month of March, 1923; that on the 9th day of April, 1923, the Railroad Commission of the state of California instituted an investigation into the "methods, practices, and operations" of defendant with reference to his conduct of said stage line, and, after regular proceedings had thereon, made the finding that defendant had been operating his stage line "as a transportation company as defined in chapter 213, Statutes of 1917, and amendments thereto, and for which no certificate of public convenience and necessity has been obtained from this Commission as required by section 5 of the above-mentioned statutory enactment; that this respondent discontinued service and operation * * * in March, 1918, without having requested or received from this Commission authority so to do"; that thereupon the Railroad Commission ordered that defendant cease such operation, and that operation be not resumed by defendant until he was granted permission so to do by the Railroad Commission, of which ruling the secretary of the Commission was ordered to serve a certified copy thereof by registered mail upon defendant; that thereafter, to wit, on or about the 13th day of June, 1923, defendant resumed the operation "of automobile stages for carriage of passengers for compensation over regular routes and between fixed termini on the public highways, * * * contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

A petition for rehearing herein having been granted, the court adopts as its opinion at this time that part of its former opinion which follows herein in quotation marks:

[1] "It is a rule of law that, for the purpose of ruling upon a demurrer to an information, the material and issuable facts alleged in the information, which facts are well pleaded without inconsistency therein or conclusions of law thereon, and which are not contrary to facts of which the court may take judicial notice, are to be taken as true.

"The demurrer to the information, with exception of one paragraph thereof, was substantially in the language of the statute, which prescribes the grounds upon which a demurrer to an information may be interposed; that is to say, the attention of neither the court nor the people was directed to any particular defect in the information, but the entire objection of defendant was permitted to rest upon the general language of the statute. In the brief presented by counsel for respondent the following appears with reference to the points raised herein: 'There are six separate and distinct propositions of law first discussed herein, none of which was ever presented in the petition for the writ of review or presented in any court.' In the case of People v. Bradbury, 155 Cal. 813, 103 Pac. 215 (in which case, however, defendant was the appealing party), it is said: 'That the court may be enlightened upon the precise matter on which error is predicated we think too plain to call for discussion. * * * Defendant, therefore, may not be permitted here in this court and for the first time to urge this ground of special objection, never presented to the trial court.' The opinion of the judge of the lower court, rendered on the decision of the demurrer, shows that the only point which was relied upon by defendant on the argument of the demurrer was included in the fifth paragraph thereof, which was to the effect that the order of the Railroad Commission upon which the information is based is null and void because of lack of power from any source to make such an order. Indeed, the brief of defendant herein, while purporting to specify various defects in the proceedings leading up to the rendition of the order, in effect is but an ultimate attack upon powers assumed by the Railroad Commission, and which, according to defendant's contention, have no existence as a matter of law.

[2] "As heretofore stated, the Commission's findings of facts were that respondent discontinued service and operation in the year 1918, and that he did not resume operations until some time in the month of March, 1923. The Supreme Court of this state has repeatedly held, in accordance with the provisions of sections 1 and 67 of the Public Utilities Act (St. 1911 [Ex. Sess.] p. 18) that the findings of the Commission on questions of fact are final and not subject to review. Oro Electric Corporation v. Railroad Commission, 169 Cal. 466, 147 Pac. 118; Clemmons v. Railroad Commission, 173 Cal. 254, 159 Pac. 713; San Leandro v. Railroad Commission, 183 Cal. 229, 191 Pac. 1; Live Oak Water Users' Association v. Railroad Commission (Cal. Sup.) 219 Pac. 65; Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 209 Pac. 586. There can be no question, therefore, but that the finding by the Railroad Commission as to the abandonment of the right to operate a stage line and the fact that operations were not resumed until some time in the month of March, 1923, must be accepted as final; such conclusion being one that cannot be inquired into by this court.

[3] "It is urged that, because on May 10, 1917, when the statute particularly herein involved became effective, defendant was in the lawful possession of the right to operate stages over the route in question, such right was vested, and that the Commission had no jurisdiction to order the cessation of such operation. But, as is pointed out by Mr. Justice Sloss in his opinion in the case of Oro Electric Corporation v. Railroad Commission, 169 Cal. 475, 147 Pac. 118, an abstract right may exist in a corporation to engage in a business falling within the provisions of the Public Utility Act; nevertheless, in the absence of a determination by the Railroad Commission, as manifested by its certificate, to the effect that the rights and interests of the general public will be advanced by the prosecution of the proposed enterprise, the corporation may not lawfully exercise such right. That the order by the Railroad Commission was purely regulatory and was expressly authorized by a constitutional provision of the so-called Auto Stage and Truck Transportation Act is clearly made to appear by the ruling of the Supreme Court of this state in the case of Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 209 Pac. 586.

[4] "It is contended by appellant that the superior court erred in assuming jurisdiction to declare that the order of the Railroad Commission was invalid. Section 67 of the Public Utilities Act provides, in part, that 'no court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof or to

enjoin, restrain or interfere with the Commission in the performance of its official duties.'

[5] "In the case of Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, also in the case of Sexton v. Atchison, Topeka & Santa Fé Ry. Co., 173 Cal. 760, 161 Pac. 748, the constitutionality of the section just quoted is upheld by the Supreme Court. It must therefore be accepted as the settled law of this state that no court other than the Supreme Court has jurisdiction to review, reverse, correct, or annul any decision or order of the Railroad Commission. Even though the order by the Railroad Commission be palpably erroneous in point of law, until some order by the Supreme Court may be issued to the contrary, the original order of the Commission must stand as a proper and legal order in the premises. No court, other than the Supreme Court, may lawfully disregard it. Such being the state of the law, it would follow that, as is provided by the act itself, the only relief which the aggrieved party may have from such an order is by or through a writ issued by the Supreme Court. In the instant case it appears that an application for a writ of review was presented by the defendant to the Supreme Court, and was by that court denied by an order dated August 23, 1923, which was after the date when the demurrer to the information herein was sustained. The order denying the application for the writ of review was not accompanied by an opinion—merely the formal order 'petition denied' being entered in the record. That such an order is a final adjudication of the correctness and the validity of the decision which it is attempted to have reviewed is decided in the case of Napa Valley Electric Co. v. Railroad Commission of California decided by the United States Supreme Court, and reported in 251 U. S. 366, 40 Sup. Ct. 174, 64 L. Ed. 310, where the court cited several authorities, and in the course of the opinion said: 'In those cases [referring to cases cited] the applications for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California. And so with the denial of the petition of the electric company—it had like effect and was the exercise of the judicial powers of the court. * * * And we agree with the district court that 'the denial of the petition was necessarily a final judicial determination * * * based on the identical rights' asserted in that court and repeated here. Williams v. Bruffy, 102 U. S. 248, 255, [26 L. Ed. 135, 137]. And further, to quote the district court, 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact'—citing cases.

" 'The court held, and we concur, that absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the electric company.'

"The case was originally heard in the federal District Court (257 Fed. 197), where Mr. Justice Van Fleet, speaking for the court, said: I am unable to perceive how the objection that the action of the state court is conclusive of the controversy, and that plaintiff is now precluded from bringing the same grievance here, may be avoided. It has had its day in court. * * * The contention by plaintiff that the ruling of the state court is not a proper predicate for invoking the doctrine of res judicata, in that it is not a judgment "on the merits," but purely a negative determination or refusal to assume jurisdiction, is unsound. We are bound to assume, if we accept the averments of the bill, that the petition put that court in full and complete possession of all the facts upon which it relies here (Detroit & Mackinac R. Co. v. Michigan Railroad Commission); and, that being true, the denial of the petition was necessarily a final judicial determination (Williams v. Bruffy, supra), based on the identical rights asserted in this court, and it was between the same parties. Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact [citing cases]. Nor is it material that the reasons for the conclusion reached by the court are not given. We are not concerned with the reasoning, but only with the judgment, and it must be assumed in support of the latter that upon the facts presented to it the state court upon due consideration reached the conclusion that plaintiff's rights had not been violated.'

"Taking the authorities at face value, the only conclusion which can be reached as applied to the instant case is that the point relied upon by respondent in support of the judgment on the demurrer is res adjudicata and that it is entirely against his contention.

"In view of the fact that the order of the Railroad Commission is considered as being legal in itself, the other objections to the information urged by respondent in this court, apparently for the first time 'in any court,' should receive attention.

[6] "In support of the judgment the first specification by respondent has to do with an alleged lack of findings by the Railroad Commission to the effect that the stages were being operated on the public highway of the state; the argument being that the act under which the Commission assumed to make the order in question conferred jurisdiction upon the Commission in cases of this character only where stages were being operated for compensation upon public highways. But a reference to the findings discloses the fact that counsel is mistaken in that regard; the finding being 'that the operation now being conducted by respondent, * * * its operation as a transportation company as defined in chapter 213, Statutes of 1917, and amendments thereto,' which is the enabling act, and which clearly covers the respondent's objection.

[7] "The second reason assigned by respondent for sustaining the judgment relates to the alleged invalidity of the order of the Commission because of its attempt to enjoin the operation of stages 'over regular routes and fixed termini'; but, as before, in addition to the matter being res adjudicata the enabling act contains language identical with that to which counsel objects. Hence that argument as well as the argument under respondent's third point to the effect that the charges in the information must follow the findings and the order of the Commission, would appear to be not sustainable.

[8] "The objection that the information does not conform to the provisions of section 456 of the Code of Civil Procedure, in that there is no allegation that the order of the Commission was 'duly given or made,' is likewise untenable, for the reason that the information in pleading the determination by the Commission set forth the facts conferring the jurisdiction, rather than adopting the shorter procedure of pleading that the order was duly given or made—both of which methods are recognized and at least impliedly authorized by the section to which reference has just been made.

[9] "The sixth point advanced by respondent herein, in substance, is that the charge in the information that the stages were operated for compensation is a conclusion of law and is indefinite and uncertain as to what is meant by the word 'compensation.' The language of the information in that regard follows the language of the statute; hence, under many decisions of our Supreme Court, the information is unobjectionable in that regard.

"It is urged that the information is faulty in its failure to contain an allegation of service upon defendant of the order of the Commission. The charging part of the information is couched substantially in the language of the section of the act which provides for any violation of the provisions of the act and prescribes the penalty therefor. There is nothing in the act itself which requires service upon any person of any order of the Commission before it shall become operative."

[10] But, according to the terms of that act, the Railroad Commission is vested with the power and authority to supervise and regulate every transportation company in this state; and it was in accordance with that provision that the Railroad Commission acquired and assumed its jurisdiction to enter the order to which reference has heretofore been made. The general powers of the Railroad Commission are prescribed by the Public Utilities Act, and in section 61 thereof is found the following:

> "After the conclusion of the hearing the commission shall make and file its order containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney."

The opinion in the case of Clemmons v. Railroad Commission, 173 Cal. 254, 159 Pac. 713, intimates that, in a proceeding of the nature of the matter before the Commission at the time the order here under consideration was made, a necessary part of the duty of the Commission upon making the order was to comply with the terms of the statute by serving upon the corporation or person complained of, or his or its attorney, a copy of such order, certified under the seal of the Commission. The rule appears to be well settled that, where an act not before subject to punishment is declared penal, the mode pointed out for the prosecution of the violators of the act must be strictly pursued. Wharton's Criminal Pleading and Practice, § 230, and cases there cited.

[11-15] The alleged disobedience by defendant of the order of the Railroad Commission is in the nature of a contempt. Affidavits in a contempt proceeding constitute the complaint. Such proceedings are of a criminal nature, and nothing may be indulged in favor of their validity. In the absence of a statement of facts in the affidavit showing in themselves that a contempt has been committed, the court is without jurisdiction. In order that one may be punished for contempt because of the violation of an order of court, it is essential that such person either have actual notice of the making of the order or that personal service of the order be had upon him prior to the time that he is charged with its violation. The failure to charge either such previous knowledge or previous service of the order constitutes a fatal defect in the proceedings, and deprives the court of jurisdiction. Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817; Selowsky v. Superior Court of Napa County, 180 Cal. 404, 181 Pac. 652; Johnson v. Superior Court, 63 Cal. 580; Hennessy v. Nicol, 105 Cal. 142, 38 Pac. 649.

In the case of Selowsky v. Superior Court of Napa County, 180 Cal. 404, 181 Pac. 652, it is said:

> "That a proceeding to punish for contempt is criminal in character, and the affidavit which is made the basis of the proceeding is the counterpart of the complaint in a criminal action"—citing cases.

[16] Such being the law with reference to contempt proceedings, it would appear that in this matter an allegation of service upon the defendant of a certified copy of the order of the Commission prior to the date of the alleged disobedience of such order is absolutely essential to the maintenance of the action against him. It is a part of the foundation of the statement of the offense, and without proof of such service the court is without jurisdiction.

There would seem to be no escape from the conclusion that the correctness of the order of the Railroad Commission has already been determined by the Supreme Court. Such being the case, it afforded a sound basis for the issuance herein of the complaint and filing of the information against defendant. But for the sole reason that the information as filed is fatally defective, as herein pointed out, it is ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

66 Cal. App. 795

PEOPLE v. HADLEY et al. (Cr. 1032.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1924. Hearing Denied by Supreme Court May 26, 1924.)

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Information by the People against O. D. Hadley and others for violation of an order of the Railroad Commission. From a judgment for defendants on demurrer, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Ernest R. Utley, Dist. Atty., of El Centro, for the People.

Robert G. Hill, of El Centro, for respondents.

Hugh Gordon and Carl I. Wheat, both of San Francisco, for Railroad Commission as amicus curiæ.

HOUSER, J. This is an appeal by the people of the state of California from a judgment in favor of defendants on a demurrer to an information which charged defendants with the violation of an order of the Railroad Commission of this state.

The facts are identical with those recited in the case of People v. Hadley, 226 Pac. 836, this day decided by this court; and, relying upon that case as an authority herein, it is ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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66 Cal. App. 797

PEOPLE v. ERNSTING. (Cr. 1033.)

(District Court of Appeal, Second District, Division 1, California. March 27, 1924. Hearing Denied by Supreme Court May 26, 1924.)

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Information by the People against Frederick Ernsting for violation of an order of the Railroad Commission. From a judgment on demurrer, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Ernest R. Utley, Dist. Atty., of El Centro, for the People.

Robert G. Hill, of El Centro, for respondents.

Hugh Gordon and Carl I. Wheat, both of San Francisco, for Railroad Commission as amicus curiæ.

HOUSER, J. This is an appeal by the people of the state of California from a judgment in favor of defendant on a demurrer to an information which charged defendant with the violation of an order of the Railroad Commission of this state.

The facts are identical with those recited in the case of People v. Hadley, 226 Pac. 836; this day decided by this court; and, relying upon that case as an authority herein, it is ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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66 Cal. App. 570

CONNERLY v. CORREIA et al. (Civ. 2688.)

(District Court of Appeal, Third District, California. April 16, 1924. Hearing Denied by Supreme Court June 12, 1924.)

1. Highways 🔑184(2)—In automobile accident case, evidence held sufficient to support finding of negligence.

In automobile accident case, evidence showing, among other things, violation of Motor Vehicle Act, § 20, as amended by St. 1919, p. 214, § 12, requiring driver of motor vehicle before turning to left to give suitable visible signal, *held* sufficient to support finding of negligence by defendant.

2. Appeal and error 🔑1002—Reviewing court bound by testimony supporting verdict where testimony conflicting.

Where the testimony is conflicting, if there is any reasonable testimony to support the verdict, appellate court is bound thereby.

3. Damages 🔑132(8)—$3,500 for injuries to automobile driver in collision held not excessive.

$3,500 for injuries to automobile driver colliding with truck, on evidence of broken collar bone, incapacity to raise right arm to plaintiff's head, a "stove-up" left shoulder preventing raising left arm above certain height, doctor bills, repair to car, loss of earnings for 11 months, and impairment of earning capacity, *held* not excessive.

4. Appeal and error 🔑1004(3)—Trial court's reduction of verdict held not to indicate that passion and prejudice influenced verdict.

That court reduced amount of plaintiff's verdict in a personal injury action, *held* not to indicate that passion and prejudice influenced the verdict in view of seriousness of injuries.

5. Appeal and error 🔑1033(7)—Verdict held to sufficiently conform to complaint.

That plaintiff in automobile accident case alleged that his automobile was "wrecked and destroyed," whereas the jury found that it was "damaged" in certain sum, *held* not matter of which defendant could complain.

6. New trial 🔑104(1)—Affidavits showing only corroborative evidence insufficient to support motion on ground of newly discovered evidence.

Affidavits for new trial for newly discovered evidence, showing only corroborative evidence, were insufficient to warrant granting motion.

7. New trial ⚿102(1)—Showing of diligence necessary to warrant new trial for newly discovered evidence.

To authorize grant of new trial for newly discovered evidence, there must be satisfactory showing that such testimony could not have been obtained before trial by exercise of reasonable diligence.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by John Connerly against Frank Correia and others, doing business as Frank Correia & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

M. H. Farrar and J. J. Dunne, both of San Francisco, for appellants.

W. E. Simpson and Ernest Walling, both of Fresno, for respondent.

PLUMMER, J. This is an action by the plaintiff to recover damages from the defendants for and on account of damages alleged to have been suffered by him in an automobile accident occurring on the 14th day of July, 1921. The cause was tried before a jury, the plaintiff had judgment, and the defendants appeal.

It appears from the pleadings and transcript in this case that the plaintiff in this action on the day above named was driving a Ford automobile on the highway leading from Los Banos towards the town of Volta; that at the same time the defendants, by an employee and one of its partners, were driving a Ford truck belonging to the partnership on the same highway and in the same direction and, before the occurrence of the collision hereinafter referred to, were preceding the automobile driven by the plaintiff; that the driveway consisted of a concrete pavement approximately 16 feet in width; that at a point near where the collision occurred there is a narrow lane leading off from the highway towards the left at an acute angle; that for a time just preceding the reaching of the intersection of the lane with the highway, the Ford truck was proceeding along the right-hand side of said highway and close to the right margin of the pavement. It also appears that there was a roadway of some five feet on either side of the concrete slab upon which an automobile might be driven. It appears that the driver of the truck intended to turn into the lane, above mentioned, and proceed towards his home, and just before reaching the intersection turned in that direction; that at about the same period of time the plaintiff, driving at a speed in excess of that maintained by the truck, was about to and was proceeding to pass the truck on its left-hand side; that while the automobile was so passing the truck, the collision in question occurred. It is alleged on the part of the plaintiff that the driver of the truck turned to the left for the purpose of entering the lane, heretofore mentioned, without extending his arm or giving any visible signal whatever of his intention so to do; and that by reason of such failure, the impact of the two cars took place. On the part of the defendants it is claimed that the injuries suffered by the plaintiff were due to his having driven his automobile against the truck in question and failed to turn sufficiently to the left in passing the truck to allow sufficient clearance between the two machines. The answer of the defendants denies all negligence, but does not allege contributory negligence on the part of the plaintiff.

The testimony introduced on the part of the plaintiff is to the effect that immediately preceding the collision the automobile owned and driven by the defendants was keeping and proceeding along that part of the paved highway where it was legally entitled to be and proceeding in such a position as to permit of safe passage thereby of the Ford automobile being driven by the plaintiff; that the Ford automobile was being driven at a speed of about 25 miles per hour; that the speed of the Ford truck was variously estimated at from 4 to 8 miles per hour. The testimony introduced on the part of the plaintiff is to the effect, also, that the plaintiff gave timely notice by the sounding of the horn with which his automobile was equipped a moment or so preceding his attempted passage of the Ford truck; that prior to the turning of the Ford truck to the leftward, no signal whatever was given of the intent of the driver thereof to turn to the leftward and proceed along the lane leading at an acute angle from the improved highway. On the part of the defendants it is insisted that no turn had been made to the leftward; that the driver of the truck was about to look around, according to his own testimony, to see if the turn to the left could be safely made; and that he put out his left hand as a signal of his intention to turn. The driver of the truck also testified that he did not know that the Ford automobile was coming from the rear and that he had made no turn before he was struck. The Ford automobile continued on for a distance of 40 or 50 feet after the impact before it turned over on the side causing the alleged injuries to the plaintiff constituting the basis for this action. The driver of the Ford truck testified that the hub cap on the right front wheel of the automobile was marked, and that there were no marks on the wheel of the truck.

[1, 2] On the part of the appellant it is insisted that from the estimated distances separating the cars at the instant of time the plaintiff began his attempt to pass the Ford truck and the estimated relative speed of the two cars, that it was absolutely impossible for the collision to have been caused by the driver of the defendants' truck turn-

ing to the leftward. The distance each car would run in a second of time is figured out, and the conclusion is sought to be deduced therefrom that, owing to the estimated distances, the version given by the plaintiff and the witnesses is so directly contrary to mathematical calculations as to necessitate a reversal of the judgment of the trial court. Our attention is also called to the laws of nature, the laws of motion, the philosophy of Comte, and the writings of Prof. Tyndall. If the major and minor premise laid down by the appellants were positive facts and not mere estimates, then the mathematical calculations would have convincing weight; but when there is any uncertainty in the basis upon which the argument is founded or the premises from which the conclusion is to be deduced. we do not feel impressed by the so-called mathematical demonstration. Several pages of appellants' brief are also given to the exposition of the laws of nature and of how they should be applied in determining the merits of this cause. We have no quarrel with the laws of nature or the laws of motion. When understood and properly applied, correct results undoubtedly may be reasonably expected; but however this may be, we do not feel at liberty to disregard the provisions of the Motor Vehicle Act of the state of California. We do not mean to hold that an act of the Legislature takes precedence of the laws of nature, but we do find that it is more readily applicable in arriving at conclusions in automobile accident cases. The Motor Vehicle Act, by section 20 thereof (St. 1915, p. 406, as amended by St. 1919, p. 214, § 12), requires that a driver of such a vehicle on the public highway, before turning to the left, must give suitable visible signal by extending his hand and arm (not hand), which shall be visible from the rear, or by the use of an approved mechanical or electric device. There is abundant testimony in the transcript, if believed by the jury, to justify the conclusion that the driver of the Ford truck did not do anything of the kind, did not extend his arm and hand or use any means whatever to indicate that he was about to turn into the lane heretofore referred to, and also that the driver of the Ford truck did turn his car to the leftward. Much stress is laid upon the testimony of the plaintiff and criticism directed at the expression "cramped his car into the left" when describing the action of the driver of the Ford truck. It is probable that if the plaintiff had possessed the skill, learning, and ability displayed in appellants' brief, the exact manner in which it is claimed the defendant turned his car towards the left at the period of time when the Ford automobile was attempting to pass the same, a much more luminous description would have been given of the occurrence; but we think the language used was sufficiently definite and explicit to enable a jury of ordinary comprehension to understand what was meant. Such occurrences take place so quickly that it is not to be expected any one would be able to explain step by step the events as they take place or give anything more definite than a general statement of the events as they were impressed upon the mind by the rapidity of their occurrence. We may readily concede that no testimony founded upon impressions received and an almost instantaneously passing view of the events can approach anything like positive assurance, but this applies to the testimony of the witnesses for both the plaintiff and the defendants. The jury has the benefit of the personal presence of the witnesses, and where the testimony is conflicting, if there is any reasonable testimony to support the verdict of the jury, this court is bound thereby. The testimony to which we have referred complies with the requirements of the rule just stated, and hence the alleged insufficient testimony to support the verdict requires no further consideration.

[3-5] It is next insisted that the damages awarded are excessive. The jury fixed the sum at $5,000, in addition to the allowance for the damages to the truck and the moneys expended by the plaintiff for medical attention. The court, however, reduced the total damages allowed to the sum of $3,500. It is still insisted that there is no basis for this allowance. The testimony shows that the injuries were sustained and received on the 14th day of July, 1921. The verdict of the jury was returned on the 14th day of June, 1922, thus a period of 11 months had expired after the injury before the damages were fixed. The plaintiff had a collar bone broken; testified that he had been unable to work or to earn any money since the date of the collision; that it would cost at least the sum of $5 per day to obtain the kind and quality of labor that he theretofore performed; that he had suffered much pain since the time of the injury; that it was impossible for him to raise his arm to his head; that if he tried to get his arm up it pained him; that his left shoulder was "stove up"; that he could lift his left arm to a certain height only by using his right hand and arm in so doing. It further appears that the height to which the plaintiff could lift his left arm was shown in court, but the transcript in this respect is so indefinite that we can arrive at no conclusions upon this point, as the word "showing" is used to illustrate what occurred in court and nothing further is made to appear. It further appears in the testimony that the plaintiff at the time of the injury was the owner of a small vineyard, which he has since sold, and was living off the proceeds thereof. The testimony shows that the medical attendance cost the plaintiff the sum of $100, and that the repairs to his car were approximately the sum of $175, which would leave $3,295

to cover the loss of earnings for the period of 11 months, and such pain and suffering and bodily injury as the plaintiff had endured and received. The loss in earning capacity appears from the testimony to have been reasonably worth the sum of between $1,400 and $1,500. This would leave in the neighborhood of $1,700 to cover the physical suffering and injury. We do not feel that such an award can be declared excessive as a matter of law. Considerable attention is given by appellant to the fact that the jury awarded a larger sum than that allowed to stand by the trial court, and therefore must have been actuated by passion or prejudice. We do not think such a conclusion necessarily follows, as the average man would hesitate a long time before having a collar bone broken and the left arm injured so as to impair its usefulness, and, also, be deprived of his earning capacity for almost one year. We say nothing as to future suffering and inconvenience, because the testimony stops in this particular with the date of the trial, although the inference can readily be drawn therefrom that it must continue for a considerable further period.

[6] The appellants set forth 42 alleged errors of law committed by the court during the course of the trial, 31 of which are based upon instructions refused or given by the court to the jury.

To follow these objections seriatim would entail needless labor and an unwarranted lengthening of this opinion. We have carefully read the instructions and do not find anything inconsistent therein, and, taken as a whole, the instructions given by the court to the jury, we think, fairly and fully informed the jury as to the law applicable to this cause and that nothing was said or omitted which could be reasonably alleged as prejudicial to the appellants in this action. We agree with counsel for the respondent that a reading of the instructions shows that appellants' objections are exceedingly "hypercritical." This is true of nearly all the objections urged in this cause, as one example here will sufficiently establish. The plaintiff alleged in his complaint that his automobile was wrecked and destroyed. The jury found that the automobile was damaged in the sum of $175. Appellants treated this subject as follows:

> "But there was no such issue; the real issue was whether the plaintiff's automobile was 'wrecked and destroyed'; and this very issue illustrates the lack of sound judgment by the jury in dealing with the cause, and their disregard of the actual evidence before them. The plaintiff asserted, not that his automobile was damaged, but that it was 'wrecked and destroyed.'"

We do not know to what extent a Ford car may be damaged before the allegation obtained in plaintiff's complaint may be properly used, but we do know that a jury of ordinary common sense can comprehend the language used in the complaint in this action and apply it to the testimony relating to the injury to the car with the same ability as though the word "damaged" had been used instead of "wrecked and destroyed"; and we also know that the reformed procedure of this state does not require any such refinement of language.

[7] The appellants, also, urge that the trial court erred in denying their motion for a new trial based upon affidavits of newly discovered evidence. We have read these affidavits, and we agree with the trial court that there is not a sufficient showing therein upon which to grant a new trial. When carefully analyzed, the alleged newly discovered evidence presents nothing not submitted to the jury upon the trial already had. At best, the testimony set out in the affidavits would constitute only additional corroborative testimony. In order to warrant a granting of a new trial on newly discovered evidence, there must be a satisfactory showing that such testimony could not have been obtained by the exercise of reasonable diligence, and in this particular, after reading the affidavits in question, we think the trial court properly exercised its discretion in denying the appellants' motion.

It is hereby ordered that the judgment of the trial court be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 518

MYERS v. ROVAI et al. (Civ. 2531.)

(District Court of Appeal, Third District, California. April 12, 1924.)

1. Highways 🔑184(2)—Testimony held to justify jury's conclusion views of drivers in rounding curve were obstructed.

In action for damages arising from automobile collision, testimony *held* sufficient to entitle jury to conclude view of drivers of the respective machines in rounding the curve was more or less obstructed within the Motor Vehicle Act, § 22.

2. Trial 🔑295(1)—Appellate court reads instructions in their entirety.

The appellate court reads instructions in their entirety.

3. Highways 🔑184(4)—Testimony on subject made it duty of trial court to give instruction on view of drivers in rounding curve.

Where, in action for damages arising from auto collision, there was testimony for and against on the subject of obstruction of the view of drivers of the respective machines in rounding a curve, it was the duty of trial court to give an instruction pursuant to Motor Vehicle Act, § 22.

4. Trial 🔑253(4)—Requested instruction held properly refused as omitting contributory negligence and not complete.

In action for damages to automobile arising from a collision with defendant's truck, defendant pleading contributory negligence, plaintiff's requested instruction, which omitted reference to contributory negligence and was not a full statement of the law, was properly refused.

5. Trial 🔑260(1)—Refusal to give requested instruction as to matter covered in given instruction not error.

Refusal to give a requested instruction as to matters which were covered in an instruction given *held* not error.

6. Evidence 🔑596(1)—In civil cases question is whether any particular issue has been established by a preponderance of testimony.

In a civil case, question is whether any particular issue has or has not been established by a preponderance of testimony, and not whether question is left uncertain.

7. Appeal and error 🔑1170(7)—Improper admission of testimony on direct examination of witness on issue of reputation held not prejudicial.

In action for damages to plaintiff's car driven by his minor son, admission, on direct examination, of testimony of what witness had heard with reference to son's fast and reckless driving, *held* erroneous; but testimony as to reputation having been introduced without objection, and, there being evidence of reckless driving at the time of the collision, admission of the objectional testimony was not, in view of Const. art. 6, § 4½, prejudicial.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by U. S. Grant Myers against A. Rovai and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. S. Burnell and H. L. Ford, both of Eureka, for appellant.

Metzler & Mitchell, of Eureka, for respondents.

PLUMMER, J. Plaintiff began this action for the purpose of recovering of and from the defendants the sum of $1,325 damages alleged to have been suffered by the plaintiff for and on account of a certain automobile collision occurring on the 20th day of July, 1921, between an automobile belonging to the plaintiff and driven by a son of the plaintiff and a truck belonging to the defendants and driven by the defendant M. Rovai. The case was tried before a jury, the defendants had judgment, and the plaintiff appeals.

It appears from the complaint that on the said 20th day of July, 1921, an automobile belonging to the plaintiff was being driven by Sidney Myers, a minor son of the plaintiff, in a southerly direction on the public highway between Pepperwood and Englewood in the county of Humboldt; that as said automobile proceeded along said highway it reached a point thereon where the road makes a curve of about 34 degrees; that at said time the defendants were driving a truck in a northerly direction on said highway and at a point approximately midway on said curve the automobile and truck collided. The force of the collision practically demolished the automobile and also inflicted some minor injuries upon the plaintiff's son. The defendants, in their answer, among other things, pleaded contributory negligence on the part of the plaintiff.

[1] Upon this appeal the appellant urges the insufficiency of the evidence to sustain the verdict, errors in the admission of testimony, and errors in the instructions given by the court to the jury.

There is a sharp conflict in the testimony especially that relating to the speed at which the plaintiff was driving immediately preceding the time of the collision. The plaintiff's son testified that he was driving at between 20 and 25 miles an hour when he first saw the truck at a place about 35 feet distant from the point of the collision. Other witnesses riding in the automobile testified that it was traveling at about the same rate of speed. Other witnesses in the automobile did not estimate the speed. The driver of the truck and lookout, who was riding on the truck, and some of the witnesses testified that the plaintiff was going at a very rapid rate of speed. Some of the witnesses testified that when the automobile reached the curve it was running at a rate of speed between 40 and 45 miles an hour. There is, also, sharp conflict as to the exact location of the automobile and the truck at the time of the impact, and, also, whether there was or was not room to have passed the truck without injury. There was, also, testimony that the automobile was being driven at such a high rate of speed over the graveled road that it was swaying from side to side. The testimony of several of the witnesses, among them Vada Myers, Harold E. Sawyer, and others, was to the effect that willows and small trees growing alongside the road at the point of the curvature therein obstructed the view of the highway so that an approaching automobile could be seen for only a short distance. Other witnesses testified that from a point along a line of the center of the highway the view was unobstructed for a distance of several hundred yards or more. It appears from the testimony that the trees and willows along the curve in the road had been removed since the time of the collision, which may or may not account for some of the discrepancy in the testimony. Whatever the facts may have been at the time of the trial, there is sufficient testimony in the record from which the jury was entitled to conclude that at the time of the collision the view of the driver of the truck and of the driver of the automobile rounding the curve in question was more or less obstructed, and such as to come within the purview of section 22 of the Motor Vehicle Act (St. 1919, p. 220) as it then read. It would serve no useful purpose to set forth the testimony, and all that needs to be said is that it is conflicting in this case, and, if the jury believed the testimony offered on the part of the defense, the verdict is amply sustained, even though it be true that the testimony offered on the part of the plaintiff would also have sustained a verdict had the jury found in his favor.

[2] The appellant urgently insists that the trial court erred in giving the following instruction:

> "That said Sidney Myers failed to keep on the right-hand side of the road, and that said Sidney Myers' rapid driving in excess of the speed limits and by reason of his failure to keep on the right side of the highway, his machine was driven against the motor vehicle being operated by the defendant Rovai and it collided with said auto truck."

Were this the instruction given by the trial court to the jury, nothing would be left but to enter an order of reversal. Such, however, is not the instruction. It is simply an excerpt taken from a longer instruction setting forth the defense interposed by the defendants in the action. That instruction reads as follows:

> "The defendants in their answer allege that Sidney Myers, minor son of plaintiff, was driving and operating plaintiff's automobile at the time of the collision in a careless, negligent and reckless manner, and at a rate of speed in excess of the speed limit, and that at or near the point of collision, while the two motor vehicles that collided, both of them making a curve in the highway, each motor vehicle being driven in the opposite direction, *that said Sidney Myers failed to keep on the right-hand side of the road, and that by reason of said Sidney Myers' rapid driving, in excess of the speed limit, and by reason of his failure to keep on the right side of the highway, his machine was driven against the motor vehicle being operated by defendant M. Rovai, and did collide with said auto truck.* The defendant alleges that the fast and reckless speed of said Sidney Myers, and his failure to drive his car on the right-hand side of the highway contributed to the collision, and that he, the said Sidney Myers, was guilty of contributory negligence. Defendants further allege in the answer to the said complaint, that said plaintiff U. S. Grant Myers was guilty of contributory negligence to allow his son Sidney Myers, a minor, to drive his automobile on the highway."

The underscored portion of the foregoing instruction shows the excerpt which appellant has lifted bodily from the context and presented to us as the instruction given by the learned trial court. Comment is unnecessary further than to add that taking of excerpts from the body of an instruction and presenting them to an appellate court is seldom successful. We are accustomed to read the instructions in their entirety.

[3] Instruction number 24, given by the court to the jury at the request of the defendant, is also assigned as error. This instruction follows the language of section 22 of the Motor Vehicle Law as it read at the time of the collision, in relation to driving around curves, and, as we have heretofore shown, there was testimony in the case both for and against on the subject of the view of the drivers of the respective machines being obstructed at the point of the collision. It was the duty of the court to give said instruction. Whether the view was in fact obstructed or unobstructed is not for this court to say. There was testimony in the case on that subject, and, therefore, called for such an instruction.

[4] Instruction No. 8, asked for by the plaintiff, omits all reference to contributory negligence on the part of the plaintiff, is not a full statement of the law and was, therefore, properly refused.

[5] Instruction No. 9, requested by the plaintiff, also refused, was, so far as it states the law, correctly included in instruction No. 10, given at the request of the plaintiff. Instruction No. 10 is as follows:

> "If you believe from the evidence, by a preponderance thereof, that the defendants at the time of the collision in question were on the westerly side of the state highway, proceeding in a northwesterly direction thereon and that they were then on the left side of the said public highway as they proceeded northwesterly thereon, and that the road, at the time and place mentioned in the complaint, was not clear and unobstructed for at least 100 yards ahead of them, then you are instructed that the defendants' motor truck was not driven and operated by them upon the side of the public highway where the said motor truck was entitled to be driven and operated when proceeding in a northwesterly direction. And the presence of said automobile truck driven and operated by defendants on the left side of the said highway under such circumstances, if it was there, would be negligence on the part of the defendants, and if you find from the evidence by a preponderance thereof that the defendants were negligent in that regard, that such negligence, if any there was, was the proximate cause of the injuries complained of in the plaintiff's complaint, that neither the said plaintiff nor the said Sidney Myers were guilty of any negligence contributing to the injury complained of, then and under such circumstances your verdict should be in favor of the plaintiff for such damages as he has sustained as shown by the evidence in this case."

[6] Instruction No. 11, as modified by the court, also properly states the law. In civil cases it is not a matter of whether a question is left uncertain by the testimony, but whether any particular issue has or has not been established by a preponderance of the testimony.

Objections are also urged to defendants' instructions given by the court, but as they are only of minor importance it would serve no useful purpose to set them forth in this opinion. A careful consideration of all the instructions given by the court shows that the law applicable to this case was fully, clearly, and fairly given by the trial court to the jury.

[7] Finally, it is urged that the court erred in the admission of certain testimony and with this contention we readily agree, but that a reversal of the judgment should follow does not seem to us a necessary conclusion in view of section 4½ of article 6 of the state Constitution relative to the improper admission or rejection of testimony. One of the issues presented to the jury was that of rapid and reckless driving of the plaintiff's minor son, a boy then of the age of about 16 years. After witnesses had testified, without objection, as to the reputation of the boy for reckless and rapid driving, the following question was asked: "Q. Did you ever hear anybody say it was a wonder he did not have an accident?" This question was objected to, the objection overruled and the witness answered "Yes." Again, the same witness was asked as follows: "Was it the general talk of about all the people along the highway there about his reckless driving, so the men upon the highway knew the way he drove?" This question was also objected to, and the same ruling made. The witness answered: "I have heard the remark made that sooner or later he would meet his 'Waterloo.'" No motion was made to strike out this answer on the ground it was not responsive. One or two other questions of like import were allowed to be answered over the objection of the appellant. The cases having to do with this subject are all very clear as to the questions permitted to be asked on direct examination of a witness when the subject of one's reputation for any particular trait is properly in issue and is being inquired into. None of them sanction the admission of the testimony above set forth, but, in view of the fact that testimony was introduced without objection showing the reputation of the boy in question for reckless and rapid driving, the fact that some of the witnesses stated on direct examination just what they had heard cannot, in view of the constitutional provision above referred to, be held prejudicial. There is plenty of testimony set forth in the transcript upon which the jury was entitled to base its verdict, irrespective of the reputation of the boy for rapid driving. There was testimony to the effect that he was driving from 35 to 40 miles per hour a few moments preceding the collision and also that he was driving from 20 to 25 miles per hour on a portion of the highway where the jury might from the testimony conclude that such a rate of speed was reckless and careless; hence the reputation of the boy for rapid and reckless driving becomes immaterial, in view of the fact of the existence of the testimony from which the jury might arrive at the conclusion that the driver of the automobile was driving at a rapid and reckless rate of speed at the time of the collision.

No other matters having been presented for our consideration in this cause, we conclude that the judgment of the trial court should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

(66 Cal. App. 97)

DANLEY v. MERCED IRR. DIST. et al.
(Civ. 2774.)

(District Court of Appeal, Third District, California. March 6, 1924. Hearing Denied by Supreme Court May 5, 1924.)

1. Waters and water courses ⚷228½, New, vol. 10A Key-No. Series—Irrigation district held not authorized to enter into agreement to pay contract holders for waiver of rights.

Irrigation district is without authority to enter into an agreement with holders of contracts to pay them a certain annual sum in consideration of waiver of rights under contract and agreement not to contest assessment under Irrigation District Act, §§ 2, 15, 59, 61, as amended; waiver of rights being confined to right to receive water at stated price without conveying water rights of contract holders, and agreement being ultra vires, in view of Civ. Code, §§ 552, 662.

2. Waters and water courses ⚷257(1)—Directors of irrigation district without power to waive tolls.

Irrigation District Act, § 55, as amended, having authorized directors of irrigation district, instead of levying assessments to fix rates of toll charges, directors have no power to make an agreement waiving right to exact tolls.

3. Waters and water courses ⚷228½, New, vol. 10 A Key-No. Series—Injunction lies to prevent irrigation district entering into ultra vires agreement.

Injunction will lie in favor of owner of land to restrain irrigation district from entering into agreement to pay contract holders for release of rights under their contracts contrary to law, notwithstanding Code Civ. Proc. § 526.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Action by L. E. Danley against the Merced Irrigation District and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hearing denied by Supreme Court, 226 Pac. 854. See, also, 222 Pac. 362.

James F. Peck, of Oakland, for appellant.
A. L. Cowell, of Stockton, and F. W. Henderson, of Merced, for respondents.

PLUMMER, J. The plaintiff, the appellant herein, as an owner of land situated in the county of Merced and within the exterior boundaries of the Merced irrigation district, began this action for the purpose of restraining the irrigation district and its directors from entering into a certain contract obligating the district to pay to certain persons, hereafter designated as contract holders, annually for 17 years the sum of $70,000 and upward. The trial court sustained the defendants' demurrer to the plaintiff's complaint without leave to amend, and thereafter entered judgment in favor of the defendants.

Prior to the formation of the Merced Irrigation District the Merced Canal & Irrigation Company and its successor, the Crocker-Huffman Land & Water Company, entered into contracts with divers persons by the terms and conditions of which contracts said canal company and its successor, the Crocker-Huffman Land & Water Company, agreed to supply water from their canal system to such persons for the purposes of irrigation. These contracts differ somewhat in formation, but are separable into different classes, one of the contracts of each class being attached to the plaintiff's complaint as exhibits, to wit, Exhibits A to P, inclusive. These contracts bound the Merced Canal & Irrigation Company and its successor, the Crocker-Huffman Land & Water Company, to furnish water for irrigating the number of acres of land set out in each particular contract for a period of years—the period being fixed in each contract. Some of these contracts, such as followed the form of Exhibit A, provided for the payment of a certain cash sum, which was therein specified, for a water right not exceeding 2½ cubic feet per second for irrigating the land therein described from the date of the contract up to and including the 3d day of March, 1933. Other contracts, as evidenced by the remainder of exhibits attached to plaintiff's complaint and executed by the Crocker-Huffman Land & Water Company, provided for the payment of a certain sum in cash upon the execution of the contract and further annual payments in a specified sum during the life of the contract, to wit, from the date of the execution thereof in 1892 until April 30, 1938. It would appear, from an examination of the transcript, that practically all of the contracts entered into by the Crocker-Huffman Land & Water Company expire at about the same time, to wit, in April 1938. The total area of land covered by the contracts just referred to is slightly in excess of 52,379 acres.

In 1920, after due and regular proceedings, the defendant the Merced irrigation district was regularly formed. This district comprises an area of 185,000 acres, including the 52,379 acres covered by the contracts hereinbefore referred to. After the organization of the said Merced irrigation district and prior to the commencement of this action the district purchased of the Crocker-Huffman Land & Water Company all its water and water rights and its system of canals and irrigation ditches for the sum of $2,500,000. After a suit had been begun by some of the contract holders against the defendant Merced irrigation district to determine and establish the rights of the contract holders herein referred to, it appears negotiations for a settlement were entered into which finally culminated in a contract drawn in the form as attached to plaintiff's complaint, and marked Exhibit Q.

The said contract involved in this action is proposed to be executed by the Merced irrigation district as a party of the first part and the contract holders herein referred to as parties of the second part. This agreement recites the execution of the contracts by the Crocker-Huffman Land & Water Company, while the owners of certain water and water rights system of canals, etc., with the contract holders as hereinbefore referred to; that the district has acquired by purchase the water and water rights of the Crocker-Huffman Land & Water Company, its system of canals and irrigation ditches; and that the rights of the contract holders to receive water at the price designated in the contracts heretofore referred to should be extinguished and acquired by the district, therefore, it is agreed on the part of the district to pay annually to the contract holders or their assigns the sum of $70,000 per year for the period of 17 years from and after the 1st day of July, 1924, provided the costs and expenses of operating the district should not exceed the sum of $146,666; that, in the event the costs and expenses of operating the district should exceed that sum, 85 per cent. of such excess should be paid to said contract holders. In fixing the costs and expenses of $146,666 per annum certain specified costs and expenses and items to be considered are set forth in the agreement. On the part of the contract holders it is then covenanted and agreed that, in consideration of the provisions of said agreement relative to payment of said sum or sums, certain rights and privileges were released as follows, to wit:

"In consideration of the foregoing covenants and other provisions of this agreement the said contract holders and each thereof hereby severally waive and release to the district all and any rights which they may have under the said contracts to receive water from the district or from the Crocker-Huffman Land & Water Company, or from any other person, for the amounts or at the rates specified in said contracts, and agree to pay the assessments heretofore levied by said district, and hereby agree on their own behalf and on behalf of their successors in ownership of the land to which said contract is attached not to contest any assessment hereafter levied by said district in accordance with law by reason of dues, rights, privileges or immunity growing out of their rights under said contracts."

The agreement then provides that the contract holders will pay several assessments levied by the district against them in the year 1922, and the district agrees to accept payment thereof without exacting penalty. Paragraph 8 of the agreement purports to waive the right of the district to exact water tolls and also for the repayment of certain amounts theretofore paid by the contract holders under their contract during the year 1922. Said paragraph 8 is as follows:

> "After the execution of this agreement the said district agrees to raise funds for the maintenance and operation of the said district, and for the retirement of its bonds and for other purposes, by assessments levied in accordance with law, and waives all right to exact the sums specified in said contracts, and agrees not to establish or exact water tolls or rentals for the use of water, and the amounts paid by the said contract holders under the said contracts in the year 1922 shall be refunded by the said district or credited by the said district on the assessment of 1922 against the said contract holders."

Paragraph 9 of the agreement specifically limits the extent of the waiver or conveyance or surrender of rights on the part of the contract holders to the amount of money agreed to be paid by them annually for the use of the water and the exercise of their water rights; that nothing further is intended to be relinquished or affected by the agreement so far as their rights may be concerned. Paragraph 9 is as follows:

> "Nothing herein contained shall be deemed to waive any right which the said contract holders may have, either under the said contracts or otherwise, to a preferred right to receive water from the said canals of the Crocker-Huffman Land & Water Company, it only being intended hereby to waive and relinquish their right to receive it at the particular rate specified in said contracts, nor shall anything herein contained be deemed as an admission by the said district that the said contract holders have any such preferred right, either under said contracts or otherwise. Nor shall anything herein be construed as in any way relinquishing any easements, rights, or privileges of the said district under said contracts, except the right to receive the several annual payments provided for in said contracts."

It is further covenanted that the agreement shall be set up in a supplemental pleading in the suit begun as aforesaid to determine the rights of the contract holders and that judgment should be entered fixing their rights as herein set forth. It is also further provided in the contract that 5 per cent. of the total amount to be paid to each contract holder was assigned to their attorney as compensation for fees for services in connection with the settlement and adjustment agreed upon.

The complaint of the plaintiff in this action sets forth all the matters herein referred to, alleges the invalidity of the agreement about to be entered into by the Merced irrigation district with said contract holders, and seeks an injunction to restrain the defendants from entering into such agreement. In addition to alleging the ultra vires nature of said contract, it is alleged that, if carried out, it will impose an unequal burden upon the landholders of the district.

On the part of the appellant it is insisted that the proposed agreement, if executed, would prove highly detrimental to the interests of the district, and on the part of the respondents it is argued that the results would prove beneficial. With this phase of the question, however, we will express no opinion, as it does not really affect the issues to be determined, there being no allegations of fraud or anything of that character in the complaint which calls in question the results that would be reached by the agreement if executed and carried through to final completion. We have to do only with the question of whether the proposed agreement is or is not ultra vires.

Section 2 of the California Irrigation District Act (St. 1897, p. 254, as amended by St. 1919, p. 717, § 2) as it read at the time of the formation of the defendant Merced irrigation district provides as follows:

> "Lands already irrigated and riparian lands may be included in the district if in the judgment of the board of supervisors such land will be benefited, or if the water used thereon or the rights to the use of water thereon should, in the judgment of the board of supervisors, be taken or acquired for the district."

Under this power the 52,379 acres of land irrigated by the water of the Crocker-Huffman Land & Water Company, were taken into the larger district of 185,000 acres now comprising the Merced irrigation district. Whether it was set forth in the petition for the organization of the defendant irrigation district that it was the purpose of the larger district to acquire the water rights, etc., of the Crocker-Huffman Land & Water system does not appear from the pleadings or transcript in this action, but from the fact the defendant irrigation district has purchased all the interests of the Crocker-Huffman Land & Water Company subject to the provisions of their contract with the contract holders hereinbefore referred to we conclude that such was the purpose set forth in the petition for the organization of the defendant district, and that all the proceedings leading up to the present state of affairs were properly taken and had, and that in furtherance of the purposes just set forth the proposed agreement was negotiated. This brings us to a consideration first of the powers of the board of directors of irrigation districts. These powers, as they apply to the agreement under consideration, are found in section 15 of the irrigation laws of the state (St. 1919, p. 661, § 1). Omitting the provisions of that section not applicable, it is there specified:

> "Said board shall also have the right to acquire, by purchase, lease, contract, condemnation, or other legal means, all lands, and waters, * * * and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal or canals, and works, whether in this or in other states."

Section 61 of the same act (St. 1921, p. 1110, § 4), after setting forth certain prohibitions relating to the incurring of indebtedness, reads:

> "Nothing contained in this section shall be construed as limiting the right of the board to enter into any contract or lease for any lands, waters, water rights or other property as elsewhere in this act authorized and by such lease or contract to bind the district for the payment of the consideration specified in such lease or contract, but if the smallest payment to be made under such lease or contract in any year exceeds an amount equal to ten cents an acre for all the land in the district, such lease or contract shall not be valid unless approved by the commission authorized by law to approve the bonds of irrigation districts as legal investments for savings banks, or unless an assessment sufficient to meet all the payments to become due under such lease or contract shall have been or shall be authorized for that purpose in accordance with section fifty-nine of this act."

This provision of section 59 (St. 1919, p. 668, § 13), however, so far as material to the circumstances before this court, is not a grant of power additional to that contained in section 15 heretofore set forth, other than that in the purchasing of the property referred to in section 15 the lease or contract may be so drawn as to extend over a period of time, if the conditions therein set forth are complied with. It does not extend the power of the board so far as section 15 relates to purchasing water, water rights, and other property necessary for the construction, use, etc., of the canals and works of the district.

[1] The words "water and water rights" used in section 15 have a definite and certain meaning. They relate to the waters to be acquired by the district and distributed by it to the different landowners, and water rights, as they relate to the landowners, means, relates to and indicates the right of the landowner to have and use upon his lands, as occasion requires, the quantity of water called for in his contract or which may be beneficially used in the irrigation of his lands, and, so far as water rights are concerned in relation to the district, it embraces the right of the district to take certain waters and convey them through its systems of canals and irrigating ditches to the various points of use. The words "other property" appearing in the section we think mean other like property necessary for the construction, use, etc., of the works belonging to the district. The word "necessary," upon which considerable stress has been laid, we think has a broader meaning than that "which is absolutely indispensable," but includes that which is reasonable, convenient, and appropriate for carrying out the purposes expressed in the section following the use of that word. The word "use" as it appears in the section following the granting of power to acquire takes on a special signification; in other words, the waters and water rights and other property authorized to be acquired must be such as is used or may be used in the supply of water to be carried through the canals and irrigating ditches owned by the district. These words relate to the use and the right to the use of the waters to be acquired and not to any compensation to be paid therefor.

With this in view, let us consider again the provisions of the proposed agreement and ascertain what the district proposes to acquire. In the recital portion of the agreement it is set forth that the district desires to acquire the rights of the said contract holders to receive water at the price provided in said contract. In the granting portion of the agreement on the part of the contract holders, as set forth in paragraph 6 thereof, the contract holders release to the district all and any rights which they have to receive water at the rate specified in said contract, and then in paragraph 9 of the same agreement the conveyance made by them is specifically limited so as to include the right to receive the water at a particular rate, and that all their other rights are retained and ungranted. Does such an instrument, which has to do only with the price paid for the service, convey the water right which the district is authorized to purchase, under section 15 of the water law heretofore considered? The agreement expressly excludes such intention. It limits the agreement to the matter of compensation or the money to be paid for the article furnished, and not as to any interest in or right to or easement relating to either the use or the article itself. What are the water rights owned by the contract holders? The answer is found in the exhibits set forth in the transcript. Exhibit A grants a water right to the contract holders as follows:

> "All the water, not exceeding at any time 2½ cubic feet per second, which may be required for irrigating 455 acres of land."

Exhibit B conveys a water right as follows:

> "All the water, not exceeding at any time 7 81/100 cubic inches per second, which may be required for irrigating twenty-five acres of land."

Exhibit E is as follows:

> "All the water, not exceeding at any time 190.1 cubic inches per second, which may be required for irrigating the lot described in the district."

All the contracts are similar in their terms, varying only in amounts, and therefore need not be specifically set forth herein. These contracts establish the water rights owned by the contract holders, and are the water rights which are expressly retained by them by the terms and provisions of the agreement proposed to be executed with them by the district. It will thus be seen that the district is not acquiring any water rights whatever; it is simply negotiating with the holders of water rights as to the compensation that may be fixed for the service. That such an agreement or proposal does not come within the terms and provisions of the powers granted by section 15 and that the compensation to be paid for a water right is not a part of the water right itself is more clearly perceived when we consider the provisions of section 1 of article 14, relating to water rights, which is as follows:

> "The use of all water now appropriated or that may hereafter be appropriated, for sale, rental, or distribution, is hereinbefore declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law."

The manner prescribed by law appears first in the act approved March 12, 1885 (St. 1885, p. 95), amended from time to time and now set forth in the act of March 23, 1912 (see St. Ex. Sess. 1911, pp. 18–64), as supplemented by the act of April 25, 1913 (St. 1913, p. 84). These various acts give the power first to the boards of supervisors of the respective counties to change the rate of water furnished for irrigation purposes where water was being furnished for a public use. Water for irrigation is declared to be a public use. The power of fixing rates as existing from that period of time was originally vested in boards of supervisors, and is now lodged with the railroad commission. The water rights of the respective parties remain the same; cost of service is a separate and distinct matter, being subject to regulation. By reason of the express limitations contained in the agreement, the water rights of the contract holders are exactly the same both before and after. They are all entitled to the specified quantity of water granted them under the terms and provisions of the contracts executed between them and the Crocker-Huffman Land & Water Company. None of these rights are proposed to be or would be acquired by the district in the event of the execution of the agreement now being considered.

By reason of these limiting provisions in the agreement withholding conveyance of water rights of the contract holders, and in view of paragraph 8 (assuming it means as alleged by respondents only a remission of the tolls agreed to be paid by the contract holders under their contracts), the proposed agreement stripped of its verbiage amounts to simply this: If the contract holders will pay all assessments levied upon their lands during the life of the agreement, then the district will refund to them the sum of $70,000 per annum, plus 85 per cent. of whatever amount of expenses the district may incur and levy taxes for in excess of $146,666 per year. We find nothing in the irrigation laws of California which authorizes or permits any such procedure.

Section 15 unquestionably, as we read it, authorizes the acquisition of the water rights owned and possessed by the contract holders herein referred to, if the acquisition of the same be found necessary for the use of the district in supplying its canals and irrigating ditches with water to be distributed to the various landowners within the exterior boundaries of the district. The necessity for so doing, we think, lies within the jurisdiction of the board of directors, and is not a matter to be determined by the courts unless impeached or attacked for fraud or in some manner other than that which simply alleges the lack of wisdon or understanding or incapacity of the board of directors.

Again, section 552 of the Civil Code fixes the water right of the contract holders as an easement to be enjoyed upon the payment of such rates and terms as may be established in pursuance of law. This is the easement which the district does not acquire and which the contract holders expressly retain. Also section 662 of the Civil Code defines such right to be incidental or appurtenant to the land when it is by right used with the land and for its benefit.

The second waiver on the part of the contract holders found in paragraph 6 of the proposed agreement does not furnish any consideration for its execution. It reads:

> "And hereby agree on their own behalf and on behalf of their successors in ownership of the land to which said contract is attached not to contest any assessment hereafter levied by said district in accordance with law by reason of dues, rights, privilege or immunity growing out of their rights under said contract."

We do not need to attempt to ascertain what this provision means, but it is manifest that if the assessment is levied "in accordance with law" no contest instituted by the contract holders would be of any avail, and an agreement on the part of the district to pay them $70,000 per annum for 17 years for waiving a right or privilege which they did not possess is an act not authorized by any of the provisions of the laws of the state relating to irrigation districts. However wise it might be to avoid litigation, the board of directors of an irrigation district is not empowered to pay landowners in order to induce them to pay their assessments. It is the duty, and the legal duty, which can be enforced against every landowner in the district, to pay all assessments which are levied in accordance with law. It appears from the briefs submitted in this cause that certain statements or promises were made to the contract holders in relation to the acquisition of their water rights by the district in order to induce them to enter into and become a part of the larger district at the time the proposal and the proceedings to create the larger district were under consideration and being had and taken, but does not furnish or give to the board of directors of the district any additional power than that contained in the statutes. If promises were made not warranted by the law, it would simply be an instance where enthusiasm had usurped knowledge of what might be done under the laws of the state, and in no sense either reprehensible or furnishing any reason for sustaining an act of the board which would otherwise be considered as ultra vires. Such promises furnish no grounds for an estoppel.

By reason of the adjusted compensation or arrangement of payments and credits provided for in the agreement, respondents argued that the contract holders released the property right to the district, and that the district thus acquired the right to deal with the property irrespective of the right which was thus released, and that the district obtains the release of its property from an easement or burden upon it, and as a result of the transaction becomes the actual owner of a greater property than it theretofore owned. The fallacy of this statement is made apparent by the following illustration: Under the terms of Exhibit E, for example, the Crocker-Huffman Land & Water Company conveys to one E. L. Reed 190.1 cubic inches of the water per second in consideration of a cash payment of $190 and the further payment on the first Monday in September, 1903, of $57.03, and on the first Monday of September thereafter a certain specified sum gradually reduced until the payment is the sum of $19.01. After entering into this agreement the Crocker-Huffman Land & Water Company conveys its canal system, water, and water rights to the Merced irrigation district, and after this conveyance the Merced irrigation district enters into negotiations with E. L. Reed or his assigns changing the terms of the annual payments. The quantity of water, to wit, 190.1 cubic inches, constituting the water right possessed by Reed and his grantors, is expressly eliminated from the agreement. That is to say, both before and after the execution of the proposed agreement, the water right possessed by Reed and his grantors is 190.1 cubic inches. The quantity of water that must be furnished by the district is neither increased nor diminished by the agreement. The contract holders' rights remain actually the same, from which it follows that the district has acquired no additional property rights whatsoever. The difference in the price of the service does not change the quantity of water included in the contract holder's water right. He is entitled to the 190.1 cubic inches both before and after the execution of the agreement. In other words, the contract holder has sold nothing and the district has bought nothing. From which it follows that the expenditures of money about to be incurred by the district under the arrangement is not authorized by any of the provisions of the law governing irrigation districts empowering them to make purchases.

[2] Section 55 of the California irrigation laws (St. 1911, p. 516, § 11) authorizes the board of directors of irrigation districts, instead of levying assessments, to fix rates of toll charges for irrigation or other public uses declared by the act and collect the sum from all persons using the canal for irrigation or other purposes. As this is a legislative grant and a continuing power, we think the provisions of paragraph 8 purporting to waive the right to exact tolls without the power of the board of directors, are therefore void. This paragraph of the proposed agreement may be read out of the instrument without affecting other portions thereof, and although void in itself does not, we think, bear upon the validity or invalidity of the agreement as a whole.

Although elaborately argued, the rights of the contract holders and the district arising out of any assessment that might be levied are not really before us for determination. In some of the states the statutes provide for a hearing whenever an assessment is levied to determine the benefits to the lands assessed, but there is no such provision in our irrigation law. Some of the cases hold that these questions are all presumed to have been taken into consideration and settled at the time the district is formed. Thus, in the case of Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the court says:

> "The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the

district, and the citizen has no constitutional right to any other further hearing upon that question."

To the same effect is the case of Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334, 26 Pac. 237. See, also, People v. Linda Vista Irrigation District, 128 Cal. 477, 61 Pac. 86; an opinion on rehearing in the case of Knowles v. New Sweden Irrigation District, 16 Idaho, 217, 101 Pac. 87. The holding in the Knowles Case is followed in the case of Nampaand Meridian Irrigation District v. Briggs, 27 Idaho, 84, 147 Pac. 75. A somewhat different view of this question is taken by some of the courts, as appears in the case of In re Harper Irrigation District (Or.) 216 Pac. 1020, and the cases cited in that opinion. As any opinion we might express on this question would be pure obiter, we pass it by without expressing any views thereon as not an issue involved in this case.

[3] It is finally insisted that injunction will not lie in this case by reason of the provisions of the latter portion of section 526 of the Code of Civil Procedure setting forth instances in which an injunction cannot be granted. We find nothing in the section referred to which inhibits the issuance of an injunction herein. We have found that the board of directors are not executing any public statute, nor are they, in proposing to enter into the agreement referred to, exercising a public office in a lawful manner. Abbott on Municipal Corporations, § 1134, states the law on this question as follows:

> "A court of equity will interfere and restrain by injunction the execution of a contract by a public corporation where the same involves the illegal use of public moneys or property, where it is ultra vires or illegal because of irregularities in conditions precedent, or where the effect of the contract would be a waste, misappropriation or misuse of public funds or property."

The payment of money proposed to be made under the agreement not being in accordance with law, as we construe the irrigation statutes, it follows that the expenditure of the funds of the district in such a manner would amount to a misappropriation or misuse thereof. This we hold will be enjoined upon the application of a property owner and taxpayer within the district.

We think the trial court should have overruled the defendants' demurrer to the plaintiff's complaint. It is therefore ordered that the judgment of the trial court herein be, and the same is hereby, reversed, with directions to overrule the defendants' demurrer to the plaintiff's complaint and proceed with this cause in accordance with the views expressed herein.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 113

KELSEY et al. v. MERCED IRR. DIST. et al. (DANLEY, Intervener). (Cr. 1056.)

(District Court of Appeal, Second District, Division 1, California. March 6, 1924. Hearing Denied by Supreme Court May 5, 1924.)

Appeal and error ⚷518(3)—Ruling on demurrer to complaint in intervention, held not required to be presented by bill of exceptions.

Reviewing court may consider ruling sustaining demurrer to complaint in intervention, though not presented by bill of exceptions, where intervention was allowed and judgment of dismissal entered, making a complete judgment roll.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Action by H. G. Kelsey and others against the Merced Irrigation District and others, in which L. E. Danley intervened. From an adverse judgment, intervener appeals. Reversed.

Hearing denied by Supreme Court 226 Pac. 854.

James F. Peck, of Oakland, for appellant.

A. L. Cowell, of Stockton, and Edward F. Treadwell, of San Francisco, for respondents.

PLUMMER, J. This action was begun by the above-named plaintiffs against the above-named defendants to determine the rights of the plaintiffs, as contract holders, to certain water rights obtained by them from the Crocker-Huffman Land & Water Company, the water rights of which company had been purchased by the defendant Merced irrigation district. L. E. Danley, the appellant in this action, after obtaining leave therefor, filed a complaint in intervention. This complaint set out the necessary jurisdictional facts as to his being a landowner and taxpayer within the exterior boundaries of the Merced irrigation district. To this petition in intervention the defendants demurred. This demurrer of the defendants to the appellant's complaint in intervention was sustained without leave to amend, and judgment of dismissal thereafter entered. From this judgment the intervener, L. E. Danley, appeals. All the matters considered in the case of L. E. Danley v. Merced Irrigation District et al. (No. 2774) 226 Pac. 847, are presented for consideration in this case, but, as we have gone into them quite fully, it is unnecessary to again set them forth. The further objection is made that this court cannot consider the merits of the controversy by reason of the fact that the ruling of the trial court upon the defendants' demurrer is not presented by a bill of exceptions. Respondents base this contention upon the holding in the case of Stich v. Goldner, 38 Cal. 608. That case, however, differs from this. There the intervener had been denied the right to file a petition in intervention, and consequently there was no judgment entered against him from which he could appeal. In the present case the petitioner was allowed to intervene, defendants' demurrer to the petition or complaint in intervention was sustained, and judgment of dismissal entered. We thus have a complete judgment roll so far as ruling and judgment on the appellant's petition for intervention is concerned. There being no other points involved in this case that have not been considered in the Danley Case we therefore, upon the authority of that case, hold that the ruling of the trial court in sustaining the defendants' demurrer to the intervener's complaint in intervention was erroneous, and that the judgment entered thereon should be, and the same is hereby, ordered reversed, with leave to the defendants to file answers to the appellant's complaint in intervention within such reasonable time as may be allowed by the trial court.

We concur: FINCH, P. J.; HART, J.

66 Cal. App. 97

DANLEY v. MERCED IRR. DIST. et al.

KELSEY et al. v. MERCED IRR. DIST. et al. (DANLEY, Intervener).

(Sac. 3587, 3588.)

(Supreme Court of California. May 5, 1924.)

Waters and water courses 🔑228½, New, vol. 10A Key-No. Series—Rights of contract holders purporting to be waived held not property which could be acquired by irrigation district; "other property."

Rights of contract holders purporting to be waived, released, or extinguished by contract with irrigation district *held* not included within either class of property enumerated in Irrigation District Act, § 15, as amended by St. 1919, p. 661, § 1, which the district is thereby empowered to acquire; words "other property" appearing therein meaning other property necessary for construction, use, supply, maintenance, repair, or improvements of system or works belonging to district.

In Bank.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Actions by L. E. Danley against the Merced Irrigation District and others, and by H. G. Kelsey and others against the Merced Irrigation District and others, in which L. E. Danley intervened. Judgments adverse to L. E. Danley in each case were reversed by the District Court of Appeal (226 Pac. 847, 853), and application is made for hearing. Hearing denied.

James F. Peck, of Oakland, for intervener and appellant.

A. L. Cowell, of Stockton, and Edward F. Treadwell, of San Francisco, for respondents.

PER CURIAM. The petition for transfer of the above entitled causes to this court after decision in the District Court of Appeal is denied. We are satisfied with the conclusion of that court to the effect that the "rights" of the contract holders purporting to be waived, released, or extinguished by the proposed contract are not included within either of the classes of property enumerated in section 15 of the California Irrigation District Act (St. 1897, p. 258, as amended by St. 1919, p. 661, § 1), which the said board is thereby empowered to acquire. We agree with the conclusion that the words "other property" appearing in this section mean other property necessary for the construction, use, supply, maintenance, repair, or improvements of the system or works belonging to the district. We do not understand that such "other property" is limited to other like property under the rule of ejusdem generis. We withhold our approval from what is said in that opinion respecting the applicability of section 1 of article 14 of the Constitution, and sections 552 and 662 of the Civil Code, and the authority of the railroad commission to fix rates in such a situation as is discussed herein, and also from the conclusion that the provisions of paragraph 8 of the proposed contract, purporting to waive the right to exact tolls, is a separable covenant which, although void in itself, does not bear upon the validity of the agreement as a whole. The determination of these questions we do not deem necessary to the judgment herein.

193 Cal. 602

HALL v. STEELE. (L. A. 7318.)

(Supreme Court of California. May 27, 1924.)

1. Physicians and surgeons 🔑24(1½)—Action held one sounding in tort.

Complaint for damages from surgical operation *held* to set forth cause of action in tort; whatever was said as to engagement of defendant as surgeon and dermatologist and as to representations made by defendant as to effect of operation upon plaintiff's face being mere matters of inducement and not averments of breach of contractual relation.

2. Physicians and surgeons 🔑14(3)—Surgeon not warrantor of cures.

In an ordinary action for malpractice, physician or surgeon is not to be held as warrantor of cures or of consequences, other than those arising from breach of duty to skillfully perform operation.

3. Physicians and surgeons 🔑18(8)—Verdict of negligence in operating on lip held warranted.

Verdict of negligence and unskillfulness in performing operation to thin lip *held* warranted under evidence.

4. Trial ⚷296(3)—Instruction held erroneous but not prejudicial.

In action for negligent operation to thin lip, it was error but not prejudicial, in view of other instructions, to instruct that, if jury found from evidence that shape of lower lip was changed by operation and plaintiff suffered damage thereby, jury should find for plaintiff, unless condition was result of own contributory negligence, since it ignored question of defendant's negligence.

5. Trial ⚷228(1)—Court not required to embody all of issuable elements of case in single instruction.

Trial court is not required to embody all of issuable elements of case in any single instruction, and its failure to do so will not be held prejudicial error if, from consideration of all instructions, it appears that jury was fairly and fully instructed.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Pauline Hall against Gertrude Steele. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Dominguez and W. H. Dehm, both of Los Angeles, for appellant.

George W. Bush and James A. Houlahan, both of Los Angeles, for respondent.

RICHARDS, J. This action was one wherein the plaintiff sought to recover damages from the defendant for injuries received as the alleged result of the negligence of the defendant in the performance of a surgical operation. The plaintiff headed her complaint with the caption "Damages for Negligence," and then proceeded to allege:

"(1) That in and about the month of October, 1920, and at all times herein mentioned, at Los Angeles, Cal., the defendant Gertrude Steele held herself out to the general public, and particularly to this plaintiff, as a surgeon and dermatologist, skilled in the art of such profession, and as such, able with skill to treat the plaintiff for the ailment hereinafter mentioned.

"(2) That plaintiff was at the times herein mentioned a motion picture actress, earning her living by employment from various motion picture companies as an actress on the screen.

"(3) That at the time heretofore mentioned, plaintiff's lower lip was too large and full to correspond with her face in general, in the work which she was performing. That plaintiff consulted with defendant, believing defendant to be a surgeon and dermatologist, skilled in the art of such profession. That defendant represented to plaintiff that by removing a slight or small strip of skin from the lower lip of plaintiff, that said lip would be narrowed and the shape would not be changed, and that said lip would then correspond with the face of plaintiff in general, and would add largely to the harmony of plaintiff's face, and in this way make plaintiff a better subject for the screen, thereby enlarging her earning power.

"(4) That plaintiff believed the representations of defendant and employed defendant as such surgeon and dermatologist to perform the operation of removing a slight or small strip of skin from the lower lip. That on or about the 11th day of October, 1920, defendant performed the operation aforesaid. That defendant so negligently and unskillfully performed said operation that the lower lip of plaintiff, instead of being narrowed and made more sightly, was caused to droop on each side, revealing the teeth of plaintiff when plaintiff endeavored to close her lips, and making plaintiff's lips and mouth ugly and unsightly, and disproportionate to plaintiff's face.

"(5) That through and by the negligence and unskillfulness of defendant, plaintiff's face has become permanently disfigured and made unsightly, and her earning capacity as a motion picture actress is greatly lessened and impaired, if not altogether destroyed, to her damage in the sum of $15,000. * * *"

[1, 2] From the foregoing averments of the plaintiff's complaint it indubitably appears that the action is one sounding in tort the gravamen of which is the alleged negligent and unskillful performance of a surgical operation; and that whatever is said therein as to the engagement of the defendant as a surgeon and dermatologist to perform said operation, and as to representations made by the defendant as to the probable effect of said operation upon the plaintiff's features, are to be considered as mere matters of inducement to the main cause of action and not as averments of the breach of a contractual relation forming the basis of the present action. This case in that regard falls within the rule laid down in Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 Pac. 98; Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 Pac. 993; Krebenios v. Lindauer, 175 Cal. 431, 166 Pac. 17; Marty v. Somers, 35 Cal. App. 182, 169 Pac. 411. It is true that in the foregoing cases the doctrine was applied in relation to the plea of the statute of limitations, but the like principle is applicable to cases wherein the plaintiff is not suing for breach of warranty made in connection with the contract of employment of the surgeon, but solely for the unskillfulness of the operation performed. In such cases whatever representations the physician, surgeon, or dermatologist may have made as an inducement to the performance of the operation are not essential to the plaintiff's alleged cause of action for negligence; the sole actionable issue being as to whether or not the operation was skillfully or unskillfully performed. In an ordinary action for malpractice the physician or surgeon is not to be held as a warrantor of cures or of consequences other than those arising from a breach of his duty to skillfully perform the operation, and if, as the individual cases show, through no unskillfulness on the part of the surgeon, the plaintiff's broken arm was permanently impaired (Houghton v Dickson, 29 Cal. App. 321, 155 Pac. 128; McGraw v.

Kerr, 23 Colo. App. 163, 128 Pac. 870), or the patient's nervous system shattered (Booth v. Andrus, 91 Neb. 810, 137 N. W. 884), or if the patient fails to recover (Wurdemann v. Barnes, 92 Wis. 206, 66 N. W. 111), or even if, as in this case, the facial expression of the plaintiff is altered to an extent amounting to a disfiguration, the plaintiff cannot recover in this form of action without being able to show that the specific operation which the surgeon was engaged to perform was negligently and unskillfully performed.

In the discussion of the legal principles applicable to this, the interesting inquiry is suggested as to whether a mere naturopath or so-called "beauty doctor" is entitled as such to be placed in the same category or to claim the same immunity from liability as is applied by law to regular medical practitioners and surgeons whose mission it is to minister to those who are ill or injured or afflicted with diseases or physical injuries which medicine or surgery skillfully applied may cure; while a naturopath or "beauty doctor" does none of these, but merely assumes or undertakes to remove physical or facial deformities not due to disease or injury but existing as natural deficiencies or defects of form or countenance which for the comfort, convenience, or vanity of the individual it is deemed desirable to have removed. The question as to whether the practitioner undertaking to remedy by a surgical operation such deformities or defects and who, while performing with skillfulness the proposed alteration, does not remove the particular physical defect, or, doing so, produces another and perhaps more objectionable deformity, can rely upon the rule which protects the regular practitioner or surgeon from liability for the effect of an operation skillfully performed is, as we have observed, an interesting one; but we do not think it arises in the present case, in view of the state of the pleadings, which sound in tort and count upon an alleged unskillful surgical operation. A different issue involving this very question would have been presented if the action had been one for the breach of warranty as to the result of the operation performed. Another question which is presented upon the face of this record, but which has not been discussed in the briefs of counsel, is as to the defenses which are available to a naturopath who undertakes to perform a surgical operation which his license as such naturopath does not entitle the holder to perform. In the case of In re Gerber, 57 Cal. App. 141, 206 Pac. 1004, it was held that the holder of a license to practice naturopathy, issued in accordance with the statutes regulating the practice of naturopathy as they existed prior to 1909 or issued in accordance with the terms of the statute passed during the latter year, was entitled to practice medicine and surgery. In the case of Millsap v. Alderson (Cal. App.) 219 Pac. 469, it was held that one holding a certificate to practice neuropathy was without any right or authority thereunder to engage in the general practice of medicine; and the court in so holding expressly disapproves In re Gerber, supra. Upon petition for hearing in the Supreme Court of the case of Millsap v. Alderson, supra, this court in denying said petition expressly disapproved the decision in the Gerber Case. The bearing which these cases may have upon the case at bar is not at this time discussed or decided for the reason that this subject has not been touched upon in the briefs of counsel upon the present appeal.

[3] The first question urged by the appellant as a ground for reversal of the judgment herein is that of the insufficiency of the evidence to justify the verdict of the jury in the plaintiff's favor. It is true that from a reading of the complaint of the plaintiff herein it would seem that the injury of which she complained was that of the alleged unskillfulness of the operation performed by the defendant upon the plaintiff's lower lip in an attempt to thin said lip. During the trial of the cause, however, there was considerable controversy over the precise nature of the operation to be performed or that was actually performed upon the plaintiff, which controversy turned upon the question as to whether the defendant had engaged to thin the plaintiff's lower lip only, or to perform such an operation as would have the effect of narrowing the mouth. This was apparently treated by both court and counsel as the issue in the case, and upon that issue the testimony of the plaintiff herself bore most strongly, and if believed by the jury would have justified a verdict to that effect. Much of the plaintiff's testimony in the case consisted of ocular demonstrations to the jury as to the nature of the operation which was to be, and which was, performed upon her, and of this type of evidence none, of course, has been or could be produced before us, and we are therefore left in a state of doubt as to whether the whole effect of the plaintiff's testimony and demonstrations before the jury would be reasonably sufficient to have induced the belief in the minds of the jurymen that the operation to be performed and that was attempted was that of narrowing the plaintiff's mouth. If such was their conclusion, the testimony of the expert witnesses in the case would have substantiated their further conclusion that the operation which was actually performed was not the suitable one from a surgical viewpoint to accomplish that result, and hence that the defendant in performing it acted unskillfully. Such was the conclusion of the jury as manifested in their verdict, and in the state of the record before us we are unable to say that it was not justified by the evidence.

[4, 5] The appellant insists that the trial court committed prejudicial error in giving the following instruction:

"The jury is instructed that if you find from the evidence that the shape of the lower lip of plaintiff has been changed by the operation, and that she has suffered damage thereby, you will find for the plaintiff, unless you find that plaintiff's condition is the result of her own contributory negligence."

This instruction was obviously erroneous. It entirely ignored the question of the defendant's negligence and directed the jury that it might find a verdict for the plaintiff if the shape of her lower lip had been changed by the operation, no matter how skillfully performed. The trial court, however, gave a number of other instructions, apparently prepared and presented in support of the defendant's view of the case, and wherein the jury is clearly and expressly instructed that in order to find a verdict for the plaintiff it must find from the preponderance of the evidence not only that the defendant was guilty of the negligence complained of by the plaintiff, but that such negligence was the proximate cause of the injury for which the plaintiff seeks to recover damages in the action. There are a number of these instructions, all emphasizing the direction to the jury that the defendant was only required to exercise the ordinary skill of her profession in the performance of the operation in question, and that the jury was not to take into consideration the condition of the plaintiff at the time of the trial unless they found that her said condition was caused by the negligence of the defendant. It is a well-recognized rule, applicable to instructions, that the trial court is not required to embody all of the issuable elements of the case in any single instruction, and that its failure so to do will not be held to be prejudicial error if, from a consideration of the whole body of the instructions, it appears that the jury was fairly and fully instructed. When the instruction complained of here is read in connection with and in the light of the other instructions in the case, of which the defendant does not complain, it cannot be said that the instruction, though manifestly erroneous, was prejudicial to a degree which would require a reversal of this case.

The judgment is affirmed.

We concur: LAWLOR, J.; LENNON, J.; SEAWELL, J.; WASTE, J.

193 Cal. 751

STREET v. BERTOLONE et ux.
(S. F. 10560.)

(Supreme Court of California. June 9, 1924.)

1. Husband and wife 🔑268(2)—Wife's earnings not liable for "debts of the husband," though incurred for benefit of community.

Under Civ. Code, § 168, earnings of wife are not liable for "debts of husband," which include those incurred by husband for benefit of community, in view of sections 169, 171.

2. Husband and wife 🔑149(1), 268(2)—Earnings of wife preserved separate from rest of community property cannot be reached by creditors of husband.

When earnings of wife are preserved separate and distinct from rest of community property, they cannot be reached by creditors of husband, regardless of whether debts contracted with creditors are community debts, or separate debts of husband, under Civ. Code, §§ 168, 169, 171.

In Bank.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by E. C. Street, as trustee in bankruptcy of G. Bertolone, against G. Bertolone and Clara Bertolone, his wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Reuben G. Hunt, of San Francisco, for appellant.

Max Mayer, of San Francisco, for respondents.

LENNON, J. [1] In this action for an accounting and the delivery of personal property, the demurrer to the complaint was sustained with leave to amend. The plaintiff having failed to amend, judgment was thereupon entered in favor of defendants, and the plaintiff has appealed therefrom. The complaint alleges, in substance, that, pursuant to petition duly filed, defendant G. Bertolone was adjudicated a bankrupt on the 1st day of July, 1922, by the District Court of the United States; that plaintiff is the duly appointed, qualified, and acting trustee of the estate of said bankrupt; that the total liabilities of said bankrupt's estate amount to $9,000, due unsecured creditors; that the total amount of the assets of said estate, with the exception of the claim herein sued upon, equals $2,125 when reduced to cash; that defendants G. Bertolone and Clara Bertolone were married in 1902 and ever since that time have been and now are living together as husband and wife. The complaint further alleges, and therein lies the cause of the present controversy, that the defendant Clara Bertolone is now in the possession or control of certain personal property which was "acquired by the defendant Clara Bertolone, as the result of her earnings from her personal service during her said marriage with the defendant G. Bertolone, and no part of said personal property was acquired by defendant Clara Bertolone, by gift, devise, bequest, or descent." There follows an allegation of demand and refusal and a prayer for an accounting and the delivery of the property. The demurrer was sustained upon the ground that it appeared upon the face of the complaint that the property sued for on behalf of the creditors of the husband consisted of the earnings of the wife, and that section 168 of the Civil Code provides that "the earnings of the wife are not liable for the debts of the husband." The correctness of this ruling is the only point presented on this appeal. Appellant advances four propositions in support of his position: (1) That the section of the Code above quoted merely exempts the earnings of the wife from liability for the separate debts of the husband; (2) earnings of the wife while living with her husband are community property; (3) debts contracted during the marriage are presumed to be community debts; and (4) it appears from the complaint that the debts were contracted during the existence of the marriage. We cannot concede the correctness of the first proposition, which is fundamental to appellant's case. Section 168 appears in a chapter of the Civil Code wherein the distinction between obligations of a community nature and those which pertain separately to husband or wife is of vital significance, and the other sections, among which it is placed, were evidently carefully drawn with this distinction uppermost in mind. The language of section 168 is clear and explicit, and appellant's contention in so far as it involves the proposition that money earned by the wife may be taken for the debts of the husband is answered by the very language of the section itself. Finnigan v. Hibernia, Savings & Loan Society, 63 Cal. 390. To hold that it provides that the earnings of the wife are not liable for the separate debts of the husband would require an unwarranted reading into the law of language not put there by the Legislature and not necessitated either by reason of ambiguity or obvious error. The term "the debts of the husband," unless otherwise qualified, includes debts incurred by the husband for the benefit of the community as well as his own separate debts. This is so for the reason that the greater term includes the lesser. It is the husband who has charge of the incurring of community obligations, and, in contemplation of law, such obligations are therefore the debts of the husband. That this is the meaning intended by the Legislature is evidenced by the language of section 171 of the same Code, which provides that—

> "The separate property of the wife is liable for her own debts contracted before or aft-

er her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together. * * *"

This proviso expressly excepts from the "husband's debts," for the purposes of that section, the debts contracted by the husband for the necessaries of life furnished to them, the husband and wife. Had such debts, which are an important class of community obligations, not been included in the term "husband's debts," they would not have been inserted in the proviso. Appellant calls attention to section 169 of the Civil Code, which reads as follows:

> "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate [and apart] from her husband, are the separate property of the wife."

It is urged that the provisions of this section, concerning the earnings of a wife living separate and apart from her husband, will be meaningless if the construction given by the trial court to section 168 is upheld, for the reason that earnings of the wife will be her separate property irrespective of whether she is living with or apart from her husband. This result does not follow. Section 168 does not provide that the earnings of the wife are her separate property, but that they are not liable for the debts of her husband. They continue to be community property for the purposes of administration and for the purposes of investment and other management by the husband. In other words, the earnings of the wife living with her husband are subject to the rules governing community property except in the single respect mentioned in section 168; whereas, the earnings of a wife living separate from her husband are not subject to any of the rules governing community property.

[2] Likewise without foundation is appellant's contention that, even though the earnings of a wife be incorporated with the other community property, a sum equal to the amount of these earnings will always remain exempt from the community creditors. For the purposes of this case it is only necessary to hold that when the earnings of the wife are preserved separate and distinct from the rest of the community property, as is alleged in the present complaint, they cannot be reached by the creditors of the husband regardless of whether the debts contracted with these creditors are community debts or separate debts of the husband. Nor is it necessary to decide in this case whether or not the income from those earnings is liable for the debts of the husband. Had it not appeared upon the face of the complaint that the community property sought to be reached consisted of the earnings of the wife, the manner in which the property was acquired and the amount thereof thus acquired would perhaps have been a matter of special defense. However, inasmuch as it is conceded by plaintiff, by the allegations of the complaint and the refusal to amend, that the entire property herein involved consists of property earned by the wife, the property was not subject to the claims of the creditors in question.

The judgment is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; LANGDON, Justice pro tem.

(193 Cal. 633)

Ex parte RAMERIZ. (Cr. 2636.)

(Supreme Court of California. May 29, 1924.)

1. Aliens 🔑17—Constitutional law 🔑250—Statute prohibiting aliens from owning or carrying weapons that may be concealed does not deny equal protection of law.

St. 1923, p. 695, § 2, prohibiting unnaturalized foreign-born person from owning or carrying weapons that may be concealed, does not violate Const. U. S. Amend. 14, guaranteeing equal rights and protection of laws, being valid exercise of police power of state.

2. Constitutional law 🔑81—"Police power" defined.

"Police power" is power inherent in a government to enact laws to protect order, safety, health, morals, and general welfare of society.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

3. Weapons 🔑2—Within police power to restrain dangerous practices and use of firearms.

In exercise of police power, Legislature may restrain dangerous practices and regulate carrying and use of firearms and other weapons in interest of public safety.

4. Weapons 🔑2—Federal constitutional provision as to bearing arms inapplicable as against state.

Const. U. S. Amend. 2, regarding right to bear arms, applies only to federal government.

5. Weapons 🔑2 — Absence of constitutional provision relative to bearing arms leaves Legislature free to deal with subject.

Absence in state Constitution of a guaranty of right to bear arms leaves Legislature entirely free to deal with subject.

6. Constitutional law 🔑87—Rights of private property not infringed by statute prohibiting owning and possession of weapons by aliens.

Stats. 1923, p. 695, § 2, prohibiting unnaturalized foreign-born persons from owning or possessing weapons capable of being concealed upon persons, does not infringe rights of private property under Const. art. 1, § 17.

In Bank.

Application for writ of habeas corpus on behalf of Gevino Rameriz, prayed to be directed to the Sheriff of Kings County. Writ discharged, and petitioner remanded.

Bradley & Bradley, of Visalia, for petitioner.

William R. McKay, Dist. Atty., of Hanford, U. S. Webb, Atty. Gen., and W. F. Cleary, Deputy Atty. Gen., for respondent.

J. J. Henderson, Dist. Atty., and Ben P. Tabor, Deputy Dist. Atty., both of Sacramento, amici curiæ.

LAWLOR, J. On application of his attorneys a writ of habeas corpus was issued on behalf of Gevino Rameriz, whom we shall refer to as petitioner. The record before us shows that he was charged, tried, and convicted in Kings county, and sentenced to serve a term of from one to five years in the state prison at San Quentin for violation of a new statute (Stats. 1923, p. 695) in having on and about his person and in his possession a certain automatic revolver about four inches in length of 25 caliber and loaded with powder and ball, the petitioner then and there being an unnaturalized foreign-born person. After judgment was pronounced, a certificate of probable cause was issued pending appeal, and at the time of the issuance of the writ the petitioner was in the custody of respondent, W. J. Hime, sheriff of Kings county.

The petitioner was charged under section 2 of the said statute, which reads as follows:

"On and after the date upon which this act takes effect, no unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the state of California or of any political subdivision thereof shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor for more than five years."

It is contended that this statute is unconstitutional (a) in that it violates the Fourteenth Amendment of the Constitution of the United States, (b) because it violates article 2 of the Amendments of the Constitution of the United States, and (c) for the reason that it violates section 17, article 1, of the Constitution of the state of California.

[1] (a) It is contended that this statute violates the Fourteenth Amendment of the federal Constitution, in that it denies to aliens the equal rights and protection of the laws. In other words, that aliens have been unjustly discriminated against within the meaning of the Fourteenth Amendment. It is argued on behalf of the petitioner that the deprivation of the right to unnaturalized foreign-born persons to have the possession of such firearms as are described in the statute is an unconstitutional exercise of the police power of this state. It is admitted by amici curiæ that the Legislature has the unquestioned power to enact, as a proper police regulation designed to promote the public safety and welfare, a law absolutely prohibiting any and all persons within its jurisdiction the possession or use of weapons of the character described in the act under consideration, but "that so long as the Legislature expressly recognizes the class of firearms described in section 2 of the act as the subject of property, ownership and possession by citizens of the United States, it cannot deny to resident foreigners the absolute right to acquire and own and, as a corollary to such ownership, the right to possess, under proper regulation, firearms of the same description."

Respondent does not claim that the protection of the Fourteenth Amendment does not extend to aliens within the territorial jurisdiction, but contends that within the exercise of the police power they may be classified for purposes of legislation. It is argued, on the other hand:

Firstly, that unlawful discrimination is shown in the proviso contained in section 6 that nothing in section 5 "shall be construed to apply to or affect sheriffs * * * nor to the possession or transportation by any merchant of unloaded firearms as merchandise," and that, consequently, "no unnaturalized foreign-born merchant, who happens to be engaged in business in the state of California, is permitted to possess or tranport a certain kind of property if it consists wholly or partly of firearms capable of being concealed on the person." Secondly, it is argued, "there is no provision in the law whereby an unnaturalized foreign-born person, no matter what his status may be, can secure a license or permit to own or possess any firearms or stock in trade consisting of firearms. The mere fact that he is an unnaturalized foreigner absolutely precludes him from owning or possessing this species of property. * * * Interpreted according to their ordinary signification, the words of the statute prohibit even the owning by an unnaturalized foreigner of any firearms capable of being concealed on the person. In other words, every unnaturalized foreign-born person, resident of the state of California, was required, the instant this statute took effect, to rid himself of the ownership of any such firearm which he theretofore owned, and was prohibited from acquiring the ownership of any such firearm in the future."

Petitioner further complains in his brief that section 5 of the act, which makes it a misdemeanor only for any person to carry such weapons as are described without a license is added evidence of unlawful discrimination. The following is quoted from the brief:

> "A penal statute which makes arbitrary distinctions between different persons or classes or persons, either by making certain acts criminal offenses when committed by some persons but not when committed by others, or by prescribing different penalties for the commission of the same acts by different persons, has been declared unconstitutional as class legislation. Peonage Cases (D. C.) 123 Fed. 67; 12 C. J. 1141."

The Attorney General contends that the legislation does not violate the equal protection clause of section 1 of the Fourteenth Amendment, and cites section 1, article 19, of the state Constitution, that "The Legislature shall prescribe all necessary regulations for the protection of the state, * * * from the burdens and evils arising from the presence of aliens who are or may become * * * criminals, * * * and from aliens otherwise dangerous or detrimental to the well-being or peace of the state, * * *" as additional authority for such legislation as contained in section 2 of the act in question. We quote:

> "It also appears to us that in order to hold the act in question unconstitutional, it will be necessary for this court to hold that section 1 of article 19 of our state Constitution violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

Petitioner has cited a number of authorities to the effect that certain statutes and ordinances which discriminated against aliens were repugnant to the Fourteenth Amendment: Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; In re Parrott (C. C.) 1 Fed. 481; and In re Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L. R. A. (N. S.) 604. In the Yick Wo Case a municipal ordinance to regulate public laundries and requiring the consent of the board of supervisors to their establishment when the building was not made of brick and stone was held unconstitutional and not a valid exercise of the police power for the reason that it allowed arbitrary and unjust discrimination to be made by such board founded on differences of race, between persons otherwise in similar circumstances. In Barbier v. Connolly, supra, the ordinance fixing certain hours when laundries were not to be operated was held to be a reasonable police regulation. Truax v. Raich, supra, dealt with a statute which required that employers employ only a specified number of alien employees and fixing a penalty. The statute was declared unconstitutional as involving the right to earn a livelihood. In re Parrott, supra, involved an article of the state Constitution which authorized restrictive legislation relating to the employment of Chinese. It was held invalid as violative of the Fourteenth Amendment and not within the police power of the state. A criminal statute in Re Opinion of Justices, supra, attempted to prevent Chinese from admitting into hotels and restaurants conducted by them or their serving with food and drink therein girls under the age of 21 years. It was held such restrictions denied to persons of the Chinese race the equal protection of the laws. The case of Commonwealth v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514, also cited by petitioner, held a statute which required that a license as a hawker and peddler shall be granted only to a person who is or has declared his intention to become a citizen of the United States, a valid exercise of the police power. The following cases are cited as instances of the denial of the equal protection of the laws: Pearson v. City of Portland, 69 Me. 278, 31 Am. Rep. 276; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; McCabe v. A., T. & S. F. Ry. Co., 235 U. S. 151, 35 Sup. Ct. 69, 59 L. Ed. 169; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; In re Kotta, 187 Cal. 33, 200 Pac. 957; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265. In Pearson v. City of Portland, supra, a statute which precluded the recovery by a nonresident of damages for injury to person or property under circumstances sanctioned by another state law if a similar remedy was not provided in the place of residence of the injured party was held to deny him the equal protection of the laws. In re Kemmler, supra, involved a state electrocution law. The court held that no federal question was presented because the due process clause of the Fourteenth Amendment has reference to the law of the land in each state, and so long as the law is equal in its operation it does not violate due process. The legislation in Strauder v. West Virginia, supra, which denied to negroes the right and privilege of participating in the administration of the laws as jurors, was held unconstitutional under the Fourteenth Amendment as being a discrimination against negroes on account of race and color. In McCabe v. A., T. & S. F. Ry. Co., supra, a statute requiring separate, but equal, accommodations on railways for white and African races was held not to be an infraction of the equal protection clause of the Fourteenth Amendment. In City of Pasadena v. Stimson, supra, it was held that a statute which required cities of the fifth and sixth classes to make an effort to agree with the owners of land sought to be condemned before instituting condemnation proceedings was a special law making a forbidden discrimination against two classes of municipal corporations and denying them the equal privileges with other cities in the exercise of the right of eminent domain. In re Kotta, supra, was a case where a statute imposed a poll tax upon unnaturalized foreigners. This was held unconstitutional on the ground that the enforcement would deprive the persons so burdened of the equal protection of the laws guaranteed by the Fourteenth Amendment. In St. Louis Southwestern R. Co. v. Arkansas, supra, a statute imposed an annual franchise tax upon the right to exist as a corporation, and the court said it was not within the Fourteenth Amendment, since nothing therein prevents double taxation or any other form of unequal taxation so long as the inequality is not based on arbitrary distinctions. The following cases are cited as instances where statutes deprived persons of property without due process of law: In Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116, the statute provided that mechanics' liens except as to contractors be payable in money; Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960, a statute making it unlawful for an employer to require an employee to agree not to become a member of any labor organization during the time of employent; Hannah v. People, 198 Ill. 77, 64 N. E. 776. dealt with restrictions on the conduct of public warehousemen; in Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989, a constitutional amendment and state statute adjusted the appellate jurisdiction of the courts in the various counties of the state, and this was held not to violate any provision of the Fourteenth Amendment; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408, held that certain legislation which made party affiliations a requisite to eligibility to an office violated the state Constitution. The following cases cited by petitioner involved the police power of the states: Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, held that a state statute prohibiting the sale of intoxicating liquor did not violate the Fourteenth Amendment, as that guaranty does not deprive the states of any police power; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, a law which fixed the hours of labor in a bakery, was held unconstitutional as not constituting a valid exercise of the police power, the health of the individual following the occupation not being jeopardized by the employment in question; in Lacey v. Palmer, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822, 57 Am. St. Rep. 795, a statute regulating pool selling was held to be within the police power of the state; Ex parte Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183, passed on a statute requiring all fruit shipped to be labeled with the county and locality where grown—held an unconstitutional invasion of liberty and not a proper exercise of the police power under the guise of a health regulation; Eubank v. Richmond, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192, involved a municipal ordinance requiring the establishment of building lines on the request of two-thirds of the owners of abutting property. It was held the ordinance did not constitute a valid exercise of the police power, as it could not serve the public safety, convenience, or welfare. It will serve no purpose to discuss Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470, and Ex parte Bailey, 155 Cal. 472, 101 Pac. 441, 31 L. R. A. (N. S.) 534, 132 Am. St. Rep. 95.

The foregoing authorities have been described somewhat in detail by way of making clear their inapplicability to the legislation here involved. In other words, we have found nothing in any of them that supports the contention that section 2 of the act is violative of the Fourteenth Amendment. Correct principles are stated as applied to the legislation to which these cases were addressed, and they furnish the tests by which the constitutionality of legislation may be determined under the Fourteenth Amendment, but there were involved in none of them the subjects of public peace, public safety, public security, or collateral subjects as affected by the possession of firearms. One of these tests is whether the legislation comes within the police power, and several of the cases are authority for the proposition that the Fourteenth Amendment was not "designed to interfere with the power of the state sometimes termed its police power. * * *" Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 359 (28 L. Ed. 923). The precise question presented here is whether section 2 is a valid exercise of the police power.

Respondent urges that the legislation represents a proper exercise of the police power for the reason that it tends to safeguard the public peace and security. The argument is twofold: (1) Allegiance to the government, that is, the "danger of permitting aliens to arm themselves, and thus place themselves in a position to dispute, with force of arms, the sovereignty of our nation and our people. While such a danger may seem improbable at the present time, yet, in time of war, it becomes a very real danger indeed, particularly as a few thousand organized aliens, in the course of a few hours, could so cripple our basic industries and our transportation facilities as to make us practically powerless in conducting war. * * * On the other hand, firearms, and particularly firearms capable of being concealed upon the person, are capable of being put into active and immediate use. * * * Thus, even though the possession of firearms by any person may be harmful to the public welfare, yet as the possession of such weapons by an alien is doubly harmful, * * * it is within the province of the Legislature to confine its restrictions to aliens." (2) Here follows an argument in favor of the legislation, giving illustrations of the need of guarding against aliens, which concludes thus:

> "There is yet another reason for the classification: The additional difficulty in apprehending and securing evidence against aliens."

Amicus curiæ for respondent makes a similar argument and concludes that the classification is not unreasonable.

Among the cases relied upon by respondent are Patsone v. Pennsylvania, 232 U. S. 139, 34 Sup. Ct. 283 (58 L. Ed. 539), and State v. Rheaume (N. H.) 116 Atl. 758. The former case upheld the constitutionality of an act which made it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property, and "to that end" made it unlawful for such foreign-born person to own or be possessed of a shotgun or rifle. It is sought on behalf of petitioner to distinguish this case on the ground that the decision "seemed to hinge upon the provisions of the act and especially of the phrase 'to that end,' that is, to the protection and preservation of wild game." It is claimed the federal court did not squarely decide the question of whether or not ownership of shotguns and rifles by foreigners could be prohibited for other purposes, and the following excerpt from the opinion is quoted:

> "It will be time enough to consider whether the statute can be construed or upheld as precluding Italians from possessing a stock of guns for purposes of trade when such a case is presented. The act was passed for an object with which possession in the way of trade has nothing to do and well might be interpreted as not extending to it."

Concerning the question of discrimination, the decision in Patsone v. Pennsylvania, supra, declared:

> "The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. * * * The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. * * *
>
> "Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state Legislature was wrong in its facts."

This well-established principle was applied in Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829, where a California statute limiting hours of employment of women in specified occupations, including those in hotels, was upheld. The court said:

> "Dealing with practical exigencies, the Legislature may be guided by experience. * * * It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. * * * If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

State v. Rheaume, supra, sustained as constitutional a statute requiring persons not citizens of the United States to make application for a permit to possess firearms. Petitioner, referring to the differentiation in the respective statutes as regulatory and prohibitory, says:

> "It will be noticed that in two essential respects it is radically different from the California law. In the first place, no attempt is made to deny to foreign-born residents of the state of New Hampshire the right to acquire or own property in firearms; and, in the second place, no attempt is made to prohibit such unnaturalized foreign-born residents from possessing such firearms provided they comply with certain regulations and procure permits therefor. * * * From the foregoing it will be seen that the New Hampshire law merely regulates the possession and use of firearms. It makes no attempt to deny to any one, resident within the state, the right to acquire or own property in such firearms. It does not even prohibit the possession of firearms by foreigners, but merely provides that any foreigner desiring to possess the same shall first submit to certain regulations and procure a permit for such purpose. The law, moreover, makes no attempt to disturb the ownership of firearms by any class of persons who owned the same at the time the law took effect. The California law, on the other hand, at its very inception, seeks to deprive persons who owned firearms at the time of such enactment, of their property in such firearms. In this phase it is retroactive in its effect and unquestionably deprives persons resident in the state of California of their property without due process of law. * * * Under no circumstances does it permit any unnaturalized foreigner either to own or possess a firearm or firearms of the description denounced by the statute, and, in this respect, it unjustly, oppressively and without reason, deprives the class of the population of the rights guaranteed them by the federal Constitution."

The point to that case is not whether the legislation was merely regulatory or prohibitory. It is conceded by amici curiæ for petitioner that firearms are the proper subject of the exercise of the police power. The question presented here is whether, in the exercise of the police power, the segregation of aliens constitutes an unlawful discrimination against that class. It was said in State v. Rheaume, supra:

> "Classifications distinguishing between citizens and aliens have not infrequently, been the basis of regulations under the police powers of the states. * * *
>
> "Aliens are under no special constitutional protection which forbids a classification otherwise justified simply because the limitation of the class falls along the lines of nationality. That would be requiring a higher degree of protection for aliens as a class than for similar classes of American citizens. * * * It therefore remains to be considered whether there is such a relation between the restriction as to the alien and the public safety as to warrant the classification in the present case. * * *
>
> "That explosives and firearms are proper subjects of regulation is self-evident. The Legislature was dealing with subject-matters of great inherent danger to the public. * * * It was an incident to such a system that a classification should be made based on domicile, allegiance, duty, habit, temperament, and other characteristics which distinguish the citizen and applicant for citizenship from the alien who has manifested no desire or intention to bind himself to support the government.
>
> "Citizens as a class have more settled domiciles, and are better known to the local police officials, while the sojourn of aliens in this country, in theory, and usually in practice, is temporary, and their abode, while here, capricious and uncertain. Citizens by means of taxation bear the expense of the government and of police protection, while the alien does not necessarily pay taxes or share any part of the public burden. Native citizens are justly presumed to be imbued with a natural allegiance to their government which unnaturalized aliens do not possess. The former inherit a knowledge and reverence for our institutions, while the latter as a class do not understand our customs or laws, or enter into the spirit of our social organization. Or, passing more directly to the use of firearms, the citizen has an obligation to defend the state, while the alien has none. The citizen is required to assist in maintenance of order, the enforcement of law, and the arrest of wrongdoers in some instances. It is clear that there exists a reasonable and substantial basis for the classification."

Moreover, it is not strictly true that the legislation here in question is prohibitory to every class of firearms. Under the statute aliens may own or have in their possession firearms, provided they are not of a size capable of being concealed on the person. This would permit aliens to have shotguns, rifles, or other large weapons for all lawful purposes.

The case of People v. Crane, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D, 550, Ann. Cas. 1915B, 1254, approves a similar classification of aliens. The statute there, known as the New York Labor Law (Consol. Laws, c. 31), provided that in the construction of public works by a state, municipality, or by contractors, only United States citizens shall be employed and that citizens of the state should be given perference. Numerous cases are cited therein in which the power of a state to discriminate in favor of citizens was sanctioned. Among these are McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248, where a state denied to aliens, and even to citizens of another state, the right to plant oysters or to fish in public waters, and Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, where the state restricted to its own citizens the enjoyment of its game. The principle that justified the discrimination in all these cases was held to be "that the common property of the state belongs to the people of the state and hence that in any distribution of that property, the citizen may be preferred." It was said in People v. Crane, supra:

> "If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely, or conditionally by the exaction of a license, the fact of alienage may justify a denial of the privilege. * * * There must, however, be some relation in such cases between the exclusion of the alien and the protection of the public welfare."

In Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129, a writ of habeas corpus was issued. The petitioner was held in custody on a complaint charging him with a misdemeanor under section 626 of the Penal Code in unlawfully selling a quantity of deer meat, the meat having been cut from the carcass of a deer killed in Texas and brought into this state. Petitioner contended that as the above section did not prohibit the sale of deer meat lawfully taken without the state the charge did not come within the terms thereof. It was also argued that the act violates the Constitution of the United States in that it is an attempt to regulate interstate commerce. It was held in discharging the writ and remanding the prisoner that it is within the police power of the state, in the protection of the wild game thereof, to prohibit the sale of the meat of any wild game within the state, and that such a police regulation making it a public offense to buy and sell deer meat within the state, which was cut from an entire carcass brought from without the state, is not a violation of the Constitution of the United States as an attempt to regulate interstate commerce. "The fact that a regulation may incidentally, and to a certain extent, affect commerce between the states, does not affect its validity * * * The authority of Congress over any article of commerce imported into a state ceases 'when the importer has so acted upon it, that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands,' and that thereupon the property becomes subject to the jurisdiction of the state, and affected and controlled by its regulations."

A classification of aliens has been made with respect to procuring a license to hunt and fish upon payment of a fee. The Statutes of 1909, page 663, amending a similar act (Stats. 1907, p. 247), requires every person in the state, who hunts, pursues, or kills any of the wild birds or animals, excepting predatory birds or animals, to first procure a license therefor. A license to citizens of the United States and resident in this state may be issued on the payment of $1; to any citizen of the United States and not a resident of this state on the payment of $10; to any person not a citizen of the United States upon the payment of $25. In the Statutes of 1919, p. 119, a further classification was made allowing a license to be issued to a person who shall have declared his intention to become a citizen of the United States and who is a resident of this state, on the payment of $10, provided that the applicant take an oath that he has not claimed his citizenship in a foreign country as a basis for avoiding service in the armed forces of the United States. Fishing licenses, by Statutes 1913, p. 986, may be granted to citizens and residents of this state on the payment of $1, to citizens of the United States and not residents of this state, on the payment of $3, and to persons not citizens of the United States on the payment of $3. We do not find that these provisions have been made the subject of attack on the point of differentiation in the amount of the fee required.

In Commonwealth v. Hana, supra, in holding constitutional that part of the act which provided that a license as a hawker and peddler shall be granted only to a person who is, or shall have declared his intention to become, a citizen of the United States, and referring to State v. Montgomery, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386, which delared a similar statute unconstitutional, the court said:

> "There is, however, an important question which was not much discussed in that case, whether the Legislature, in the exercise of the police power, could discover a reason for withholding peddlers' licenses from aliens. The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. * * * If, in the same interest [protection of the public], the Legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect. * * * Indeed, the nature of their business is such that their possession of a domicile and citizenship in this country might be important to those seeking remedies for wrongs done in their business."

Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15, 68 L. Ed. —, involved the Alien Land Law of the state of Washington (Laws 1921, c. 50), prohibiting the purchase or lease of land by any alien who has not declared his intention to become a citizen. In holding that the legislation was not repugnant to the Fourteenth Amendment, the court approved the following statement from the decision of the district court in that case (274 Fed. 841):

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership * * * of noncitizens."

In Porterfield v. Webb, 263 U. S. 225, 44 Sup. Ct. 21, 68 L. Ed. —, the court considered the right of a citizen to lease his land to a Japanese subject under the Alien Land Law of this state (St. 1921, p. lxxxiii), forbidding aliens ineligible to citizenship to acquire, possess, or enjoy agricultural land. It was said in upholding the legislation that "Our decision in Terrace v. Thompson, supra, controls the decision of all questions raised here."

Webb v. O'Brien, 263 U. S. 341, 44 Sup. Ct. 112, 68 L. Ed. —, dealt with the right of a citizen to enter into a cropping contract with a Japanese subject living in California as affected by the Alien Land Law. The court said:

> "The provision of the act which limits the privilege of ineligible aliens to acquire real property or any interest therein to that prescribed by treaty is not in conflict with the Fourteenth Amendment. Terrace v. Thompson, supra; Porterfield v. Webb, 263 U. S. 225, 44 Sup. Ct. 21, 68 L. Ed. —."

Another case under the Alien Land Law is Frick v. Webb, 44 Sup. Ct. 116, which involved the ownership of stock by a Japanese subject in the Merced Farm Company, a corporation of this state. The court held that—

> "The state has power, and the act evidences its purpose, to deny to ineligible aliens permission to own, lease, use, or have the benefit of lands within its borders for agricultural purposes. * * * It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens."

It may safely be assumed that in a general sense the reasons that induced legislation involved in the case at bar exerted an influence in the adoption of the enactments considered in the foregoing authorities. If rights in land may be denied to aliens by the state, there would seem no reason why in the exercise of its police power it might not also protect itself against the ownership, traffic in, and use of firearms by aliens. This inhibition might well tend to conserve peace and quiet, and in times of war as well as of peace serve to avoid the injection of such issues into the international relations of the federal government.

[2, 3] "Police power is the power inherent in a government to enact laws within constitutional limits to protect the order, safety, health, morals and general welfare of society." 12 C. J. 904. It is a well-recognized function of the Legislature, in the exercise of the police power, to restrain dangerous practices (Id. 916) and to regulate the carrying and use of firearms and other weapons in the interest of the public safety (Id. 917).

In our opinion the legislation constitutes a proper exercise of the police power and is not invalid under the Fourteenth Amendment. The purpose of the act is to conserve the public welfare, to prevent any interference with the means of common defense in times of peace or war, to insure the public safety by preventing the unlawful use of firearms. It cannot be assumed that the Legislature did not have evidence before it, or that it did not have reasonable grounds to justify the legislation, as, for instance, that unnaturalized foreign-born persons and persons who have been convicted of a felony were more likely than citizens to unlawfully use firearms or engage in dangerous practices against the government in times of peace or war, or to resort to force in defiance of law. To provide against such contingencies would plainly constitute a reasonable exercise of the police power.

As to the point that different and more severe punishment is provided for the same offense by section 2 than section 5 of the act, it is to be noted that the respective sections prescribe different offenses. Section 5 provides it shall be a misdemeanor for any person within the state to carry concealed on his person or within any vehicle which is under his control or direction any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm. The gravamen of that offense is for any person, citizen or otherwise, to have the possession of the kind of fire arms described without a license. In Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207, the court said: "Equality of protection" means that persons "shall not be subjected, for the same offense, to any greater or different punishment." In that case a heavier penalty was prescribed when the crime of adultery was committed by a white person and a negro than in a case where the crime was committed by persons of the same race and color. It is apparent that the respective criminal acts in sections 2 and 5 are not of the same import, and so far as the penalty is concerned it may be assumed that the Legislature regarded the possession of concealed weapons by aliens of graver consequence than in the case of citizens having such possession without a license.

[4, 5] (b) The second point is that the right of the people to bear arms is infringed upon by this statute. The Second Amendment of the Constitution of the United States is as follows:

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

It will suffice to state that this point is without merit, since this amendment offers no protection against the state governments, but applies only to the federal government. "The right of the people to keep and bear arms" is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that this right shall not be infringed, but this means no more than that it shall not be infringed by Congress. This amendment is one of those that has no other effect than to restrict the powers of the national government, and not those of the state. U. S. v. Cruikshank, 92 U. S. 553, 23 L. Ed. 588. See, also, Miller v. Texas, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812. It was said in Ex parte Spies, 123 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80:

> "That the first ten articles of amendment were not intended to limit the powers of the state government in respect to their own people, but to operate on the national government alone, was decided more than half a century ago, and that decision has been steadily adhered to since."

See, also, Presser v. Illinois, 116 U. S. 265, 6 Sup. Ct. 580, 29 L. Ed. 615.

If there is an inhibition upon the Legislature, it must be found in the state Constitution, and not in the Second Amendment of the federal Constitution. The Constitution of this state contains no provision on the subject. An examination of the numerous authorities in various states will show that the right to keep and bear arms as guaranteed by a state constitutional provision similar to the federal amendment refers only to the bearing of arms by the citizens in defense of a common cause, and not to their use in private broils and affrays. Thus, it is not an invasion of the right to make it unlawful for any person to carry a dirk, sword cane, Spanish stiletto, or other similar weapon. Aymette v. State, 2 Humph. (Tenn.) 154; State v. Wilburn, 7 Baxt. (Tenn.) 57, 32 Am. Rep. 551; Andrews v. State, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; English v. State, 35 Tex. 473, 14 Am. Rep. 374; State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. It may be remarked that an absolute prohibition of such right might be held to infringe a fundamental right.

In Nunn v. Georgia, 1 Ga. 243, the court said:

> "We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defense, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void, and that, as the defendant has been indicted and convicted for carrying a pistol, without charging that it was done in a concealed manner, under that portion of the statute which entirely forbids its use, the judgment of the court below must be reversed, and the proceeding quashed."

It appears, therefore, that, although state Constitutions declare that every citizen has the right to bear arms, in defense of himself and the state, and do not expressly or by implication deny to the Legislature the right to enact laws in regard to the manner in which arms shall be borne, this can be done, and the absence of such a guarantee in the state Constitution leaves the Legislature entirely free to deal with the subject.

[6] (c) The conclusions that the legislation comes within the police power, and that it is a reasonable exercise thereof, render unnecessary any discussion of the last point that rights of private property under section 17, art. 1, of the state Constitution, are infringed by the statute in question, since the principle of law that private property rights of individuals are required to yield when in conflict with reasonable police regulations is applicable. 5 Cal. Jur. 882.

Writ discharged and petitioner remanded.

We concur: MYERS, C. J.; WASTE, J.; RICHARDS, J.; SEAWELL, J.

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193 Cal. 653

IDEMOTO et al. v. SCHEIDECKER et al. (S. F. 10473.)

(Supreme Court of California. June 2, 1924.)

1. Parent and child 🔑13(2)—Cause of action against parents for negligence of child in driving automobile held not stated.

In action for injuries caused by operation of automobile by minor son of defendants, allegations that automobile was purchased for pleasure and use of defendants and son, that latter was at all times authorized to drive machine, and that at time of injury he was driving it with defendants' consent *held* not to state cause of action.

2. Pleading 🔑8(2)—Allegation in action against parents for negligent operation by son of automobile held conclusion.

In pedestrian's action against parents for injuries when struck by automobile driven by son, allegation that son "was acting in furtherance of and not apart from service and control of defendants, and within purposes for which automobile was purchased," *held* pure conclusion.

3. Parent and child 🔑13(1) — Liability of father, procuring license for son, for latter's negligence in driving automobile stated.

Where defendant's son was in possession of an operator's license which had been issued to him upon his father's application under Motor Vehicle Act, § 24, as amended by St. 1919, p. 223, § 14, father was jointly and severally liable for actionable negligence on part of such minor while operating a vehicle upon public highway.

4. Appeal and error 🔑883—Theory pursued below held to preclude raising objection that evidence was outside issues.

Where both parties on trial treated certain evidence as properly within issues, and it was received pursuant to stipulation appellant could not complain on appeal that evidence was outside issues.

5. Highways 🔑184(2)—In automobile accident case evidence held to show defendant's negligence and plaintiff's freedom from negligence.

Evidence that plaintiff while walking along a highway was struck from the rear by an automobile driven by defendant's son, while a foot and a half to two feet off the traveled portion of the roadway, *held* sufficient to support an implied finding of defendant's negligence and plaintiff's freedom from contributory negligence.

6. Appeal and error 🔑1052(2)—Error in admission of opinion evidence held cured by subsequent testimony as to facts.

If court erred in admitting opinion evidence of deputy sheriff based on wheel tracks, that car which struck plaintiff was a Ford, she having been struck by a Ford, such error was not prejudicial, where witness proceeded to testify to certain facts, which if believed would show conclusively that defendant's car made such tracks.

7. Appeal and error 🔑1066—In automobile accident case based on wanton negligence instructions defining forms of negligence generally held not prejudicial error.

In pedestrian's action for injuries when struck by automobile, with an averment of reckless and wanton negligence, that court generally defined and differentiated between different forms of negligence without an application to the facts, did not constitute prejudicial error, where evident purpose was to clarify jurors' minds upon subject to which they related.

8. Appeal and error 🔑1064(1)—In automobile accident case error in instruction on law of road held not prejudicial in view of evidence.

In automobile accident case instruction that motor vehicle approaching behind pedestrian walking in same direction, in order to pass such pedestrian should turn to the left, did not constitute prejudicial error where evidence showed that automobile could not have passed plaintiff except upon her left.

9. Highways 🔑184(4)—Instruction on pedestrian's duty to watch for cars approaching from rear held not inapplicable.

In pedestrian's action for injuries when struck by automobile, instruction that pedestrian was under no legal duty to look back to see whether she was in danger of being struck was not inapplicable, where defendant's son testified contrary to plaintiff that she never looked back towards his machine, since jury may have believed his testimony.

10. Highways 🔑184(4)—Instruction on automobile driver's duty to warn pedestrian held not inapplicable.

In pedestrian's action for injuries when struck by automobile, instruction as to driver's duty, on approaching pedestrian from behind, to give warning, *held* not inapplicable under the evidence.

11. Trial 🔑194(16)—Instruction held not to withdraw all question of plaintiff's contributory negligence from jury.

In pedestrian's action for injuries when struck by automobile, instruction that question for jury was whether defendant's son was guilty of negligence did not withdraw from jury all questions as to plaintiff's contributory negligence, since its utmost intendment was that primary question to be determined was negligence of car driver.

12. Trial 🔑194(16)—Instruction held not to withdraw question whether defendant's negligence proximate cause of plaintiff's injury.

In pedestrian's action for injuries when struck by automobile, instruction that question for jury was whether defendant's son was negligent, *held* not to withdraw question whether his negligence was proximate cause of plaintiff's injury, in view of an instruction given at defendant's request that negligence in manner stated in complaint must be shown.

In Bank.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Kankichi Idemoto and another against Mary L. Scheidecker and others. Judgment for plaintiffs, and defendants appeal. Reversed as to named defendant, and affirmed as to other defendants.

W. F. Cowan, of Santa Rosa, for appellants.

Wallace L. Ware and Geo. W. Murphy, both of Santa Rosa (A. W. Hollingsworth, of Santa Rosa, of counsel), for respondents.

RICHARDS, J. Defendants appeal from a judgment in favor of plaintiffs for personal injuries suffered by Toki Idemoto as the result of an automobile accident upon the public highway. Plaintiff Toki Idemoto, while walking in a northerly direction upon the easterly or right-hand portion of the Russian river road in Sonoma county, was struck and injured by an automobile driven by the defendant Albert F. Scheidecker, Jr., while in the act of overtaking and attempting to pass her.

[1-4] In behalf of the defendants Albert F. Scheidecker, Sr., and Mary L. Scheidecker, as distinguished from their codefendant Albert F. Scheidecker, Jr., it is urged upon this appeal that the court erred in overruling their demurrer to the complaint and in denying their motion for nonsuit, and that the verdict as against them is totally unsupported by the evidence. These two defendants demurred to the complaint upon the ground that it did not state facts sufficient to state a cause of action against them, and that there was a misjoinder of parties defendant, in that they were improperly joined with their codefendant. The allegations of the complaint which were designed to connect these two defendants with the cause of action were, in brief, that Albert F. Scheidecker, Jr., who was operating the automobile at the time of the injury was the minor son of these defendants; that the automobile had been purchased by them for the pleasure, comfort, enjoyment and use of said defendants and their said minor son; that said minor son was at all times authorized and permitted by said defendants to drive said automobile; and that at the time of the injury he was driving the same with their consent, knowledge, and permission, and was acting in furtherance of and not apart from the service and control of said defendants, and within the purposes for which said automobile was purchased. These allegations were evidently designed to bring the case within the rule in Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595, and Walsh v. Flatland, 36 Cal. App. 819, 173 Pac. 596. The rule stated and applied in those cases was, however, definitely repudiated by this court in the later case of Spence v. Fisher, 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083, and is no longer to be regarded as a correct statement of the law in this state. Respondents suggest that the case at bar is to be distinguished from Spence v. Fisher by the circumstance that the driver of the car here in question was a minor. In the opinion in that case it was said that—

> "No authority sustaining the doctrine of liability under such circumstances that we have seen puts the decision on any other ground, even when the driver was a minor child, in the absence of a statute creating it, it being recognized that there is nothing in the nature of the automobile itself or in the relationship of parent and child, aside from the fact that the latter is a member of the family of the parent, to create such a liability."

It may be conceded that this passage, in so far as it referred to the case of a minor child, was obiter dictum; but respondents have not suggested any good reason why the rule of that case should not be applied to the facts of this case, nor has any such reason suggested itself to our minds. The allegation that the minor defendant "was acting in furtherance of and not apart from the service and control of said defendants and within the purposes for which said automobile was purchased" was a pure conclusion of the pleader. In the absence of any allegation of facts which would have the legal effect of fastening a liability upon these defendants for the negligence of their minor son, the allegation last quoted would be ineffectual for any purpose. It follows that the demurrer of these two defendants should have been sustained. No facts were developed at the trial which would serve in any way to render the defendant Mary L. Scheidecker answerable for the negligence, if any, of the defendant Albert F. Scheidecker, Jr., and the judgment as to her must therefore be reversed. It was established at the trial that Albert F. Scheidecker, Jr., was in possession at the time of the accident of an operator's license which had been issued to him upon the application of his father, Albert F. Scheidecker, Sr., pursuant to section 24 of the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1919, p. 223, § 14), then in force, the effect of which was to charge the father with joint and several liability for actionable negligence on the part of such minor while operating a motor vehicle upon the public highway. Whitworth v. Jones, 58 Cal. App. 492, 209 Pac. 60; Buelke v. Levenstadt (Cal. Sup.) 214 Pac. 42. This evidence was not, strictly speaking, within the issues as framed by the pleadings, but both parties treated it at the trial as a matter properly within the issues, and the evidence upon this point was received pursuant to a stipulation of both parties entered into at the suggestion of counsel for defendants. Under such circumstances defendants would not be heard to complain upon appeal that this matter was outside of the issues and, indeed, they have not done so. The result is that the case as against the father must stand or fall with the case as against the son. Hereinafter, for brevity's sake, the word "defendant" will be used to indicate the defendant Albert F. Scheidecker, Jr., and the word "plaintiff" will be used to indicate the plaintiff Toki Idemoto, unless otherwise specified.

[5] Appellants assert that the evidence is insufficient to support the implied finding of negligence on the part of the defendant and the implied finding of freedom from contributory negligence on the part of the plaintiff. The plaintiff testified that shortly before the accident she was walking northerly along the easterly part of the traveled portion of the road, it being a dirt road with a well-traveled portion from ten to sixteen feet in width, at the sides of which grass and weeds were growing. She heard the sound of an automobile approaching her from the rear, and looking around saw two automobiles, one to the rear of the other and some distance apart. She thereupon stepped out of the roadway to her right into the grass and weeds and waited there until the first automobile passed her. She then started to walk in a northerly direction in the grass and weeds along a line distant from a foot and a half to two feet easterly from the traveled portion of the roadway, and while so doing was struck from the rear by the second automobile, which was driven by the defendant. This testimony, if credited by the jurors, was sufficient to support both of the implied findings referred to.

[6] The appellants contend that the trial court committed prejudicial error in permitting the witness Zanolini to give certain opinion evidence to the effect that certain automobile tracks which were seen by him immediately after the accident along the easterly side of the roadway, where the plaintiff testified she was walking at the time she was struck by the defendant's Ford machine, had been made by a Ford automobile. The following is the state of the record touching that subject: The witness Zanolini, who was a deputy sheriff at the time, testified that he reached the scene of the accident within a few monents after it had occurred and that he examined the marks and tracks along the side of the road within five or ten minutes after the injured woman had been removed and that he saw there the track of a machine which had pulled off the side of the traveled portion of the highway some distance from the spot where the injured woman's bonnet was lying and had continued along the side of the highway for a distance of 80 feet, where it had turned back into the traveled road. He was asked by the court: "Do you know anything about the kind of a track a Ford machine makes?" to which question, without objection, he replied: "Yes; because I own one." The court then asked, "Were these Ford automobile tracks that you saw?" to which the witness replied, again without objection, "Yes, sir." The court then said, "Your objection to that will be overruled if you have one; I think he may testify as to whether it was a Ford, made by a Ford or any other machine." The court and counsel for the defendants then engaged in quite a discussion as to whether a person could tell what type of machine made a particular imprint, during which the court said, "Well I think a man may testify who knows; it is for the jury of course to determine whether or not his judgment is accurate if he is familiar with the prints made by different machines." During this discussion the defendants' counsel formulated no specific objection to the testimony of the witness nor to the remarks of the court, nor did they either move to strike out the testimony of the witness, nor did they attempt to cross-examine him upon the subject at all, but contented themselves with their vague objection and desultory discussion as to the reasonableness of admitting

this form of evidence. Under these conditions it is doubtful whether the admission of this evidence would constitute error; but, conceding that it would be so, we are of the opinion that its admission did not constitute prejudicial error in the instant case for the reason that the witness Zanolini proceeded to testify to certain facts coming within his immediate observation at the time of his examination of the tracks of the machine which, if believed by the jury, would show conclusively that it was the defendant's car which made the tracks in question, and which struck and dragged the woman along the side of the road and alongside the tracks of the car. The evidence of the witness Zanolini in that behalf shows that he also examined the footprints and other marks which then appeared to have been freshly made for a considerable distance along the side of the road. He testified that he found footprints which appeared in the dust along that side of the road and which went along to the point where the bonnet of the injured woman was found lying and that these footprints disappeared at that point, and the marks indicating the dragging of a body began and continued alongside the tracks of the car for a considerable distance and up to the point where the body of the woman was found lying. It is a significant fact in this connection that the young son of the defendants, who was driving the car at the time of the accident, was present when the witness Zanolini was engaged in making his examination of the tracks and other marks along the roadside, and that he made no denial of the fact that the tracks there shown and being examined were the tracks of his car. The evidence further discloses that on the following day Zanolini and two other persons again examined the tracks and footprints along the roadside and that one of these, the husband of the injured woman, had brought one of her shoes from the hospital which he fitted to the footprints and found to correspond in size. In this state of the evidence we are unable to conclude that the error of the trial court, if it be such, in admitting the opinion evidence of Zanolini as to the type of machine making the automobile tracks in question, was prejudicial.

[7, 8] The appellants further contend that certain instructions given by the court to the jury were erroneous or were erroneously given. The plaintiffs in their complaint had averred that the negligence of the young son of the defendants, who was driving their car at the time of the accident, was "reckless and wanton." The court in that portion of its instructions dealing generally with the definition of negligence defined and differentiated between "negligence," "wanton negligence," and "gross negligence," but without an application of these definitions and differentiations to the facts of the particular case. The appellants seek to invoke the rule that instructions which are inapplicable to the particular case or to the relief sought therein ought not to be given. Conceding this to be the rule, it cannot be rigidly applied to the giving of instructions which are general in character and which have for their evident purpose that of clarifying the minds of the jurymen upon the general subject to which they relate. We do not think that the action of the trial court, with this manifest object in view, was prejudicial error in this case. The court further instructed the jury as follows:

> "I instruct you that the law of the road provides that a motor vehicle approaching from behind the pedestrian walking in the same direction, in order to pass such pedestrian should turn to the left. * * *"

The appellants complain that this instruction was erroneous, but conceding it to be so we are unable to see that the defendants could have in any way been prejudiced by it, since the physical facts as disclosed by the undisputed evidence in this case, showed that the automobile could not have passed the injured plaintiff except upon her left.

[9, 10] The court further instructed the jury as follows:

> "I instruct you that a pedestrian walking along a public highway should keep a lookout ahead for vehicles approaching from in front, but such pedestrian, having no knowledge of an automobile about to approach from behind is not expected to contemplate the approach from behind of any automobile, and under such circumstances would be under no legal duty to look back or watch behind to see whether he or she was in danger of being struck or run down from behind."

It is the contention of the appellants that this instruction, while not in itself bad law, should not have been given because inapplicable to the facts of the instant case. We are not sure that the appellants are altogether correct in this assertion. It is true that the injured woman testified that she had looked back and saw the approaching vehicle a few moments before its impact upon her; but it is also true that the young son of the defendants who was driving the car testified that he was watching the woman as he approached her and that so far as he saw she never looked back toward his machine. The jury may have believed the testimony of the young man in this regard, in which case the foregoing instruction would be applicable. A like observation applies to another instruction following the latter one and has reference to the duty of a driver approaching a pedestrian on the highway from behind to sound his horn or other warning in order to make certain that the foot passenger is aware of his rearward approach. The undisputed evidence in the case is to the effect that the driver did not sound his horn or give other warning of his approach, and there is some evidence in the case tending to show that the woman was not aware of his approach since the main defense offered in the case was that the woman stepped suddenly from the side of the road onto its traveled portion, directly in front of the approaching car, and when it was so near to her as to render it impossible to avoid the impact. Under the circumstances we are unable to say that the giving of the foregoing instructions constituted prejudicial error.

[11, 12] In concluding its charge to the jury the court gave the following and final instruction:

> "I think you have been instructed now on every possible legal phase of the case. The question for you to decide after all is whether or not at the particular time shown by the evidence the defendant Albert F. Scheidecker, Jr., was guilty of negligence. Of course the testimony going both before and after the incident may throw light upon the real situation, and you are to consider all of the evidence in the case in determining your verdict."

It is quite apparent that the court in adding these closing words to the general body of its instructions was not intending to comprehensively cover the subject, or to state the whole law of the case, or to contradict or vary the effect of its former instructions. It is argued by the appellants that this instruction withdrew from the minds of the jurors all questions relating to the contributory negligence of the injured plaintiff, but obviously such was not the intent of the court. It does not by this instruction tell the jury that if they should find the defendant named to have been negligent they must bring in a verdict for the plaintiffs. Its utmost intendment was to advise the jury that the primary question to be determined by it was the negligence of the driver of the car. In this aspect the instruction was entirely correct, since if it should be found that he was not negligent at the particular time of the accident all such secondary questions as the contributory negligence of the plaintiffs would become immaterial, since in the absence of such primary negligence in the driver of the car they would not be entitled to recover. The appellants further argue that the foregoing instruction withdrew from the jury the question as to whether the defendant's negligence was the proximate cause of the injuries complained of, and urge that the court did not elsewhere in its instructions give an instruction as to proximate cause. We think the instructions fairly construed cover this subject. The court charged the jury as follows, evidently at the defendant's request:

> "I instruct you that the plaintiffs in this action are not entitled to recover damages unless it is shown by a preponderance of the evidence that the defendants were guilty of negligence in the manner stated in plaintiffs' complaint, and, if the plaintiffs fail to prove such negligence on the part of defendants, your verdict must be in favor of the defendants."

A finding by the jury that the defendants were guilty of negligence "in the manner stated in the plaintiffs' complaint" would of necessity amount to a finding that the negligence of the defendant as alleged and found was the proximate cause of the stricken woman's injuries. We find no prejudicial error in the instructions of the court, except in so far as it might be inferred therefrom that the jury was entitled to bring in a verdict against Mary L. Scheidecker as to whom, as already stated, there is no sufficient evidence to warrant a judgment against her.

The judgment is reversed as to Mary L. Scheidecker, and is affirmed as against the other two defendants.

We concur: LENNON, J.; LAWLOR, J.; WASTE, J.

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193 Cal. 664

PIPER et al. v. BIG PINE SCHOOL DIST. OF INYO COUNTY et al. (S. F. 10953.)

(Supreme Court of California. June 2, 1924.)

1. Schools and school districts 🔑148—Enjoyment of privilege of attending public schools held enforceable rights vouchsafed to those entitled to attend.

The enjoyment of privileges of attending public schools is an enforceable right vouchsafed to all who have a legal right to attend the public schools, which cannot be enjoyed as a matter of right by those who, from choice or compulsion, attend schools without the control, supervision, and regulation of the state educational departments.

2. Schools and school districts 🔑9—Education of children state obligation.

The education of the children of the state is an obligation which the state took over by the adoption of the Constitution and is exclusively a function which cannot be delegated to any other agency.

3. Constitutional law 🔑220—When denial to children of admittance to common schools solely because of racial differences violates Fourteenth Amendment.

While the privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, because the general system of education is distinctly a state affair, the denial to children whose parents, as well as themselves, are citizens of the United States and of the state of their residence, of admittance to the common schools solely because of color or racial differences without having made provision for their education equal in all respects to that afforded persons of any other race or color, is a violation of Const. U. S. Amend. 14.

4. Constitutional law 🔑70(1)—Courts not concerned with economic consequences to school district if required to maintain separate school for Indian children, question being for Legislature.

That it would add to the cost of a school district should it be required to maintain a separate school for Indian children *held* a matter for which the courts are not responsible, it being an economic question proper to be addressed to the Legislature.

5. Schools and school districts 🔑151 —Indian child held entitled to attend school of district of her residence, though eligible to attend federal school for Indians, in same district.

Petitioner, an Indian child whose parents as well as herself are citizens of the United States and of the state and who never belonged to any tribe within Dawes Act of 1887 (U. S. Comp. St. § 3951), was entitled to attend as a pupil a school conducted by the governing body of the school district of which she is a resident and a citizen, in view of Const. art. 9, §§ 1, 5, and Const. U. S. Amend 14, and could not be excluded under Political Code, § 1662, subds. 2, 3, merely because she was an Indian and as such was eligible to attend a federal school for Indians situate in same district; St. 1921, p. 1673, § 1, subds. 3, 4 (known as Compulsory Educational Law), not applying.

In Bank.

Original petition for mandamus by Alice Piper, by Pike Piper, her guardian ad litem, and others, against the Big Pine School District of Inyo County and others. Writ granted.

J. W. Henderson, of Eureka, for petitioners.

U. S. Webb, Atty. Gen., Frank English, Deputy Atty. Gen., and Jess Hession, Dist. Atty., of Independence, for respondents.

SEAWELL, J. This is an application for a writ of mandamus to compel the trustees of Big Pine school district of Inyo county, this state, and its teacher, to admit and receive into said school as a pupil thereof Alice Piper, a female Indian child of the age of 15 years, and a resident of said district, who has been excluded from attendance upon said school. Big Pine school district is a part of the common or public school system of this state, organized and maintained in obedience to the constitutional mandate and the general school laws of the state. The guardian ad litem, Pike Piper, and his wife, Annie Piper, persons of the Indian race and blood, are the parents of petitioner, Alice Piper. It is admitted by the answer that both parents and petitioner are citizens of the United States and of this state, and that neither the petitioner nor either of her parents has ever lived in tribal relations with any tribe of Indians or has ever owed or acknowledged allegiance or fealty of any kind to any tribe or "nation" of Indians, or has ever lived upon a government Indian reservation, or has at any time been a ward or dependent of the nation. No separate school for Indian children has at any time been established by the governing body of said school district, but the United States government, under the direction and supervision of the Department of the Interior, has established and does now maintain a school for the education and training of members of the Indian race within the territorial boundaries of said school district, to which school petitioner is eligible as a pupil. No objection is made to the admission of petitioner to said public school other than that she is a person of Indian blood. Petitioner alleges, and respondents admit, that she is now and at all times mentioned in said petition has been a person of good habits and character, in good physical health, and that she is in need of and desirous of obtaining an education such as is obtainable in the public schools of this state, and that her parents are desirous that she should obtain such an education. As a citizen of the state, under the foregoing circumstances, she claims the right to be admitted to and received into said school, and challenges the constitutionality of the provisions of section 1662, subdivisions 2 and 3, of the Political Code as amended (Stats. 1921, p. 1160), so far as it attempts to confer upon the governing body of the school district the power to exclude Indian children, because of blood differences alone, from attending a district public school maintained under the authority of the laws of the state, provided the United States government maintains an Indian school within said school district and the Indian children residing within said district are eligible for attendance upon such Indian school, as provided by said subdivisions 2 and 3 of section 1662. Said section so far as it directly bears upon the question of the education of Indian children is as follows:

"1662. First. The courses of study for the day elementary schools of California shall embrace eight years of instruction; and such courses must allot eight years for instruction in subjects required to be taught in such schools and may allot not more than two years for kindergarten instruction.

"Second. The day elementary schools of each school district of California shall be open for the admission of all children between six and twenty-one years of age residing within the boundaries of the district, including Indian children whose education may not otherwise have been provided for by the federal government, and may be open for the admission of adults if the governing body of the district deem such admission advisable; provided, that where kindergarten instruction is given in the schools of a district, such school shall admit children to the kindergarten classes at four years of age; and the reports for the kindergarten classes shall be kept and shall be made separate from other school reports; and provided, further, that wherever a school is established for the

> instruction of the deaf, such children may be admitted to such school at three years of age; provided, that the average daily attendance of deaf children who are six years of age or older shall be counted as part of the average daily attendance in the day elementary schools.
>
> "Third. The governing body of the school district shall have power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Chinese, Japanese or Mongolian parentage. When such separate schools are established, Indian children or children of Chinese, Japanese, or Mongolian parentage must not be admitted into any other school.
>
> "It is further provided, that in school districts in Calfornia where the United States government has established an Indian school, or in an area not to exceed three miles from the said Indian school, the Indian children of the district, or districts, eligible for attendance upon such Indian school, may not be admitted to the district school."

It is a claim of respondents that if the school maintained by the federal government corresponds in all respects in grade, course, and hours of study to state schools and otherwise affords equal educational facilities and advantages with the schools maintained by the state or, as intimated, if they be better adapted to the education of members of the Indian race, petitioners would not be prejudiced by being excluded from said state school and could have no reasonable ground of complaint. Respondents justify their action on the authority of said section 1662, Political Code, which they claim to be a valid exercise of legislative power and which in nowise exceeds constitutional limitations. If constitutional guaranties are to be regarded, this contention cannot be sustained.

The policy of the law of this state since its organization with reference to the subject of the education of its citizens finds forcible expression in the language of our earlier and present Constitution and in legislative enactments. By article 9, § 1, of the state Constitution, the advantages and necessities of a universally educated people as a guaranty and means for the preservation of the rights and liberties of the people is thus declared:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."
>
> Section 5. "The Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

By other sections the Constitution provides for the establishment of elementary, high, day and evening secondary schools, vocational and technical schools, kindergarten schools, normal schools, and teachers' colleges as may be established by the Legislature or by municipal or district authority.

[1, 2] The Legislature is commanded by the organic law to provide for the appointment or the election of a state board of education whose duty it shall be to provide, compile, or cause to be compiled, and adopted, a uniform series of text-books for use in the day and evening elementary schools throughout the state. Such books shall be furnished and distributed by the state free of cost or any charge whatever, to all children attending the day and evening elementary schools of this state under such conditions as the Legislature shall prescribe. Both the Constitution and statutes of the state provide for a uniform system and course of study as adopted and provided by the authority of the state. Under this uniform system pupils advance progressively from one grade to another and, upon the record made, are admitted from one school into another pursuant to a uniform system of educational progression. The enjoyment of these privileges are enforceable rights vouchsafed to all who have a legal right to attend the public schools which cannot be enjoyed as a matter of right by those who, from choice or compulsion, attend schools without the control, supervision, and regulation of the educational departments of the state. The education of the children of the state, into whose keeping, sooner or later, the preservation of the "rights and liberties of the people" must be committed, is not only directed by but also protected and safeguarded by a state board of education vested with supervisory power against the teaching of doctrines that might have the tendency of purpose of destroying the fundamental principles upon which our government rests. It is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state.

[3] The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States. The federal Constitution does not provide for any general system of education to be conducted and controlled by the national government. It is distinctly a state affair. Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 Pac. 351; Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558. But the denial to children whose parents, as well as themselves, are citizens of the United States and of this state, admittance to the common schools solely because of color or racial differences without having made provision for their education

equal in all respects to that afforded persons of any other race or color, is a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws." For an application of this amendment to the subject before us, see 11 Cor. Jur. 805.

The early case of Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405, considered the provisions of the Constitution of 1849 relative to educational affairs which, in all material respects were similar to those of the present Constitution. There an application for a writ of mandamus to compel the admission of a person of African descent into the public schools of the city and county of San Francisco was denied upon the ground that a separate school had been established by the governing body of the district with like facilities and advantages with those maintained for the general public. The court said:

> "The opportunity of instruction at public schools is afforded the youth of the state by the statute of the state, enacted in obedience to the special command of the Constitution of the state, directing that the Legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district, at least three months in every year, etc. (article 19, sec. 3). The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor. * * * The public law of the state—both the Constitution and statute—having established public schools for educational purposes, to be maintained by public authority and at public expense, the youth of the state are thereby become pro hac vice the wards of the state, and under the operations of the constitutional amendment referred to, equally entitled to be educated at the public expense. It would, therefore, not be competent to [for] the Legislature, while providing a system of education for the youth of the state, to exclude the petitioner and those of her race from its benefits, merely because of their African descent, and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Constitution."

The establishment by the state of separate schools for Indians, as provided by the statute, does not offend against either the federal or state Constitutions. Questions of racial differences have arisen in various forms in the several states of the Union and it is now finally settled that it is not in violation of the organic law of the state or nation, under the authority of a statute so providing, to require Indian children or others in whom racial differences exist, to attend separate schools, provided such schools are equal in every substantial respect with those furnished for children of the white race. "Equality, and not identity of privileges and rights, is what is guaranteed to the citizen." No separation can be had, however, in the absence of statutory or constitutional authority therefor. Ward v. Flood, supra; Wysinger v. Crookshank, 82 Cal. 558, 23 Pac. 54; Crawford v. School District, etc., 68 Or. 388, 137 Pac. 217, 50 L. R. A. (N. S.) 147, Ann. Cas. 1915C, 477 and note; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895; United States v. Buntin, 10 Fed. 730, and note; Roberts v. City of Boston, 59 Mass. (5 Cush.) 198; People, etc., v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; 14 R. C. L. § 18, p. 122; 35 Cyc. 1111.

No dispute arises here as to the political or civil status of petitioner. She is the descendant of an aboriginal race whose ancient right to occupy the soil has the sanction of nature's code. Since the founding of this government its policy has been, so far as feasible, to promote the general welfare of the American Indian, even to the point of exercising paternal care, and, whenever he has shown an inclination to accept the advantages which our civil and political institutions offer, to permit him to enjoy them on equal terms with ourselves. To this end Congress, in 1887, adopted a statute known as the Dawes Act (24 U. S. Stats. at Large 390 [U. S. Comp. St. § 3951]), which provides as follows:

> "* * * Every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

See People v. Bray, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158; Anderson v. Mathews, 174 Cal. 537, 163 Pac. 902.

Petitioner's parents, doubtless, belong to that group of Indians commonly known as California Indians, who do not, and have not within the memory of man, belonged to any tribe of Indians recognized as such by the United States as a distinct political community and which are described, and whose political rights are thus defined in Anderson v. Mathews, supra, as follows:

> "The tribe, so far as we know, never had a tribal government of any sort. Admitting that the original tribe may have had such govern-

ment, yet the plaintiff's group never had any form of self-government of any kind. Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico. The reason for the rule laid down in Elk v. Wilkins [112 U. S. 94], declaring that a tribal Indian is not a citizen of the United States, is wholly wanting here, and therefore this case is governed by the general rule that the place of birth confers citizenship. The plaintiff and his group rather belong to that class of Indians described in Danzell v. Webquish, 108 Mass. 133, and Fletcher v. Peck, 6 Cranch (U. S.) 146 [3 L. Ed. 181], as Indians who have lost their power of self-government and become subject to state laws, and who accordingly must be citizens by birth, since they have never been subject to any jurisdiction other than that of the United States."

See, also, 13 Cal. Jur. 1062; 31 Cor. Jur. 482.

Respondents' contention that section 5, article 9, state Constitution, which provides that "the Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year," etc., is satisfied by the establishment of the federal school in question, is answered by the patent fact that the mandate of the Constitution has been wholly ignored and no legislation whatever has been had in compliance therewith so far as this petitioner is concerned. To argue that petitioner is eligible to attend a school which may perchance exist in the district, but over which the state has no control, is to beg the question. However efficiently or inefficiently such a school may be conducted would be no concern of the state. The public school system of this state is a product of the studied thought of the eminent educators of this and other states of the Union, perfected by years of trial and experience. It is adaptability to the genius of western development and expansion makes it peculiarly important to those who choose to remain in this state where its influence will be felt. Each grade forms a working unit in a uniform, comprehensive plan of education. Each grade is preparatory to a higher grade, and, indeed, affords an entrance into schools of technology, agriculture, normal schools, and the University of California. In other words, the common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges that cannot be denied.

Respondents cite in support of their position subdivisions 3 and 4 of section 1 of an act entitled "An act to enforce the educational rights of children and providing penalties for the violation of this act" (Acts 1903, p. 388, as amended by Stats. 1921, p. 1673), commonly referred to as the "Compulsory Educational Law," which permits children to attend privately conducted schools provided the tutors or instructors of such schools are capable of teaching, and provided, further, that such institutions shall offer instruction in the several branches of study required to be taught in the public schools of this state. Other provisions not important to this discussion, such as the keeping of an attendance record, are within its terms. We think those permissive sections do not strengthen respondents' position and are not relevant to the issue presented. Those sections give to the child or parent or guardian of such child the right to exercise a volition—a choice—as to the kind of school the child shall attend. To permit children to attend privately conducted schools and avoid the penalties prescribed for nonattendance upon the public schools, the compulsory attendance law prescribes an alternative system, this act, however, is in aid of the exercise of a free volition and is not intended as the denial of the right to attend schools supported at the state's expense. We deem it unnecessary to go further in this direction.

[4] Respondents call our attention to the serious effect that the issuance of the writ will have upon the respondent district. Big Pine school district is located in a sparsely settled portion of the state and contains a number of Indian children, who, it is fairly inferable, attend the Indian or federal school, either as a matter of choice or under the belief that they may not, as a matter of right, attend the district school. It appears from the papers in the case that children of nontaxpaying Indian parents are, by government rule or upon other authority, eligible to attend the federal school, but Indian children whose parents are taxpayers are not admitted into said school. The effect of this decision, it is suggested, will probably cause a greatly increased attendance of Indian children upon the district school who cannot be cared for because of the economic or administrative problem which it will create. No doubt it would add to the cost of the district should it be required to maintain a separate school for Indian children, but this is a consequence for which the courts are not responsible. The economic question is no doubt an important matter to the district, but it may very properly be addressed to the legislative department of the state government.

[5] The constitutional guaranties involved in this case are imperative and must be given effect. Petitioner is entitled to be received as a pupil into the school conducted

by the governing body of the school district of which she is a resident and a citizen.

The writ will therefore issue.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; LENNON, J.; RICHARDS, J.; SHENK, J.

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66 Cal. App. 593

KNIGHT et al. v. MARKS et al. (Civ. 4802.)

(District Court of Appeal, First District, Division 1, California. April 17, 1924. Hearing Denied by Supreme Court June 16, 1924.)

1. Appeal and error ⚷1099(4)—Opinion held not to hold that entire clause of lease for deposit as security was void because of provision for liquidated damages.

Opinion on former appeal *held* not to hold void entire clause of lease providing for deposit by lessee as security for performance of lease and as liquidated damages for failure to pay rent, but merely the provision for liquidated damages to be void, and the judgment, to the extent of recovery of liquidated damages, unauthorized.

2. Landlord and tenant ⚷184(2)—Provision of lease for deposit as general security valid though provision for liquidated damages void.

Provision of lease for deposit as general security for performance of lessee's covenants is valid, and may be enforced, disregarding the void attempt of lease to fix liquidated damages for failure to pay rent.

3. Principal and surety ⚷45 — Finding that transaction was loan sustained by evidence.

Finding that $8,000 represented by check of B. to M., which M. indorsed and deposited in bank as security for his obligations under lease from K., was loaned by B. to M. so that B. was not as to it surety for M. on the lease, *held* sustained by the evidence.

4. Evidence ⚷383(7)—Recital of contract evidence of nature transaction in favor of third person.

That agreement between B. and M., made immediately after M. indorsed and deposited in bank as security for his obligations under lease to him from K. check of $8,000 from B. to M., recited, Whereas, B. has loaned to M. $8,000 for purposes set forth in the lease, is evidence in favor of K. of the transaction being a loan by B. to M., though K. was not party to and did not know of the agreement.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Thomas G. Knight and another, executors, against Benjamin L. Marks and others. From a judgment for plaintiffs, defendant Joseph C. Bianchi appeals. Affirmed.

Geo. Clark Sargent, of San Francisco, for appellant.

Elliott M. Epsteen, of San Francisco, for respondent Marks.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent German Savings & Loan Society.

Peter A. Breen and Percy E. Towne, both of San Francisco, for other respondents.

ST. SURE, J. This is the second appeal in this case. The action was brought to recover money claimed to be due to the plaintiffs' testatrix upon a lease executed by her to Benjamin L. Marks on October 22, 1908. Plaintiffs sought to obtain liquidated damages for the nonpayment of rent, and to forfeit a deposit held by the German Savings & Loan Society as security. The cause was first tried by a jury, and upon the verdict judgment was rendered in favor of plaintiffs and against Marks for the sum of $2,900, and against Bianchi and the German Savings & Loan Society for the sum of $11,222.87. From this judgment the defendant Joseph C. Bianchi appealed. The Supreme Court reversed the judgment upon the ground that, the breach of the lease complained of being merely nonpayment of rent, plaintiffs were not entitled to liquidated damages under section 1670 of the Civil Code. Knight v. Marks, 183 Cal. 354, 191 Pac. 531. Upon the filing of the remittitur in the court below plaintiffs amended their complaint, and upon the second trial made no claim to liquidated damages, but claimed that the deposit was a general security for the lease, and that they had the right to apply it in satisfaction of unpaid rent.

Defendant Bianchi set up six special defenses in his answer. The first is to the effect that the money deposited was, at the time of the deposit, the property of C. D. Bianchi; that Mrs. Knight had been informed prior to and at the time of the deposit that the money deposited was the property of Bianchi, and that it was furnished by Bianchi for the purpose of making the deposit, and that it was only pledged by Bianchi as security for the obligations of Marks, and that Marks had no other interest in it. The second defense pleads a judgment in an action pending in the superior court and numbered 56400, wherein Bianchi was plaintiff and B. L. Marks and the German Savings & Loan Society were defendants. The third defense is a narration of the various provisions of the lease secured by the deposit. The fourth defense alleges that by an executed oral agreement between these plaintiffs, as executors of the will of Mrs. Knight, and Marks as lessee, made on or about the 1st day of January, 1916, the rent under the lease was reduced from $1,000 to $700 per month, and that all rental due under the lease has been paid. The fifth defense is that the judgment upon the former trial is final and bars the further prosecution of this action. The sixth defense alleges that defendant Marks, with the written consent of plaintiffs, and without the consent of defendant Joseph C. Bianchi, assigned the lease to the Central Garage Company, and that said assignee took possession of and occupies the premises as tenant of plaintiffs and as assignee of Marks.

The trial court found that the money deposited was loaned to Marks by C. D. Bianchi, and that at the time of the deposit Marks was the owner thereof; that it is not true that Mrs. Knight had been informed that the sum deposited was the property of C. D. Bianchi, nor that it was furnished by Bianchi as security for the obligations of Marks under the lease, nor that Marks had no other interest therein; that it is not true that the money was pledged by C. D. Bianchi as security for the obligations of said Marks under the lease, or otherwise. The trial court further found that Serena H. Knight was not a party to nor interested in said action in the superior court, numbered 56400, and that the said action did not in any manner or to any extent affect or alter the right, title, or interest of said Serena H. Knight in or to said fund. The trial court further found that the allegations of the fourth defense are not true, and as to the fifth defense it was found that the judgment recovered in the former trial is not final nor a bar, as said judgment has been reversed and set aside by the Supreme Court. It was further found that the allegations contained in the sixth defense are untrue.

Judgment was given in the trial court in favor of the plaintiffs and against the defendant Marks for the sum of $16,400 unpaid rent, and $200 attorneys' fees as provided in the lease. The judgment further declared that the defendant Bianchi had an interest in the deposit, subject to the right of plaintiffs to apply the deposit and accrued interest in satisfaction of the judgment against Marks, and provided that any balance of the deposit remaining after the satisfaction of the judgment against Marks should be paid to Bianchi. From this judgment the defendant Bianchi alone appeals.

The appellant contends, first, that, as the Supreme Court has held that the provision in the lease for the application of the deposit to the payment of liquidated damages is void, the security cannot be taken for any other purpose; second, that the ruling of the lower court that the $8,000 was loaned by C. D. Bianchi to Marks cannot be upheld because delivery of the money to the debtor is necessary to constitute a loan, and no such delivery was shown; third, that the deposit in the German Bank was a pledge; and, fourth, that, when C. D. Bianchi furnished Marks with the money with which to make the deposit, the former became a surety, and was discharged when Mrs. Knight and Marks entered into the contract of May 13, 1912, modifying the lease by extending the term and making other changes.

The facts on this appeal and those presented on the first appeal, are almost identical. We quote and adopt the following clear and succinct statement from the opinion of Mr. Justice Shaw in Knight v. Marks, 183 Cal. 354:

> "The lease embraced property upon which the lessor agreed to erect a building in accordance with plans and specifications annexed thereto. * * * It was for the term of 10 years, beginning 30 days after the completion of the building. The total rental was $120,000, payable in monthly installments of $1,000 each on the 1st day of each month, and Marks was to pay $200 as attorneys' fees in any action by the lessor against the lessee for a breach of any covenant of the lease. It provided that the lessee should furnish $8,000 as security for the performance of the covenants on his part, which sum should be deposited in the German Savings & Loan Society in the names and for the joint account of the lessor and lessee, there to remain with such interest as should accumulate thereon, provided that, in the event of failure to pay rent or other breach of covenant by Marks, the 'lessor may withdraw from the said account the entire sum, together with the accumulated interest, as agreed liquidated damages for the breach,' and that upon the termination of the lease by expiration of time or otherwise, any balance of the money and interest so on deposit and not applied to the claims of the lessor should be returned to the lessee. * * * The evidence showed that at the time the money was deposited C. D. Bianchi, as a loan to Marks for the purposes of said lease, gave him a check for $8,000 to be used in making said deposit; that the check was indorsed by Marks and transferred to the bank, and that the deposit was, by that means, effected. Upon the deposit being made, Marks, in writing, assigned all his interest therein to C. D. Bianchi, 'subject to the lien thereon of said Serena H. Knight,' under the lease, as security for the repayment of said sum to Bianchi by Marks, and Marks therein expressly promised to repay the same."

[1, 2] Appellant contends that the entire clause of the lease under which the deposit was made is void because that clause contains a provision for liquidated damages; and in this connection it is urged that the Supreme Court on the first appeal (Knight v. Marks, supra) held that the provision in question was void in toto. The provision in question reads as follows:

> "It is further covenanted and agreed by and between the parties that the lessee shall furnish the sum of eight thousand dollars ($8,000) in cash, as security for the performance of the covenants in this lease contained on his part to be performed, and that the said money shall be deposited in the German Savings & Loan Society, in the names and for the joint account of the lessor and the lessee herein above named, and that the same shall there remain, together with such interest as may accumulate thereon, during the term herein prescribed, provided that in the event that the lessee shall fail at any time to pay any installment of rent herein provided, or shall fail to

> observe or perform any of the covenants herein prescribed, then and in that event the lessor may withdraw from the said account the entire sum together with the accumulated interest, as agreed liquidated damages for breach of the said covenants or covenant. At the expiration of the term of this lease or the sooner termination thereof by agreement, and not otherwise, any balance of said moneys which may not have been applied to the claim of the lessor as hereinabove provided, shall be returned to the lessee with such interest as may have accumulated."

A careful reading of the decision on the former appeal discloses that the Supreme Court did not hold that the entire clause above quoted was void. The Supreme Court said:

> "The only breach of the covenants of the lease here in question that is alleged is the failure to pay the stipulated rent," and "this action was merely for the rent due and the stipulated damages."

The Supreme Court held:

> "It could not be difficult or impracticable to fix the damages in such a case. It was a breach of an obligation to pay money only and the damage was 'the amount due by the terms of the obligation, with interest thereon,' Civ. Code, § 3302. The parties cannot overcome this objection in such a case by any provision in the contract itself, for such a provision is expressly declared to be void. Civ. Code, § 1670; Green v. Frahm, 176 Cal. 262, 168 Pac. 114; Jack v. Sinsheimer, 125 Cal. 564, 58 Pac. 130. It follows that the plaintiff was not entitled to anything as liquidated damages for the breach of contract alleged, and that the verdict and judgment are, to that extent, without support in the law and evidence."

Appellant approves the maxim that a contract should be construed to make it valid rather than void, but argues that—

> "When the court says that the 'provision' is void, it does not mean merely the words 'liquidated damages' but all of the context which is tributary to those words."

Our attention has not been called to any authority which gives to section 1670 of the Civil Code a construction contrary to that indicated in Green v. Frahm, 176 Cal. 259, 168 Pac. 114, and Knight v. Marks, supra, the opinions in both cases being delivered for the Supreme Court by the same learned justice. In Green v. Frahm, a clause in a lease similar to the clause in the lease under discussion here was under consideration, and there the court held that the part of the clause attempting to fix liquidated damages must be treated as a void provision and disregarded entirely. The conclusion reached by the Supreme Court on the first appeal of this cause is quite plain; we repeat it:

> "It follows that the plaintiff was not entitled to anything *as liquidated damages for the breach of contract alleged*, and that the verdict and judgment are, *to that extent*, without support in the law and evidence." (Italics ours.)

This language admits of no such construction as appellant seeks to place upon it. We think that the provisions of the lease may be enforced disregarding the attempt to fix liquidated damages in case of breach. The deposit was a general security for the lease and could be applied in satisfaction of unpaid rent (Green v. Frahm, supra). In line with such view we are constrained to say that, in our opinion, there is nothing in the lease which is against public policy.

[3, 4] The further contentions of appellant that the finding of the trial court that the $8,000 was loaned by C. D. Bianchi to Marks cannot be upheld because delivery of the money was not shown, that the deposit was a pledge, and that when C. D. Bianchi furnished Marks with the money with which to make the deposit the former became a surety, will be considered and disposed of together.

On the first appeal the Supreme Court held that at the time the deposit was made the money therefor was loaned by C. D. Bianchi to Marks, and that "by the terms of the agreement and of the loan the title to it passed absolutely to Marks."

The evidence before us shows that immediately after the deposit of $8,000 was made C. D. Bianchi and Marks entered into an agreement which recited, among other things:

> "And whereas, the party of the second part herein [C. D. Bianchi] has loaned to said party of the first part herein [Marks] the said sum of eight thousand ($8,000) dollars, for the purposes as set forth in said lease. * * *"

This agreement, made on the day of the deposit, is convincing evidence as to the understanding between Marks and Bianchi relative to the ownership of the $8,000. That Mrs. Knight was not a party to the agreement, or did not know of it, does not detract from its value as evidence of the nature of the transaction between Marks and Bianchi. It is true that appellant, upon the second trial, offered testimony by Marks to show knowledge on the part of Mrs Knight that Marks was going to obtain the money for deposit from Bianchi. But such additional evidence merely accentuates an existing conflict which makes conclusive the finding of the trial court in the premises. Appellant claimed on the first appeal, as he claims here (see Knight v. Marks, supra)—

> "the absolute and immediate right to the fund, on the ground that, by the terms of an alleged agreement between Mrs. Knight, Marks, and C. D. Bianchi at the time the deposit was made, it was understood between them that said Bianchi should deposit the money as security for the performance by Marks of his obligations under the lease, and consequently that said Bianchi and the fund he so deposited stand in the relation of a surety for Marks to Mrs. Knight for such performance. It is claimed, further, that in May, 1912, after the lease had run nearly three years, Mrs. Knight and Marks made an

agreement in writing constituting a material alteration of the terms of the lease, so far as the obligations of Marks thereunder were concerned, which alteration it is argued operated to release the fund and transfer the same to Bianchi as the absolute owner thereof, under his assignment from Marks. It does not appear that Mrs. Knight had any knowledge of the terms of the agreement between C. D. Bianchi and Marks whereby the money was loaned to Marks for the purpose of making the deposit, and was immediately assigned by Marks to Bianchi as security for the repayment to Bianchi of the money so loaned by him to Marks. By the terms of the agreement and of the loan, the title to it passed absolutely to Marks. Mrs. Knight was not informed that the right of Marks thereto, such as it was, had been pledged to Bianchi for the repayment of the loan to him by Marks. The evidence does not show that she knew that Bianchi was, or claimed to be, a surety for Marks with respect to this money. Consequently the alteration of the lease, even if there were such alteration, did not operate to release her claim to the money so deposited It may be added that the agreement, which it is claimed changed the terms of the lease, merely gave the consent of the lessor to the lessee to make some alterations in the premises which he desired to make and thereafter to use the premises as a garage instead of a stable. Prior to that time he had been using it as a stable. There was no covenant in the original lease which restricted the lessee's right to use the premises for anything other than a stable. We do not perceive how the consent of the lessor to the proposed alterations operated in any respect to change the obligations of Marks for which the money was deposited as security." Knight v. Marks, supra.

Believing as we do, that the sum of $8,000, deposited as security for the performance of the covenants of the lease, was loaned by C. D. Bianchi to Marks, and that the latter had title to the money at the time of the deposit, and that the findings of the trial court are supported by the evidence and the law, we deem further discussion unnecessary. The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PEOPLE v. GERE. (Cr. 1067.)

(District Court of Appeal, Second District, Division 1, California. April 18, 1924.)

1. Criminal law 🔑338(4, 5)—Evidence of other transactions admissible to show conspiracy.

In prosecution for grand larceny by defrauding scheme known as pay-off game, evidence that money was obtained from another than complaining witness, by defendant's confederates by the same means a few days before, was admissible to show conspiracy, though defendant's personal participation in other offense was not shown, and even though defendant became member of conspiracy after other transaction occurred.

2. Criminal law 🔑576(2) — Habeas corpus proceedings by defendant "good cause" for failing to bring prosecution to trial within 60 days.

Habeas corpus proceedings by defendant, which delayed proceedings, constituted "good cause" for failing to bring prosecution to trial within 60 days after filing of indictment under Pen. Code, § 1382.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Cause.]

3. Larceny 🔑68(2)—Intention is question for jury.

Intention of persons obtaining money by the "pay-off" scheme, which under Penal Code, § 21, is manifested by circumstances connected with offense, is a question for the jury.

4. Criminal law 🔑829(1)—Refusal of instruction covered by given instruction not error.

It was not error to refuse a requested instruction covered in substance by given instruction.

5. Criminal law 🔑1173(2)—Error in refusal of instruction held not to result in miscarriage of justice.

If it was error to refuse to instruct jury concerning right to decide questions of handwriting for themselves despite testimony of experts, *held* that it did not result in miscarriage of justice.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Thomas P. Gere was convicted of grand larceny, and appeals. Affirmed.

See, also, 221 Pac. 689.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and H. H. Linney, Deputy Attys. Gen., for the People.

HOUSER, J. This is an appeal from a judgment of conviction on a charge of grand larceny and from an order denying defendant's motion for a new trial.

There were five counts in the indictment under which defendant was prosecuted. On motion of the district attorney three of the counts were dismissed before the trial commenced, and a fourth count was likewise dismissed after the evidence with reference thereto had been introduced.

The point is here raised that the trial court erred in admitting any evidence as to the count which was dismissed during the pendency of the trial; that all such evidence should have been stricken out, and the jury instructed that it should not be considered in arriving at a verdict in the case. The larceny of which defendant was convicted was effected by means of a fraudulent stock brokerage deal which is described in the case of People v. Berry (Cal. Sup.) 215 Pac. 74, as follows:

"The defrauding scheme is what is known in police parlance as the 'pay-off game'; and when reduced to its brutal last analysis consists in making some 'honest' tourist to the beautiful shores of California believe that he can make a huge fortune by 'playing' Wall street through some local 'brokerage house,' and, in any event, he can escape liability for loss, if he loses, by the use of fictitious or 'phony' checks or 'credit slips.' He 'wins' anywhere from $10,000 to a quarter of a million dollars; some trouble arises with the 'brokerage house' in the matter of paying the 'winnings,' and this trouble is usually over the 'credit slips,' in that the money 'won' cannot be paid until 'credit is established' in order that the 'brokerage house' may know that the 'victim' could have paid his losses if he had lost; the victim usually goes hurriedly back to his home town and there converts everything available into current funds; more hurriedly he returns here to collect his 'winnings'; another 'play' is made; some 'mistake' is made therein and all is 'lost'; he is then sent to some far off city to wait the arrival of his associates and all will be regained by 'playing' Wall street again on the money to be furnished by his associates—who never come."

In the count of the indictment which resulted in the conviction of defendant it appeared that defendant, with the aid of at least two confederates, successfully obtained the money alleged to have been stolen, from a man by the name of Herr, and in the count of the indictment on which evidence was heard, but which count was dismissed on motion of the district attorney, although defendant's personal participation in the commission of that offense was not shown, it very clearly appeared that almost identical means to defraud a man named Donahue were used by the same men who had assisted defendant in the Herr transaction. Under appropriate instructions the evidence regarding the Donahue transaction was permitted to go to the jury on the theory that it tended to prove a conspiracy to commit the crime of grand larceny and that defendant was one of the conspirators. In the case of People v. Berry, supra, Berry was shown to have had active dealings with several different persons, including this defendant and each of his two alleged confederates, in connection with "stock brokerage" matters of a similar nature to that herein set forth; and the Supreme Court, in passing upon the question of whether or not a conspiracy was established, said that the evidence demonstrated the existence of a conspiracy and that there was no doubt "that evidence of each and all of the enumerated transactions, whether covered by the indictment or not, was admissible under the similar offense rule as tending to prove a conspiracy. The interlocking of the participants in the various frauds, their common use of the same fictitious entities, their uniform insistence that their banking needs in carrying out their numerous swindling operations should be intrusted solely to the defendant as assuring an element of safety, were facts justifying an inference that a general conspiracy existed."

[1] The evidence here as to the Donahue transaction, being based upon a specific count in the indictment against defendant, was unquestionably originally admissible, and the fact that that particular count was dismissed did not necessarily render the evidence received in support of such count improper for the consideration of the jury, if such evidence tended to prove the existence of a general conspiracy to commit grand larceny, together with defendant's connection therewith. An examination of the evidence herein discloses the fact that to all intents and purposes the system employed in the matter in which Herr was the victim was identical with that used with reference to Donahue. The same persons, with the exception of this defendant in the second affair, were involved in each of those transactions. Judging from the evidence in this case, as well as from the conclusion reached by the jury herein, a conspiracy undoubtedly existed as among defendant and his confederates to commit the crime of grand larceny as to Mr. Herr's possessions. The evidence as to the Donahue matter very plainly indicates that a conspiracy also existed among certain persons to feloniously obtain money and property from Mr. Donahue, and that such nefarious object was effected on or about January 23, 1920. Twelve days later, according to the evidence, several of the persons concerned in the Donahue case, together with this defendant, succeeded by means similar in all respects to those employed in that case in larcenously obtaining a large sum of money from Mr. Herr. The conspiracy being established in the first case and defendant's connection with a similar conspiracy consisting of the same persons, together with defendant, in the second case, the inference is almost irresistible that the conspiracy was continuous, as far at least as between the first and the second transactions, and the rule is well settled that one who joins a criminal conspiracy is to be considered as a party to all acts theretofore or thereafter committed by any or all of his coconspirators in furtherance of the conspiracy. 12 C. J. p. 579, and cases therein cited. Assuming that this defendant became a member of the conspiracy after the Donahue transaction occurred would constitute no valid objection to the introduction, on the trial of this case, of evidence relating to such transaction for the purpose of showing the existence of the conspiracy (People v. Schmidt, 33 Cal. App. 426, 165 Pac. 555), even though such evidence tended to establish the commission of a similar offense (Dahl v. United States, 234 Fed. 618, 148 C. C. A. 384).

[2] Defendant was arrested for the commission of the several offenses charged in the indictment on August 13, 1923, and his ar-

raignment thereon followed two days later. Section 1382 of the Penal Code provides that, "unless good cause to the contrary is shown," the court must order the dismissal of a criminal action "if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment." It is contended by appellant that because against defendant's objection thereto, the trial of his case was postponed by the court beyond the 60-day period fixed by the statute, defendant was entitled to have the action against him dismissed, and that in the circumstances the court erred in proceeding with the trial. It appears from the record herein that, after the arraignment of defendant, the action was originally set for trial within the time provided by the statute, but that before the date fixed for the trial arrived a petition for a writ of habeas corpus in behalf of defendant and relating to this action was presented to the District Court of Appeal, in which proceeding briefs were filed by respective counsel, after which the matter was taken under advisement by said court until November 16, 1923, when, by its order, the writ was discharged. On November 7, 1923, which was the date on which the case had been set for trial following several previous postponements thereof, the hearing was continued by the lower court until November 21st, at which time the trial was commenced. The record also discloses the fact that the reason for the said several continuances resulting in the action not being tried within the statutory 60-day period after defendant's arraignment, was that the said habeas corpus proceeding was pending in the District Court of Appeal. That proceedings of this nature constitute "good cause" for failure to bring an action to trial "within sixty days after the finding of the indictment" is indicated in the case of Chrisman v. Superior Court (Cal. App.) 219 Pac. 85, and in the same case, on petition for rehearing before the Supreme Court reported in 219 Pac. 85, in passing upon the matter before the court, it is said:

> "Where it is shown, in response to the petition for a writ of mandate, that there was in fact good cause for the delay in the trial of the case, it is immaterial whether or not such a cause was satisfactorily shown to the trial court, for the appellate court will not direct the dismissal of a case where it is shown to its satisfaction that the delay in the trial of a case was for good cause.
>
> "The refusal of the District Court of Appeal to issue a peremptory writ of mandate amounts to a determination by that court that the affidavits on behalf of the respondents show good cause for the delay, which is not overcome by the showing made by the petitioner."

Defendant instituted the habeas corpus proceedings in the District Court of Appeal for the ultimate purpose of testing the right of the superior court to proceed with his trial—his contention being that because the finding of the indictment was of date September 8, 1920, and that defendant was not arrested until August 13, 1923, under the terms of the statute to which reference has heretofore been made (section 1382, Pen. Code), the court was without jurisdiction, and consequently that the action should be dismissed and defendant given his liberty. After a consideration of the facts with reference to the delay as shown by the petition and the return to the writ in that proceeding, it was determined by this court that "good cause" was shown to exist for the delay up to that time, and the writ was discharged. Application of Gere (Cal. App.) 221 Pac. 689. All the postponements of the trial of defendant after his arrest were directly caused by his own act in petitioning this court for the writ of habeas corpus. While it may not have been outside the jurisdiction of the superior court (a point which is not herein attempted to be decided) to proceed with the trial of defendant, notwithstanding the pendency of the habeas corpus proceeding, certainly in the circumstances the "good cause" for the delay referred to in the statute was sufficiently present to authorize the several continuances of the trial to a reasonable time after the decision by this court on defendant's petition for the writ.

[3] Appellant urges the point that the evidence was insufficient to sustain the verdict. The facts of this case cannot have a better general description than those which are given in the case of People v. Berry, supra. It is just possible that in all honesty and in the best of good faith a man might in the nighttime break open a door or a window of another man's house and thereupon enter the house and remove personal property therefrom; and it is likewise true that persons situated as were the parties involved in this transaction might possibly have acted honestly and in good faith; but, after all, the question of the intention with which the act was performed is one of fact to be determined by the jury. Intention is manifested by the circumstances connected with the offense. Section 21, Pen. Code. If the intention of defendant here was to feloniously deprive Mr. Herr of his property (assuming that the intent was followed by asportation), then the crime of larceny was committed. The jury by its verdict declared against defendant's contention, and this court has found nothing in the record which would indicate that the jury reached an erroneous conclusion in that regard. The question of the identity of defendant is also raised, but that matter was likewise one for determination by the jury. There being substantial evidence to justify the conclusion that defendant's identity was clearly established, the court cannot usurp the functions of the jury and hold to the contrary.

[4] Appellant further suggests prejudicial

error as against defendant in that, at his request, the court refused to give to the jury certain instructions. The first of these instructions directs attention to some of the evidence given on the trial from which the question might arise as to the nature of the offense, if any, committed by defendant; but, while such instruction was not in terms submitted to the jury, there was another instruction given which adequately covered the situation. The second instruction, which was likewise offered by defendant and by the court refused to be given to the jury, dealt entirely with the sufficiency of the evidence to establish the identification of defendant. While there was no direct instruction given to the jury touching the particular matter contained within the refused instruction, several other instructions, general in their nature, were given to the jury, which were broad enough to thoroughly inform the jury on the legal point in question. The last instruction offered by defendant and which was rejected by the court, in effect advised the jury that, as to expert testimony regarding handwriting, the jury had the right to use its own judgment and decide the fact, not necessarily from the testimony given by any expert, but by the jury themselves from their own consideration of the exhibits before them. Among the instructions given are found several expressions such as "you are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case"; also, "you are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption of law, or other evidence that satisfies your minds"; also, "the jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case."

[5] It appears from the record that the various and sundry examplars of the handwriting of defendant were filed as exhibits in the case. The jury, of course, could have had access to them. If the jury thought that any handwriting expert had been mistaken with reference to his testimony, the jury was told that it was the sole judge of the effect thereof. On the one hand, the jury had the right to believe the testimony of any expert; on the other hand, if the jury disbelieved the testimony of said expert, defendant was not injured. But, in any event, after an examination of the entire cause, including the evidence, this court is of the opinion that, even conceding error, as claimed (which this court is not prepared to do), such error did not result in a miscarriage of justice.

The judgment and the order denying the motion for new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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67 Cal. App. 116

HERSOM v. HERSOM et al. (Civ. 4442.)

(District Court of Appeal, Second District, Division 1, California. May 1, 1924.)

1. Judgment ⟹430—Failure to assert fraud in foreclosure suit precluded setting aside default judgment in equity.

Wife was precluded from setting aside default decree of foreclosure against husband's property because of fraud and connivance between her husband and his mother who bought in the property, by her failure to assert such defense in the foreclosure proceeding, though weak physically and poverty stricken, in absence of extrinsic collateral fraud, especially in view of Code Civ. Proc. § 473, providing relief against default suffered through excusable neglect.

2. Judgment ⟹405—Mere poverty of defendant insufficient ground to set aside judgment.

Mere poverty of a defendant, unaccompanied by any effort of the prevailing party to prevent fair hearing of the cause, is never sufficient ground for suit in equity to set aside judgment.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Carrie Hersom against Milton Hersom and another to set aside a default foreclosure judgment. Judgment for defendant, and plaintiff appeals. Affirmed.

C. L. Kilgore, of Los Angeles, for appellant.

Harry K. Smith, of Los Angeles, for respondent Milton Hersom.

Rollin L. McNitt, of Los Angeles, for respondent Benjamin F. Hersom.

CONREY, P. J. This action was commenced by the plaintiff against Milton Hersom and Inez E. Hersom. Prior to the trial of the action, Inez E. Hersom died, and Benjamin F. Hersom, executor of her last will and testament, was substituted in her place as defendant.

Carrie Hersom and Milton Hersom, at all of the times mentioned in the complaint, were husband and wife. They owned as community property several parcels of land. They executed three several notes and mortgages to different mortgagees, each of them being a lien upon a part of this real property. In May, 1919, Inez E. Hersom, who was the mother of defendant Milton Hersom, purchased these mortgages and caused them to be assigned to herself. On the 2d day of August, 1919, she commenced three actions, each action being for the foreclosure of one of said mortgages. In each action summons was served upon Carrie Hersom, defendant therein, on the 13th day of September, 1919, and her default entered on the 29th of the same month. The decrees of foreclosure were entered on the 28th day of October, 1919, and sales under said decrees were made in January, 1920. In each instance Inez E. Hersom became the purchaser of the property, and the sheriff's deeds were duly issued to the purchaser in January, 1921, after the expiration of the several periods of redemption.

The plaintiff herein and the defendant Milton Hersom had separated in July, 1918, and the husband had commenced an action for divorce. After that time they never lived together. In that divorce action relief was denied to both parties. A second divorce action was commenced by the husband on March 16, 1920. In that action an interlocutory decree in favor of the plaintiff was entered on the 30th day of December, 1920, which decree, on appeal, was affirmed. Hersom v. Hersom, 60 Cal. App. 383. 212 Pac. 717.

This present action was brought by Carrie Hersom to obtain a decree setting aside the said several decrees of foreclosure and the sales and conveyances made thereunder, and to establish and declare the plaintiff's alleged rights in said several parcels of real property. In her complaint she did not attack the validity of the mortgages. She alleged that the mortgages were purchased by Inez E. Hersom with money furnished to her by defendant Milton Hersom; that the defendant Milton Hersom allowed the interest thereon to become delinquent for the purpose of instituting forclosure proceedings thereon; that said defendants connived and arranged for said proceedings for the purpose of wrongfully and fraudulently foreclosing the interest of said Carrie Hersom in said property, and that defendant Milton Hersom used the name of his mother for the purpose of defrauding said Carrie Hersom by means of said proceedings. Appellant further alleged that at the time of the commencement of said foreclosure actions, she was in a weakened physical condition and was without funds to contest the same, and was unable to file an answer thereto. Upon issues raised by the answer of the defendants, this action was tried and judgment was entered in favor of the defendants. From that judgment the plaintiff appeals.

In response to issues raised by the complaint and the answer of the defendants, the court found that at the time of service of summons upon Carrie Hersom in each of said divorce actions, she took the copies of complaints and summonses to her attorneys; that the defendant Milton Hersom and his mother did not connive or arrange for said assignment of the mortgages wrongfully or fraudulently; and that the said Milton Hersom did not furnish any money for the purchase of any of said mortgages.

Appellant did not allege and does not contend that anything was done by either Milton Hersom or Inez E. Hersom or any person acting in their behalf to prevent appellant from making her defense, if any she had, in said foreclosure actions. She now complains that the court erred, in that appellant was not permitted to introduce evidence for the purpose of proving that said foreclosure proceedings were in fact fraudulent, as alleged in her complaint, and for the purpose of proving that, by reason of her financial and physical condition at the time of service of the summons, she was precluded from filing any answer because she was without funds "even to pay the fee required by law upon the filing of an answer," and to prove "that she relied upon her attorneys to protect her in the matter of these foreclosures, and that she told her counsel that the foreclosure proceedings were instituted for the express purpose of defrauding her." Such are the claims of appellant as set out in the brief of her counsel herein.

[1, 2] In view of the well-settled law in actions of this character, it at once becomes clear that there is no merit in the appeal. The statement of the case is itself almost a complete decision. Appellant had an opportunity to submit her claims for investigation and determination in the foreclosure actions. If there was any fraud it was something involved in the issues which she could have had determined, by defense in those actions. There was no extrinsic or collateral fraud whereby the jurisdiction of the court in those actions was imposed upon, or whereby the plaintiff in foreclosure prevented or did anything for the purpose of preventing Mrs. Carrie Hersom from presenting to the court her defense, if any she had. This being so, the judgments will not be set aside in an independent equitable proceeding based upon charges of fraud affecting the merits of the actions. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736. The mere poverty of a defendant in an action, unaccompanied by any effort of the prevailing party to prevent a fair hearing of the cause, is never a sufficient ground for a suit in equity to set aside the judgment.

Moreover, as has been suggested by counsel for respondents, appellant had an opportunity, under section 473 of the Code of Civil Procedure, to apply to the court for relief against the defaults taken against her, if she had suffered default through any excusable neglect. "In such case there is no occasion to resort to equity, and it will not be permitted." Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016. Appellant did not attempt to obtain the benefit of that remedy.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

66 Cal. App. 672

WILLIAMS et al. v. WALKER et al.

(Civ. 4577.)

(District Court of Appeal, First District, Division 2, California. April 23, 1924.)

1. Bills and notes 🔑262—Maker liable to accommodation indorser without knowledge of fraud.

Maker of negotiable promissory note is liable to one who, before maturity, in good faith and without notice or knowledge that there was fraud in original consideration or a want or failure of original consideration, indorses note for accommodation of payee, and without maker's request, if such indorser is compelled to pay it upon default of maker, even though after indorsement he acquires knowledge.

2. Bills and notes 🔑262, 379—Accommodation indorser liable to subsequent holder in due course; accommodation indorser, on payment, succeeds to indorsee's rights.

An accommodation indorser is liable to a subsequent holder in due course, though there was fraud in consideration for note, and upon payment he succeeds to right of indorsee against maker.

3. Bills and notes 🔑357, 358—Indorsee "holder for value" where note taken as collateral security for pre-existing debt; indorsee holder for value where note taken for debt then created.

Where a note is taken as collateral security for a pre-existing debt owing to him by his indorser, or for a debt at that time created, indorsee is "holder for value" and in usual course of business, under Civ. Code, § 3106.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder for Value.]

4. Bills and notes 🔑357—One taking accommodation paper by way of pledge "holder for value."

One who takes accommodation paper by way of pledge to secure repayment of a simultaneous loan is a "holder for value."

5. Bills and notes 🔑262—Payment by accommodation indorser prerequisite to recovery from maker.

Payment of note by accommodation indorser is prerequisite to recovery from maker.

6. Bills and notes 🔑262—When execution of note by accommodation indorser constitutes payment of original note entitling recovery from maker.

Where an accommodation indorser has paid note of his principal by executing his own note to holder and it is accepted in payment of first note, he may recover from maker; but it is necessary that there be an express understanding or agreement that new note extinguishes indebtedness evidenced by earlier note.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles Williams and another against W. C. Walker and Harry Chann and another. From an adverse judgment, the last-named defendant and another appeal. Reversed.

Goldman, Nye & Surr, of San Francisco, for appellants.

David Cosgrave and W. A. Andrews, both of San Francisco, for respondents.

NOURSE, J. Action by accommodation indorsers against the payee and makers of a negotiable promissory note for $500, dated January 18, 1918. Judgment was rendered in favor of plaintiffs against all the defendants, from which defendants Chann and Ah Tye appeal. Defendants Chann and Ah Tye were the makers, and defendant Walker was the payee. The payee, defendant Walker, indorsed the note, and at the same time, before maturity, at Walker's request and for his accommodation, plaintiffs also indorsed the note and guaranteed payment of the same, waiving presentation, demand, protest, and notice of nonpayment. Walker immediately thereafter delivered the note to the Merchants' National Bank of San Francisco and received from them $500. The complaint then alleges payment by plaintiffs to said bank, upon demand, of $550, the amount of principal and interest then due upon said note, delivery of the note to plaintiffs, and that "plaintiffs are now the owners and holders of the same." Defendant Walker defaulted in the action. Defendants Chann and Ah Tye in their answer admitted the execution and delivery of the note. For the purposes of this opinion it is sufficient to say that they attempted to plead, by way of defense, fraud in the procurement of the note, want of consideration, and failure of consideration; the note having been given in accordance with the terms of payment of a certain lease of farming land between defendant Walker as lessor, and defendants Chann and Ah Tye, as lessees, which lease it is claimed was obtained by false representations. Because we think the judgment must be reversed for the reasons hereinafter stated, it is unnecessary to pass upon these defenses.

[1-4] The maker of a negotiable promissory note is liable to one who, before maturity, in good faith and without notice or knowledge that there was fraud in the original consideration or a want or failure of the original consideration, indorses the note for the accommodation of the payee, and without the maker's request, if such indorser is compelled to pay it upon default of the maker.

Sheahan v. Davis, 27 Or. 278, 40 Pac. 405, 28 L. R. A. 476, 50 Am. St. Rep. 722; 3 R. C. L. p. 1121. And this is so even though after his indorsement he acquires that knowledge. Sheahan v. Davis, supra; Beckwith v. Webber, 78 Mich. 390, 44 N. W. 330; 3 R. C. L. p. 1121. Such indorser is liable to a subsequent holder in due course and, upon default of the maker, may, at any time after the note becomes due, pay the legal holder, take up the note, and recover from the maker. Upon payment he succeeds to the rights of the indorsee against the maker. Sheahan v. Davis, supra; Beckwith v. Webber, supra; Lill v. Gleason, 92 Kan. 754, 142 Pac. 287; 3 R. C. L. p. 1121; 8 C. J. p. 272, § 425. Where a note is taken as collateral security for a pre-existing debt owing to him by his indorser or for a debt at that time created, the indorsee is a holder for value and in the usual course of business. People's State Bank v. Penello, 59 Cal. App. 174, 177, 210 Pac. 432; Anglo-California Trust Co. v. Wallace, 58 Cal. App. 625, 209 Pac. 78; Civ. Code, § 3106. Also "one who takes accommodation paper by way of pledge to secure the repayment of a simultaneous loan made in consideration of the pledge is a holder for value." 8 C. J. p. 267, § 419. It was alleged by respondents, and found by the trial court (and this finding is not attacked), that the note was hypothecated with the bank for a loan of $500 (the face value of the note). It is not contended that the bank had knowledge of any equities between the original parties to the note. The bank, therefore, being a pledgee for value, before maturity, in good faith and without notice of any infirmity in the note was a holder in due course (Anderson v. Union Bank, 117 Va. 1, 83 S. E. 1080, 1081), and respondents were liable to them.

[5] In this action it would have no effect upon the indicated rights and liabilities of respondents whether or not the defenses above referred to would be available to appellants in an action between the original parties to the note, if respondents indorsed without knowledge of any equities in favor of appellants. Passing the question of respondents' prior knowledge, which is one of the points urged by appellants, one other prerequisite to respondents' recovery from the makers (appellants) was payment by them to the bank. Sheahan v. Davis, supra; 3 R. C. L. pp. 1121, 1122. The trial court found that—

> "Prior to the commencement of this action, at the time said promissory note became due, upon demand made upon plaintiffs by said Merchants' National Bank, plaintiffs paid to said Merchants' National Bank the money then due and owing by the terms of said promissory note, principal and interest amounting to the sum of $550, and upon the payment of which sum said Merchants' National Bank then and there delivered to plaintiffs said promissory note and plaintiffs were, at the time of the commencement of this action, and are now, the owners and holders of the same."

Appellants attack this finding as unsupported by the evidence, and we think the criticism is merited.

[6] The evidence on this phase of the case was that on March 11, 1920 (the note became due April 18, 1918), respondent Williams paid the bank $50 in cash on account of the principal due on this note and gave his personal note to the bank for $450, the amount of the balance due on the original note; that at different times up to January 3, 1921, he paid various sums, amounting to $125, in addition to the first $50 payment; that on June 30, 1920, he gave a new note for $375, the decreased amount of the indebtedness, and a new note for the same amount on November 29, 1920; that on January 28, 1921, having reduced the amount to $325, he gave a new note for $1,075, covering this $325 and another obligation of $750, and uniting them; that he thereafter paid $50 on this latter note. The bank did not deliver the original note to respondent Williams on March 11, 1920, when he gave them his first note for the amount of the balance due on the original note. It retained the note and continued in possession of it at all times thereafter, only delivering it to respondent Williams on June 24, 1921, as the witness Harris, the bank's representative, testified, to be used as evidence on the trial of this action. At the same time Williams gave the bank what was termed a "trust receipt," stating that he had received the note from them in trust "for inspection or return," which receipt Harris identified on the trial as "a receipt for collateral." There was no evidence of any agreement at the time Williams gave his note of March 11, 1920, to the bank, or thereafter, that this note was given or received by the bank in payment of the original note. The bank's representative testified that the original note was taken off the bank records, in so far as its discount was concerned, on March 11, 1920 (the date of Williams' first note); that the bank records show that it was paid on that date and the bank then carried it as a straight loan to Williams.

There is no doubt that, as stated in McDonough v. Nowlin, 17 Cal. App. 45, 48, 118 Pac. 463, 465, relied on by respondents:

> "Where a surety or accommodation indorser has paid the note of his principal by executing his own note to the holder, and it is accepted in payment and extinguishment of the first note, he has an action to recover the amount of the first note, * * * though his own note was not paid at the time of the trial. Stanley v. McElrath, 86 Cal. 449 (25 Pac. 16, 10 L. R. A. 545)."

The difficulty here is that there was no agreement that Williams' note should be received in payment of the original note, and it is significant that the bank continued to hold the original note as collateral. The rule is that there must be an express understanding or agreement to that effect before a new note of the debtor, or of a third person operates to satisfy or extinguish the indebtedness evidenced by an earlier one. Welch v. Allington, 23 Cal. 322; Savings Bank v. Central Market Co., 122 Cal. 28, 33, 54 Pac. 273; Andrews v. First National Bank, 55 Cal. App. 138, 141, 203 Pac. 156; Anglo-California Trust Co. v. Wallace, 58 Cal. App. 625, 628, 209 Pac. 78; People's State Bank v. Penello, 59 Cal. App. 174, 183, 210 Pac. 432.

In view of our decision in this matter it will be unnecessary to consider other points raised by appellants on appeal.

For the reasons given the judgment is reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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66 Cal. App. 791

CURNS v. BRANNON. (Civ. 3941.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1924.)

1. Brokers ⊂⊃86(1)—Evidence held insufficient to sustain judgment.

Document evidencing defendant's promise to pay plaintiff "the usual commission for your services" in securing purchaser for property, in absence of evidence as to usual commissions, *held* insufficient to sustain judgment for specific amount claimed.

2. Brokers ⊂⊃82(4)—Averment as to price agreed to be paid for services rendered held sufficiently denied.

In action for broker's commission, where defendant alleged agreement to pay a stated sum, defendant's denial that he agreed to pay plaintiff that sum "or any other sum over and above the sum of $100" *held* a sufficient denial of plaintiff's averment to make proof of same necessary.

3. Appeal and error ⊂⊃171(3)—Denial of allegations treated as sufficient at trial may not subsequently be regarded as admissions.

Denials which are imperfect or defective, if acted on as sufficient at trial, are not to be regarded as admissions of allegations attempted to be denied.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. W. Curns against J. F. Brannon. Judgment for plaintiff, and defendant appeals. Reversed.

John C. Miles, of Los Angeles, for appellant.

A. J. Bledsoe, of Los Angeles, for respondent.

CRAIG, J. Defendant appeals from a judgment rendered in favor of the plaintiff for the sum of $325 alleged to have been earned as commission for procuring a purchaser ready, willing, and able to buy certain real property belonging to defendant, listed with plaintiff as broker, under a written contract dated September 9, 1921.

The complaint alleges that between the 1st day of September, 1921, and the 29th day of September, 1921, by a written agreement plaintiff was employed by defendant to procure a purchaser for said property, and that for such services defendant agreed to pay plaintiff the sum of $325. Defendant denied that he agreed to pay the plaintiff the sum of $325 "or any other sum over and above the sum of one hundred dollars ($100.00)."

The writing in controversy was introduced in evidence, and that portion having to do with the dispute herein is in the following language:

> "Los Angeles, Sept. 9, 1921.
>
> "J. W. Curns, I employ you to sell for 60 days or exchange the following property, for which I agree to pay you the usual commission for your services. 60 days. Exclusive."

Then follows certain data and a description of the property.

Evidence was introduced in behalf of the plaintiff tending to show that defendant signed this instrument, and that on September 21, 1921, plaintiff tendered to defendant a buyer ready, willing, and able to purchase the property upon the terms specified therein, but that the defendant refused to convey. The defendant offered no evidence in his own behalf.

The court found "from the evidence introduced" that all the allegations of the complaint herein are true, "and as a conclusion of law from the foregoing facts the court finds that plaintiff is entitled to judgment in the sum of $325."

[1, 2] Appellant first attacks the judgment upon the ground that there is no evidence to support the allegations of the complaint, and particularly the finding that the defendant agreed to pay the plaintiff the sum of $325. A careful inspection of the record fails to reveal any evidence, other than the document quoted in part, which even mentions the subject of compensation. No evidence was offered to show what amount would be "the usual commission" for respondent's services. It is contended by respondent that inasmuch as his complaint was verified, defendant did not sufficiently deny the allegation "that for such service as a real estate broker in procuring said purchaser for said described premises, the defendant promised to pay the plaintiff the sum of $325." It is then argued that no evidence was necessary to establish the fact that defendant agreed to pay $325 because it had been admitted by failure to deny it. We do not think the authorities cited by respondent support this

contention, since they are distinguishable from the case here presented, and from similar cases heretofore decided.

[3] In Ronning v. Way, 18 Cal. App. 527, 123 Pac. 615, it was said that an allegation that certain property was worth $600 was not sufficiently traversed by the mere denial that the value was $600. Kinney v. Maryland Casualty Co., 15 Cal. App. 571, 115 Pac. 456, involved a like denial, and the same may be said of Marsters v. Lash, 61 Cal. 623. These denials are each clearly in the form of a negative pregnant, and, consequently, insufficient. In the case at bar the answer denies that defendant agreed to pay plaintiff the sum of $325 "or any other sum over and above the sum of $100." To be complete, it should have been added by apt language that this denial referred to the asserted promise to pay for the services rendered as a real estate broker in the transaction sued upon. But no objection was made to this form of pleading, and the case was tried as though the issue were properly raised. It is well established that denials which are merely imperfect or defective, if acted upon as sufficient at the trial, are not to be regarded as admissions of the allegations attempted to be denied. Loftus v. Fischer, 106 Cal. 616, 618, 39 Pac. 1064; McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090; Board of Commrs. v. Southern Pacific Co., 177 Cal. 555, 557, 171 Pac. 294.

We do not consider the other points raised tenable, but because of the entire lack of evidence to support the allegation mentioned and the finding upon it, that the defendant agreed to pay $325 for plaintiff's services, the judgment must be reversed, and it is so ordered.

We concur: FINLAYSON, P. J.; WORKS, J.

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66 Cal. App. 550

LYON v. CARPENTERS' HALL ASS'N OF SAN FRANCISCO et al. (Civ. 4738.)

(District Court of Appeal, First District, Division 2. California. April 16, 1924. Hearing Denied by Supreme Court June 12, 1924.)

1. Corporations 🔑629—Complaint held not to show dissolution of corporation authorizing distribution of assets among members through receiver.

In action by alleged former member to secure distribution through receiver of assets of alleged dissolved corporation without capital stock, complaint alleging that only members of certain unincorporated carpenter's unions, which had ceased to exist, were eligible to membership, nonexistence of any present members in corporation, and that it was dissolved, *held* demurrable as not showing forfeiture of franchise or dissolution necessary to plaintiff's cause of action, in view of Civ. Code, § 305.

2. Corporations 🔑613(1)—In absence of statute, only state can enforce a forfeiture.

In the absence of contrary statute, only the state can maintain an action to adjudge and enforce a forfeiture.

3. Corporations 🔑629—In suit to secure distribution of assets among members through receiver, facts showing dissolution must be alleged.

In action by alleged former member to secure distribution of assets of alleged dissolved corporation through receiver, gravamen of complaint is the dissolution, and, being of such importance, requires allegations of the facts; allegation of dissolution being mere pleader's conclusion.

4. Pleading 🔑214(4)—Conclusion does not strengthen pleading against demurrer.

The presence of a pleader's conclusion does not strengthen the pleading when attacked by demurrer.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by William Lyon against the Carpenters' Hall Association of San Francisco and others. Judgment of dismissal entered on demurrers to the complaint, and plaintiff appeals. Affirmed.

Austin Lewis and Vincent Surr, both of San Francisco, for appellant.

John D. Willard, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to quiet title to his alleged interest in certain real estate located in San Francisco, Cal. The defendants interposed demurrers which the trial court sustained, without leave to amend, and judgment was entered dismissing the action. From that judgment the plaintiff appeals, bringing up the judgment roll.

[1] In his complaint the plaintiff alleges that prior to October 25, 1921, Carpenters' Hall Association was a corporation without capital stock, existing under the laws of the state of California; that Local Union 483, Carpenters of San Francisco, and Local Union 1082, Carpenters of San Francisco, were unincorporated associations, and on the 24th day of October, 1921, those two associations were expelled from the United Brotherhood of Carpenters and Joiners of America and were disbanded and ceased to exist; that Local Union 304, Carpenters of San Francisco and Local Union 616, Carpenters of San Francisco, were unincorporated associations, and prior to October 24, 1921, they disbanded and ceased to exist; that it is provided in the by-laws of said Carpenters' Hall Association of San Francisco that membership therein shall consist only of members in good standing of the unincorporated as-

sociations above mentioned, and that any one ceasing to be a member of any unincorporated association shall thereupon cease to be a member of said Carpenters' Hall Association of San Francisco; that prior to the 24th day of October, 1921, the plaintiff was a member of Local Union 483, Carpenters of San Francisco, and a member of Carpenters' Hall Association of San Francisco. It is also alleged:

> "That there are now no members of Carpenters' Hall Association, or any person, or persons, qualified to be members of said Carpenters' Hall Association of San Francisco, and the said corporation is dissolved and defunct."

In appropriate language it is alleged that at the time of the dissolution Carpenters' Hall Association owned real estate, describing it by metes and bounds; that it also owned other properties the exact nature of which are unknown to the plaintiff; that the plaintiff is a pro rata owner of such assets; and by proper averment it is alleged that the individuals named as defendants were at the time of the dissolution the duly elected and acting officers.

To the foregoing allegations the plaintiff annexed a prayer that the court determine the interest of the plaintiff, that the court appoint a receiver to take possession and sell the property of the corporation, and distribute the proceeds among the persons entitled thereto, and that the defendants be restrained in the meantime from alienating the assets.

If Carpenters' Hall Association (a corporation) had suffered no forfeiture, or if it had not been dissolved, the courts would have no right through a receiver to take possession of the corporation's property, to sell the property, or to distribute the proceeds among the persons entitled thereto, because the law has placed all of those powers in the hands of the directors of the corporation. Civ. Code, § 305.

[2] No statute is cited, and we know of no statute, which declares that the foregoing set of facts constitutes a forfeiture. Of course, if there were a statute to that effect the statute would be recognized and administered by the court according to its terms. Los Angeles Ry. v. Los Angeles, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341. In the absence of a statute to the contrary, it is the settled law of California that the state only is entitled to maintain an action to have it adjudged that a forfeiture has occurred and to enforce such forfeiture. In People v. Los Angeles Elec. Ry. Co., 91 Cal. 338, 340, 27 Pac. 673, 674, the court says:

> "Acts sufficient to cause a forfeiture do not per se produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture, and enforce it."

And see 26 C. J. 1045, §§ 117 and 119. Indeed, the rule is statutory. Code Civ. Proc. § 803.

[3, 4] In his pleadings the plaintiff has alleged that Carpenters' Hall Association is dissolved. As to the cause of action which he would have the court entertain, that allegation is the gravamen of the case. Being of such importance the pleader should have alleged the facts and not his conclusion, and it is but his conclusion under such circumstances. Winslow v. Glendale Light & Power Co., 164 Cal. 688, 689, 130 Pac. 427. Furthermore, the presence of the conclusion of the pleader in the pleading does not strengthen the pleading when attacked by a demurrer. People v. Roach, 76 Cal. 294, 296, 18 Pac. 407.

In what we have said we do not want to be understood as holding that the facts pleaded constitute a forfeiture or that such facts, if presented to the proper court, by the proper parties, in the proper action, should, or should not, be adjudged sufficient to constitute a forfeiture. We desire to be understood as merely ruling the questions presented by the record before us.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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66 Cal. App. 602

PEOPLE v. DEAN. (Cr. 1148.)

(District Court of Appeal, First District, Division 2, California. April 18, 1924.)

1. Criminal law ⚷1032(5)—Robbery ⚷17(5)—Information not defective in not alleging persons in possession to be agents of owner; objection first made on appeal not available.

Robbery information was not defective in not alleging that persons from whom property was taken were agents of owner at least as against objection made first on appeal.

2. Robbery ⚷4—Janitors of theater considered in possession of money therein, so that taking robbery and not larceny.

Money in a theater at night must be considered in possession of janitors and watchmen, so that its taking by force against them constituted robbery and not larceny.

3. Criminal law ⚷829(1)—Requested instructions covered need not be given.

It is not error to refuse requested instructions substantially covered by given instructions.

4. Criminal law ⚷1169(2)—Admission of incompetent evidence immaterial where guilt clear.

Complaint cannot be made of admission of incompetent evidence where other evidence leaves no doubt of defendant's guilt.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Robert G. Dean was convicted of robbery, and appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant Robert G. Dean from a judgment entered upon a verdict of a jury finding him guilty of robbery.

Briefly, the facts are as follows: Robert G. Dean and Joseph A. Neff were living together in Oakland prior to February 5, 1923, the date of the crime for which defendant was convicted. During the early part of January, 1923, Dean spoke to Neff about the commission of some crime, without discussing any details. The substance of this conversation, as testified to by Neff, was as follows:

> "He said that he had met a friend of his that knew of a job, as he called it, to be pulled, but that they would not be able to do it because they had to have another party and wanted to know if I would consider taking part in it, and I admitted I did, and it was dropped then for the period of about another week, when it was brought up in about the same way."

About a week later Dean again asked Neff if he was willing to go in on the "job." Neff signified his willingness and Dean said the other man wanted to meet Neff. Later Dean introduced Neff to this other man, whose name was given as James Carroll. At a subsequent meeting of these three Carroll discussed in detail the plans for robbing the State Theater in Oakland. It was proposed that they rob the theater early the next morning. Dean and Neff, according to arrangement went up to Carroll's room at about 6:15 the next morning, and from Carroll's room they walked up Broadway and passed the State Theater. They saw the janitor cleaning out the entrance and waited nearby until he had finished and gone inside. Dean and Neff then entered the theater. They found Albert Lohman, who acted as janitor and watchman, operating a vacuum cleaner back of the last row of seats. Dean pointed a revolver at Lohman and ordered him to throw up his hands. Dean and Neff had covered their faces with handkerchiefs upon entering the theater and they afterwards removed these coverings and placed them over the faces of the janitors whom they had bound to chairs. Dean and Neff took Lohman up to the mezzanine floor of the theater, where they blindfolded him and tied his hands behind his back with wire. About the time they reached the mezzanine floor, Louis Micotti, the day janitor and watchman, came down from the balcony where he had been working, and was ordered to throw up his hands. His hands were tied with wire and the keys to the office were taken from him. Lohman and Micotti were then taken into the ladies' dressing room, where they were seated in chairs and bound to the chairs with wire. Neff went down to the first floor to represent himself as the janitor to any person who might come to the theater, and Dean and Carroll went into the office of the theater, which was located on the mezzanine floor about 25 feet away from the ladies' dressing room, where the two watchmen were confined. Later Neff was called to the office and saw that the lock on the door of the large outer safe had been pried open and the strong box was in sight. At the request of Carroll, Neff pulled the strong box out of the safe and laid it on the floor. Neff then went downstairs and while there heard an explosion. Later he went back to the office and saw that the door of the strong box had been blown loose, but was not completely off. They tried to pry it off with a bar and failing to do so Carroll said he would give it another "shot" of nitroglycerine. Neff then went downstairs and while he was there E. H. Fitzgerald, a plumber, came to do some work at the theater. Neff told him to go upstairs and when he got to the head of the stairs Dean met him with a revolver and ordered him to throw up his hands. At the trial Fitzgerald positively identified Dean. Fitzgerald's hands were tied behind him and he was left sitting on the floor of the ladies' dressing room with Lohman and Micotti. After this Neff again went downstairs and while there heard a second explosion. Later he returned to the office and found the door of the box completely blown off. There were still several rolls of silver in the safe and on the desk was a leather handbag packed with money. Neff carried the bag to San Francisco, where he and Dean went to a hotel and registered and divided the money. Carroll's share was wrapped up and left for him and Neff took his share and went to another hotel, where he was arrested later.

Appellant's first attack is upon the information, which read, in part, as follows:

> "The said Joseph A. Neff and Robert G. Dean, hereinafter called the defendants, prior to the time of filing this information, and on or about the 5th day of February, 1923, in the said county of Alameda, state of California, did, unlawfully, willfully, feloniously and by means of force and fear and against the will of Albert Lohman and Louis Micotti, take,

steal and carry away from the personal and immediate presence of said Albert Lohman and Louis Micotti, the following described personal property, to-wit, two thousand forty-two dollars and twenty-five cents ($2,042.25) in lawful money of the United States and two keys, which said personal property was then and there in the possession of said Albert Lohman and Louis Micotti, and the personal property of the Oakland-San Francisco Theater Company, a corporation, organized and existing under and by virtue of the laws of the state of California, and which said personal property was then and there of the value of $2,042.25 in gold coin of the United States of America."

[1] It is contended that the information is defective in not alleging that Lohman and Micotti, alleged to have had the possession of the personal property, were the agents of the Oakland-San Francisco Theater Company, alleged to have been the owner of the same. We see no merit in the objection, and, furthermore, no demurrer was interposed to the information or other objection made to the same in the trial court, and this objection is not such an one as is available upon appeal for the first time. People v. Matuszewski, 138 Cal. 533, 71 Pac. 701; People v. Bryon, 103 Cal. 675, 37 Pac. 754; People v. Pauli (Cal. App.) 209 Pac. 88.

[2] It is contended that the court should have instructed the jury that if it was not satisfied that the crime of robbery had been committed, but, was satisfied that grand larceny had been committed, it was their duty to find the defendant guilty of the latter offense. This contention is based upon the appellant's position that the evidence showed the offense to have been grand larceny rather than robbery, because of an alleged absence of proof that Lohman and Micotti were in possession of the money taken by defendant and his confederates. But the record contains testimony that Lohman and Micotti were janitors and watchmen; that, in addition to their duties as janitors, they were charged with the custody, protection and safeguarding of the State Theater, which was conducted by the Oakland-San Francisco Theater Company, and of everything contained in and about the premises of said theater. Lohman testified that he was "night janitor and watchman"; that he had access to all the rooms of the theater and had keys to all of them, including the office from which the money was taken. He also testified that he was instructed by the manager, Mr. Holtz, to watch the building and to let nobody in after the show was over, and that at the time he was engaged to work at the theater, his employer, Mr. Frantzen, instructed him that he was to act as watchman in addition to doing janitor work. Micotti testified that he was the day janitor and watchman; that he had been working as such at the State Theater for about two years; that when he first began this work he was told by his employer, Mr. Frantzen, foreman of the American Building Maintenance Company, and by the manager and assistant manager of the theater, that he was to act as watchman in addition to doing janitor work. While these men did not own the money, nor even knew the amount in the safe, yet they were rightfully in possession of the theater and its contents at the time of the robbery and were entitled to this possession as against the defendant.

In O'Donnell v. People, 224 Ill. 218, 79 N. E. 639, 8 Ann. Cas. 123, the charge was assault with intent to rob. Dorgan, the person assaulted, was a watchman in charge of a railroad station. The statute in that state defined robbery as "the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation." It was contended that Dorgan did not have such possession of the property in the station as to come within the above definition of the crime of robbery, and that since there could not have been a completed crime of robbery, there was no crime of assault with intent to rob. It was held that Dorgan had sufficient possession as against the defendant of all the station contained to bring the offense within the definition of attempted robbery.

In the case of Brooks v. People, 49 N. Y. 436, 10 Am. Rep. 398, the house was left in charge of a girl 11 years of age. Defendant entered the house, held a pistol to the girl's head, and took her father's property from a trunk. It was held that the child had such possession of the property as to satisfy the requirements of the definition of the crime of robbery.

In the case of Reese v. State, 91 Tex. Cr. R. 457, 239 S. W. 619, it was held that a railroad employee who worked as a telegraph operator and ticket agent at a railroad station during the night, had "possession" of the contents of the safe in the office which was locked, and to which he did not have the combination, within the meaning of the word "possession" as defined in the crime of robbery.

[3] Complaint is made of the refusal to give certain instructions at the request of the defendant, but we find no merit in any of these specifications of error. Most of the instructions refused were substantially given in other instructions given by the court, and the charge to the jury, as a whole, appears from the record to be full and fair to the defendant in every respect.

There is also no merit in the contention that the witness Neff was forced, against his will, to give testimony which incriminated him. This witness was told by the court at the request of counsel for defendant Dean that he might refuse, if he wished, to answer any question, the answer to which would tend to incriminate himself. The witness for a time took advantage of this privilege and was excused from the witness stand.

Later in the trial he returned to the stand and waived his privilege, voluntarily answering the questions asked him.

[4] It is contended that evidence of the movements and activities of Dean, Neff, and Carroll after they left the theater was improperly admitted. This evidence consisted of the testimony of Neff, one of the conspirators. It is maintained by appellant that although the testimony of one conspirator is admissible against other conspirators with regard to matters and things done in furtherance of the conspiracy, nevertheless, the conspiracy in this case was ended when the robbery was completed and any further inquiry into the activities of the conspirators was erroneous. It would seem to us that the conspiracy was not ended until the spoils had been divided, and, if this be the rule, the testimony was properly admitted. But, however that may be, the outstanding fact upon this appeal is that the judgment in this case has done substantial justice. The record leaves no reasonable doubt of the defendant's guilt, quite apart from any testimony to which any objection is made. He was positively identified as one of the men who committed the robbery by one of the watchmen and by the plumber, Fitzgerald, both of whom were in the theater at the time of the robbery and saw the defendant's participation in it; and it is certain that the testimony of these witnesses, together with the portion of Neff's testimony which was admissible beyond all question and the many other facts and circumstances appearing in the record uncontradicted, overwhelmingly convict the defendant, and the jury could have brought in no other verdict than it did. In this state of the record it is idle to consider in detail the numerous contentions of defendant with regard to the admission of evidence. If any errors occurred in these rulings, we should be bound to affirm this judgment, nevertheless, after a perusal of the entire record.

The judgment and orders appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

66 Cal. App. 646

PEOPLE v. GONZALES. (Cr. 1070.)

(District Court of Appeal, Second District, Division 1, California. April 21, 1924.)

1. Criminal law 🔑1186(4)—Error in admission of irrelevant testimony held not ground for reversal in view of evidence of guilt.

In view of convincing evidence that defendant stole automobile, error in arresting officer's demonstration, as witness, of use of black silk sock, taken from defendant's person, as mask, it not being contended that defendant made any attempt to conceal features or to elude officer, *held*, under Const. art. 6, § 4½, not to necessitate reversal.

2. Criminal law 🔑1170(2)—Exclusion of written evidence of certain fact held harmless, in view of undisputed oral testimony to same fact.

Where defendant was charged with stealing an automobile, any error in refusing to admit in evidence conditional contract of sale for purchase of automobile of same make but different machine from that which defendant was charged with stealing was immaterial, in view of undisputed oral testimony that defendant was owner of machine described in contract.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Joe Gonzales was convicted of grand larceny, and he appeals. Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

CURTIS, J. The defendant was found guilty of grand larceny in the theft of a Chevrolet automobile of the value of $500, and appeals from the judgment.

[1] At the trial the arresting officer testified that he took from the person of the defendant at the time of his arrest a pistol, a policeman's billy, a flashlight, and a black silk sock with the foot cut off. These articles were admitted in evidence without any objection on the part of the defendant. Over the objection of the defendant, however, the officer further testified that the silk sock was an instrument of crime and was used as a mask by yeggmen and stick-up men. He demonstrated to the jury the manner in which the sock was used as a mask, by drawing it over his head, covering his face and eyes. As thus drawn over his head, it concealed his features, but at the same time did not obscure his vision, but permitted him to look through it and see objects in the courtroom. It is contended by defendant that this testimony was irrelevant as to any issue in the case, and that its introduction greatly prejudiced the defendant in the eyes of the jury. The testimony of the officer as to the purpose to which the black silk cloth could be put by persons engaged in the commission of crime in no way tended to prove the charge against the defendant. At the trial it was not contended that the defendant wore any mask or in any way endeavored to conceal his features, or made any attempt to escape or elude the officer at any time, either before or after his arrest. The testimony, therefore, as to the purposes to which the cloth might

be used, shed no light upon the question as to whether the defendant was guilty or not of the theft of the automobile. It was therefore irrelevant as to any of the issues involved in the case, and it was error to admit the same at the trial of the defendant. This testimony would naturally damage the defendant in the estimation of the jury. They would likely conclude that a person in the possession of such an article might in all probability be engaged in the commission of the crimes for which it could be used, and therefore they would more readily find him guilty of the crime charged.

It has been held that evidence tending to show the possession by the defendant, at the time of his arrest, of various poisons, none of which had any connection with the crime with which the defendant was charged, was inadmissible. The same ruling was had regarding evidence of the possession by the defendant of obscene letters and writings. Such evidence was held to be "very prejudicial to defendant, as it tended to show her to be a most depraved and vicious woman." People v. Martin, 13 Cal. App. 96–106, 108 Pac. 1034, 1038. "However depraved or vicious she might be, she was entitled to be tried only for the crime charged against her; and upon the issue presented by her plea of not guilty only such testimony as was relevant to such issue should have been admitted. * * * The defendant had the right to have all such irrelevant matter excluded from the jury. When, as in this case, irrelevant testimony has been admitted, and is of such a character as necessarily to be prejdicial to defendant, a new trial must be granted." People v. Martin, supra, and authorities there cited.

The rule laid down in the foregoing authorities is well established and must be followed in this case, unless the application of section 4½ of article 6 of the Constitution necessitates a different action on the part of this court. This section provides, among other things, that no judgment shall be set aside in any case on the ground of the improper admission of evidence, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of resulted in a miscarriage of justice.

The evidence in this case against the defendant was that the owner of the automobile, which the defendant was charged with stealing, parked his car at 715 West Sixth street, in the city of Los Angeles, between the hours of 12 and 1 o'clock on the morning of the 17th of May, 1923. At 15 minutes before 2 o'clock of the same morning, the defendant was found driving the car at the corner of Grand avenue and Eighth streets, less than three blocks from where the car was left by its owner. Defendant's only explanation of his possession of the car was that a man by the name of Ryan, whom he had met for the first time on the evening of May 15, 1923, had left the car with him while he (Ryan) went in search of some girls whom they were to take riding in the car. He had never seen Ryan since the night of his own arrest, and although the defendant had been out on bail from the time of his arrest to the day of his trial, he had made no inquiry at the place where the defendant testified Ryan had told him he worked, nor had the defendant made any attempt to find Ryan and have him as a witness at the trial. In other respects the story as told by the defendant at his trial was equally improbable and unreasonable. We hardly think any jury composed of intelligent and reasonable men would place any faith in the account given by defendant as to how he came into possession of the car. Furthermore, after the arrest of the defendant, he gave most conflicting accounts as to the possession of the car by his new-made friend Ryan. He first told the arresting officer that at about half past 8 on the evening immediately preceding the morning of his arrest, he met Ryan in front of a café in the city of Los Angeles, and from there Ryan drove him in this same car over the Brooklyn Heights, and then back to Los Angeles. When, afterwards, he was informed that the owner of the car reported that it had not been stolen until after 12 o'clock of the same night, he changed his story and said that he saw Ryan when he stole the car, and that he (the defendant) was only a few feet away from Ryan at the time Ryan took the car; but he disclaimed that he had any part in the theft. With evidence of this character before them, even should we eliminate all testimony of the officer as to the criminal purposes to which the silk sock could be put, we cannot see how the jury could have rendered any other verdict than that of guilty. We are therefore unable to hold that the defendant was prejudiced by the admission of the testimony complained of, or that any miscarriage of justice has resulted therefrom.

[2] Defendant makes the further contention that the court erred in refusing to admit in evidence a conditional contract of sale between the Southwest Motor Company and the defendant, for the purchase of a Chevrolet automobile, but a different machine from that which the defendant is charged with stealing. The defendant had previously testified that he was the owner of such an automobile, and upon cross-examination he further stated that this Chevrolet machine belonged to him and not to his mother. The defendant's mother also testified that the machine in question belonged to the defendant and not to her. The prosecution offered no evidence to contradict this testimony. If there was any errer on the part of the court in refusing to admit in evidence the condition-

al contract of sale, such error was of slight consequence in view of the undisputed oral testimony of the defendant and his mother, admitted without objection, that the defendant was the owner of the machine described in the conditional contract of sale.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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67 Cal. App. 123

GRAND UNION HOTEL et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4851.)

(District Court of Appeal, First District, Division 2, California. May 2, 1924.)

1. Master and servant ⚷419—Commission may enter supplemental award covering surgical treatment after prior award.

Under Workmen's Compensation, Insurance and Safety Act, § 20(d), the Commission has continuing jurisdiction to make a supplemental award to cover surgical treatment undergone by an injured employee after a prior award.

2. Master and servant ⚷419—Commission authorized to make supplemental award covering surgical treatment subsequent to submission.

Where injured employee, after submission of claim for medical and hospital treatment, but before decision thereon, received additional surgical treatment, and the award included no amount for such surgical treatment, the Commission had jurisdiction under section 20 (d) of Compensation Act to make supplemental award covering such item.

3. Judgment ⚷18(1)—Matters occurring pendente lite not adjudicated unless brought before court by supplemental pleading.

Issues in a case refer to its beginning, and matters occurring pendente lite cannot be put in evidence and are not adjudicated by the judgment unless brought before the court by supplemental pleading.

4. Master and servant ⚷416—Supplemental award may not be used to correct errors.

A supplemental award by the Industrial Accident Commission may not be used to correct errors in earlier award.

Proceedings under the Workmen's Compensation, Insurance and Safety Act by Gustaf Lindemann against the Grand Union Hotel and the New Amsterdam Casualty Company. To review supplemental award by Industrial Commission, defendants bring certiorari. Writ discharged and award affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

LANGDON, P. J. This matter comes before us upon a writ to review a supplemental order of the respondent Industrial Accident Commission awarding to respondent Gustaf Lindemann $227.62 to cover hospital and medical expenses incurred by him as a result of an injury which he received in the course of his employment by the petitioner, Grand Union Hotel Company. The petitioner, New Amsterdam Casualty Company, is the insurance carrier.

The respondent Lindemann was injured upon November 10, 1922. The employer disclaimed liability under the facts of the case and refused medical and surgical treatment to Lindemann. He was forced to go to a hospital, therefore, upon his own account, and under the care of his own physician. On November 24, 1922, he filed his application with respondent Commission for adjustment of his claim under the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831). Hearing was had upon December 19, 1922, at which time the following stipulation was entered into:

> "That the employer neglected and refused seasonably to provide surgical and hospital treatment necessary to cure and relieve the employee. That, in the event the insurance carrier is found chargeable for the medical expenses incurred by or on behalf of the employee, the reasonable cost of the medical services may be determined by the filing of itemized bills for such services and the submission of the same to the Medical Department of this Commission."

A further hearing was had January 17, 1923, at which time the case was submitted for decision. On March 7, 1923, certain bills for medical services were filed in evidence, pursuant to the foregoing stipulation, to fix the amount of medical expenses incurred prior to March 6, 1923. Up to that time no surgical operation had been performed. On May 12, 1923, the Commission entered its decision in applicant's favor, allowing him compensation benefits for his injury and awarding him the amount of the medical expenses shown by the bills filed with the Commission.

Up to this point the record does not disclose that any evidence was before the Commission of a surgical operation upon Lindemann. Some days after the award, however, Lindemann's attorney sent a letter to the Commission stating that Lindemann had submitted to such an operation upon March 27, 1923, and inclosing hospital and physician's bills covering the same, with a request that an allowance be made to Lindemann therefor. Thereupon the matter was set for further hearing, testimony was taken, and the matter was submitted for decision upon the allowance of such supplemental medical expense. On August 30, 1923, the Commission denied Lindemann an allowance for such supplemental expenses, basing its holding upon the case of Georgia Casualty Co. v.

Ind. Acc. Comm., 177 Cal. 289, 170 Pac. 625. A petition for rehearing was granted upon the request of Lindemann, and the Commission allowed such supplemental expenses to Lindemann, which allowance is contained in the order sought to be reviewed here.

The only question presented by the petitioners is whether or not the above-mentioned order is within the grant of continuing jurisdiction conferred upon said Commission by section 20 (d) of the Workmen's Compensation, Insurance and Safety Act.

In making its supplemental order the Commission relied upon the case of McBride v. Ind. Acc. Comm., 182 Cal. 407, 187 Pac. 1050. The petitioner herein, however, differentiates that case from the present one by pointing out that in the McBride Case the Commission had expressly reserved its award for medical and surgical treatment to which it found the claimant entitled pending the procuring of the necessary information and vouchers for a supplemental award. That case is not precisely in point here, nor is the case of National Engineering Corporation et al. v. Ind. Acc. Comm. (L. A. No. 7865, decided by our Supreme Court in bank on April 1, 1924), 225 Pac. 2, which is also relied upon by the Commission.

[1] However, it is settled that, where an employee is awarded benefits under the Workmen's Compensation, Insurance and Safety Act, and later requires surgical treatment for the relief of his injury, the Commission possesses continuing jurisdiction under section 20 (d) of said act to enter its supplemental award or order, allowing him such treatment as he may need, and also such further disability compensation as he may be entitled to by reason of the change in his condition, the recurrence of disability following his entry into the hospital. Section 20 (d), Workmen's Compensation, Insurance and Safety Act; Georgia Casualty Co. v. Ind. Acc. Comm., 177 Cal. 289, 170 Pac. 625; Union Iron Works v. Ind. Acc. Comm. (Cal. Sup.) 210 Pac. 410; Western Indemnity Co. v. Ind. Acc. Comm. (Cal. Sup.) 216 Pac. 611; Miller Creamery et al. v. Ind. Acc. Comm. (Cal. App.) 226 Pac. 402. We think Lindemann's entry into the hospital for the purpose of submitting himself to a surgical operation constituted a change in circumstances or a new development in his situation contemplated by section 20 (d) of said act.

[2, 3] It is true that in the present case the change in circumstances occurred after the submission of the case to the Industrial Accident Commission for decision, but before said decision was actually reached, and at the time of the decision the Commission was unaware of the fact that a surgical operation had been performed, and no evidence regarding the same had been offered to said Commission, and could not have been offered because the hearing was concluded before the operation occurred. This brings us to the precise point specially involved in the instant case, which is whether the date of the actual decision or the date of the submission of the cause should be taken as the date foreclosing the applicant. The language in the case of Georgia Casualty Co. v. Ind. Acc. Comm., supra, relied upon by petitioners herein, is not controlling here because this question was not involved in that case, and it is apparent that it was not given any consideration therein. It seems obvious that the findings of the Commission can settle questions, logically, only as of the date of the submission of the same. Any other rule would be grossly unjust, demanding proof of conditions in advance of their existence. An applicant cannot offer evidence of matters and things which affect his employer's liability if they occur after he has completed his proof. If, perchance, a case should not be decided by the Industrial Accident Commission for weeks after the evidence was offered and the case submitted for determination, this fact should not work to the disadvantage of an applicant by denying him the right to prove changes in his physical condition occurring between the time of the submission of his cause and the decision of the Industrial Accident Commission. By analogy, we find support for our view in the settled rule in this state that the issues in a case refer to the beginning of an action, and that matters occurring pendente lite cannot be put in evidence and are not adjudicated by the judgment unless brought before the court by a supplemental pleading. 1 Freeman on Judgments, § 329; People's Savings Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938; Metropolis Trust & Savings Bank v. Barnet, 165 Cal. 449, 132 Pac. 833.

[4] It is true, of course, that supplemental awards may not be used for the purpose of correcting errors in the original award (Georgia Casualty Co. v. Ind. Acc. Comm., supra; McBride v. Ind. Acc. Comm., supra), and if the expenses in dispute here had been incurred prior to the submission of the case to the Industrial Accident Commission, but, nevertheless, through error said Commission had failed to make an allowance therefor or if applicant had neglected to prove such expenses before the Commission, although they had occurred prior to the date of the hearing, no supplemental award could have accomplished the purpose of correcting the error. But in the present case, the decision having reference only to the facts as they existed at the date of the submission of the case to the Industrial Accident Commission, the expenses incurred later and the conditions which occurred later making such expenses necessary constituted such a change in the situation of the injured man as to empower the Commission to do justice by him under the provisions of section 20 (d) of the act. Any other construction of the act would be contrary to its spirit, and would result in hardship

and injustice to an applicant without fault on his part.

The writ is discharged, and the award affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

66 Cal. App. 666

ADERHOLT v. WOOD. (Civ. 4823.)

(District Court of Appeal, First District, Division 2, California. April 23, 1924. Hearing Denied by Supreme Court. June 19, 1924.)

1. Contracts ⚷252—Parties by consent canceling executory contract not governed by statutory rule as to restoration by party rescinding.

Parties by consent canceling executory contract thereby make new contract, their rights and obligations under which are to be determined by rules relating to ordinary contracts; and Civ. Code, §§ 1691, 3408, as to restoration by a party rescinding, or in whose favor rescission is adjudged, have no application to such mutual cancellation.

2. Evidence ⚷417(9)—Intention of parties as to restoration of payments determinable by conversations and communications, where cancellation agreement is silent.

If agreement whereby parties to executory contract cancel it is silent as to restoration of payments made under the contract, intention of parties may be determined by reference to their conversations and communications leading up to execution of cancellation agreement.

3. Vendor and purchaser ⚷334(3)—Under cancellation by agreement of executory contract, held, that no restoration of payments intended.

Agreement of parties canceling executory contract because purchaser could not proceed with payments, being delivered at same time as quitclaim of the property from purchaser to vendor, and being silent on the subject of restoration of payments as well as to profits received by purchaser during his three years' sole possession and occupation, and the property having greatly depreciated in value, *held*, that it was not intended payments made should be restored.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. Aderholt against Joseph H. Wood. From judgment for plaintiff, defendant appeals. Reversed.

Ben S. Hunter, of Los Angeles, and Bradford M. Melvin, of San Francisco, for appellant.

Powell & Dow, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover the sum of $4,857.50, with interest, this being the amount which his assignor had paid on principal and interest upon a written contract with the defendant for the sale of 40 acres of land situated in Los Angeles county. The contract price for the sale of the land was fixed at $12,000, $3,000 of which was paid upon the execution of the contract and the remainder thereof, with interest, was payable at specified dates. Plaintiff's assignor, the vendee under the contract, was unable to make his payments, and from time to time requested and received further extensions, and on numerous occasions urged the defendant to release him from the terms of the contract. On February 10, 1922, he addressed a letter to the defendant in which he stated definitely that he was unable to proceed further with the purchase and that he was directing his attorney to prepare a release and return of the ranch to defendant on the condition that he (the defendant) would cancel the agreement and release him from any further liability. This offer was accepted by the defendant, and a few days thereafter he received from the vendee's attorney a document signed by the vendee designated "Cancellation of Agreement" and providing that the contract of sale "has been this day canceled by mutual consent." With this document he also received a quitclaim deed from the vendee remising, releasing, and quitclaiming to the defendant all interest in the parcel of land covered by the contract of sale. The document designated "Cancellation of Agreement" was dated February 16, 1922, was acknowledged by the vendee before a notary public in the county of Storey, state of Nevada, on the same date, and was acknowledged by the vendor on the 27th day of March, 1922, in Hennepin county, Minn. The quitclaim deed was dated February 20, 1922, and was acknowledged by the vendee Dakin on the 25th day of February, 1922, in the county of Storey, Nev., and by Margaret Dakin on the 2d day of March, 1922, in San Mateo county, state of California. The date of the delivery and exchange of these papers does not appear in the record, but it does appear that "both documents were received at the same time." After the exchange of these papers, the vendee made an assignment of all claims and demands against the defendant to the plaintiff herein, who commenced this action on June 7, 1922. Defendant's answer admits the execution of the original contract and the payment of the money thereunder, but alleges that by the terms of the agreement dated February 16, 1922, taken with the quitclaim deed, the parties intended to and did effect a mutual cancellation and release of all obligations between them. The trial court found in accordance with the admissions of the pleadings on the material facts relating to the execution and cancellation of the agreement of sale. It also found that on the

1st day of April, 1922, the buyer executed and delivered the quitclaim deed to the defendant. In this respect the finding is unsupported by the evidence, as has been heretofore pointed out. The date of April 1, 1922, is the date of the recordation of the quitclaim deed in the office of the county recorder of Los Angeles county. It appears without contradiction that it was delivered to the defendant herein in Minneapolis some time during the month of March of that year at the same time when the cancellation contract was delivered to him.

Another finding which requires attention is that though the plaintiff's assignor on the 10th of February, 1922, wrote thee defendant a letter offering to make a complete release of the obligations of the original contract, the defendant did not accept said offer. The only evidence on this point is that the defendant answered this offer by telegram and, quoting from defendant's testimony, "I accepted the proposition that he made." This finding becomes important in connection with that portion of the defense raised by the defendant that the parties intended to make a complete release of all obligations one from the other growing out of the original contract of sale. Upon these findings the court rendered judgment for the plaintiff for the return of the full sum of principal and interest, and the defendant appeals on a bill of exceptions.

[1-3] As stated by respondent, the question at issue before us is, where, in the case of an executory contract for the sale of real property on which installment payments have been made, the parties mutually agree to a cancellation of the contract, is the vendee, in the absence of any agreement to the contrary, entitled to the return of the installments theretofore paid? It is argued in support of the judgment that the accepted rule in this state is that when the parties to an executory contract of this kind have abandoned it or it has been rescinded by mutual consent, either party may recover money paid under it. The authorities cited by respondent, however, all relate to the rescission of contracts in cases in which the vendor was at fault. In such a case the rule is without conflict that equity will restore the parties to statu quo. This principle is announced in section 3408 of the Civil Code and has been approved in numerous cases. The theory of these cases is that, where one party rescinds an executory contract on account of the default of the other, he is entitled to recover his outlay under the contract; but at the same time he must restore to the other party whatever of value he has obtained under it. Section 1691 of the Civil Code expressly provides that rescission can be accomplished only in such manner except where effected by consent. This exception is the important part in the consideration of cases such as presented in this record. If the parties by consent rescind an executory contract, they thereby make a new contract, and their rights and obligations thereunder are to be determined by all the rules relating to ordinary contracts. It is not improper and it is not unusual for parties to contracts of this nature to cancel them and to release each other from all mutual obligations. Where the statutes do not provide that in such cases the vendee shall recover the payments made under the contract and where the contract of cancellation is silent on the matter, the intentions of the parties may be determined by reference to the conversations and communications had between them leading up to the execution of the contract of cancellation. In the case before us all evidence of such communications tended unmistakably to show that the parties intended a complete release of all mutual obligations, and the simultaneous delivery of the quitclaim deed is persuasive evidence of such intention. The failure of the trial court to find in accordance with the evidence on this issue was highly prejudicial to the case presented by the appellant. If the trial court had found in accordance with this evidence, it would have necessarily followed that the intention of the parties in the execution of the cancellation agreement was to release each other from these obligations and that it was not the intention that the vendee should thereafter be entitled to recover the payments which he had paid in on the contract. This is especially true in view of the fact that the vendee had sole possession and occupation of the premises for a period of over three years, during which he had taken and retained all the profits therefrom. It is not reasonable to assume that, in view of the admitted fact that the property had greatly depreciated in value, the appellant would have knowingly consented to release the vendee from further payments under the contract and at the same time allow the vendee to attain the profits from the premises which he had received during the period when he was in possession without the payment of any rent.

Respondent's case is based upon a rule of law which he draws from a number of California cases cited to the effect that upon a rescission of an executory contract of sale of real property "the vendor is entitled to a return of the property, freed from the obligations of the contract of sale, and the vendee is entitled to a return of the moneys paid by him on the purchase price of the property so returned." But this statement of the rule is incomplete. The vendee is entitled to a return of the moneys paid by him less the benefits he received under the contract. When, therefore, the parties contract in writing to cancel the original agreement without mention of these respective rights, the rule as stated by respondent is not determinative; but the contract must be given a reasonable interpretation with the view of determining the intention of the parties.

The case is similar to the case of Winton v. Spring, 18 Cal. 451; the only difference in the facts being that in the cancellation agreement the vendee expressly surrendered possession of the premises, whereas in the case before us this was done by the simultaneous delivery of a quitclaim deed. The Supreme Court in construing the cancellation agreement in the Winton Case said (page 454):

> "The plaintiff contends, that this agreement being canceled as above shown, the effect was, as in the ordinary case of a rescission of a contract, to put the parties in statu quo, and having paid the $4,000 in the execution of the agreement, he is entitled to recover it back. We think not. The agreement of cancellation evidently was intended to effect a complete settlement in regard to the subject; it discharges the parties from all covenants and agreements in the original contract, and provides for a surrender of the premises. Nothing is said or done in reference to the refunding of the $4,000. If the intention was to place the parties in statu quo, and this were supposed to be effected by the use of the word 'cancel,' as an equivalent to the word 'rescind,' it is probable that language more unequivocal would have been employed. The latter clause of the agreement in respect to the possession would be tautological in this view; for the restoration of possession would follow from the use of the word cancel in the first line. Besides, it is to be supposed that the party in possession, having paid his money, would not abandon the possession, until he got a return of it, or some provision was made for securing it. He would scarcely have left so large an amount a matter of open account. Nor is it probable that the question as to the rents and profits of the land would be left unliquidated. It is much more probable that when parties come to an arrangement of a business matter, they settle all the terms of the contract, than that they leave them unadjusted. The word 'cancel,' applied to the agreement, under the circumstances, means no more than 'doing away with' an existing agreement upon the terms and with the consequences mentioned in the writing. What is not said, is excluded; and whatever was meant to be obligatory was expressed."

The Winton Case has not been overruled or criticized by any later decision of the Supreme Court, and, inasmuch as the opinion was based upon practically the same facts as we have before us, it seems to be decisive of the question presented.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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66 Cal. App. 782

PEOPLE v. WRIGHT et al. (Cr. 752.)

(District Court of Appeal, Third District, California. April 29, 1924.)

1. Insurrection and sedition 🔑2—Conflict in evidence held for jury.

In prosecution for criminal syndicalism, conflict in evidence as to purposes and practices of I. W. W. *held* to raise question for jury.

2. Insurrection and sedition 🔑2—Objection to testimony of acts of I. W. W. as too remote held to be on its weight rather than competency.

Though after enactment of criminal syndicalism law, I. W. W. proclaimed itself against commission of crime or acts of sabotage or other violence, where there was evidence that this was a subterfuge, and that it had not changed its tactics, acts of violence in years 1917, 1918, 1919, were not objectionable as too remote, objection going to weight of testimony rather than competency.

3. Criminal law 🔑1169(2)—Error in admitting I. W. W. literature without prejudice in view of case made.

In prosecution for criminal syndicalism, any errors in admitting evidence of I. W. W. literature *held* without prejudice in view of strong case made against accused.

4. Insurrection and sedition 🔑2—Teaching or advocating sufficient to constitute offense.

In prosecution for criminal syndicalism, acts of violence and actual commission of crime are merely evidentiary; the teaching or advocating of the prohibited matters being sufficient to constitute the offense.

5. Criminal law 🔑829(1)—Refusal of instructions covered by court's charge, was not error.

Refusal of instructions which were covered by court's charge was not error.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

W. H. Wright and others were convicted of criminal syndicalism, and all defendants except D. Williams appeal. Affirmed.

Austin Lewis, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants above named were jointly charged, by information filed in the superior court of Plumas county, with the crime of "criminal syndicalism," as that crime is defined by an act of the Legislature of 1919 entitled "An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor." Stats. 1919, p. 281. The defendants were jointly tried for the offense so charged, and all, with the exception of the defendant Williams, who was acquitted, were found guilty by the jury. A separate verdict was found and returned as to each of the defendants. A motion for a new trial was made in behalf of each of the convicted defendants and denied, and each appeals from the judgment of conviction and the order denying him a new trial.

Subdivision 4 of section 2 of the Criminal Syndicalism Act constitutes the basis of the charge alleged in the information. That section provides:

> "Any person who: * * * Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism," is guilty of a felony, etc.

Section 1 of said act thus defines "criminal syndicalism" as said phrase is used therein:

> "Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

[1] The points made by the appellants on this appeal are numerous, the general import thereof being that the evidence does not support the verdicts, that irrelevant and incompetent testimony was allowed to go before the jury, and that error was committed by the giving of certain instructions and the refusal to give others, the latter having been proposed by the appellants.

The defendants, with the exception of Wright and Bamman, were arrested by the sheriff of Plumas county in a raid on a house in Portola, said county, on the 14th day of July, 1923. Suspended from the front of the house was a sign about three feet long and eight inches wide, containing the words "I. W. W. Office." On the windows were smaller signs containing the same words. Each of the defendants found in the house at the time of the raid was made was searched by the sheriff and found to have in his possession a membership card of the I. W. W. The defendant Bamman was out on the street at the time the raid was made, but practically surrendered himself to that officer by stepping up to him and delivering to him his membership card. Wright was arrested in Quincy, the county seat, and upon his person was also found a membership card. These cards were introduced in evidence for the purpose of showing that the defendants were members of the I. W. W. organization. There is not and could not be any question raised here as to the fact that the defendants were members of the organization, because they admitted at the trial that they were such members. The sheriff found and took possession of a large quantity of I. W. W. literature, and this was introduced in evidence.

There is no necessity for detailing or reciting in substance herein the testimony introduced by the people to support the charge against the accused. Elbert Coutts and W. E. Townsend, former members of the I. W. W., and whose testimony has been received in every criminal syndicalism case which this court has been called upon to review in the past three or four years, testified in the instant case, going over practically the same ground that they had at previous trials. Joe Arada, another witness whose testimony has appeared in previous cases, and to which reference has been made in the opinions filed in this court in said cases, was also a witness in the present case, and gave the same testimony that he had theretofore. G. J. Davis, deputy sheriff of Stanislaus county, in the years 1917 and 1918, who has also testified in one or two previous cases reviewed by this court, testified to the incendiary fires which occurred in that county and in the city of Modesto in the year 1917, and which were supposed to have been caused by certain members of the I. W. W. The attorney for the defendants in the present case made no objection at any time at the trial to the testimony of Townsend, Coutts, Arada, and Davis. Coutts told the story of his connection with the I. W. W. from 1912 until and including a portion of the year 1918, he having joined the organization when he was but 16 years of age. He repeated the story of the making, by himself and other members of the I. W. W., of different chemical combinations and explosives on a houseboat on Smith's slough, about three miles south of the city of Stockton, in the year 1917, and reiterated that such chemicals and explosives were made for the purpose of carrying on the destructive policy of the I. W. W. in its efforts to establish an industrial government in this country in place of our present system. He also told the story of his connection with other members of the I. W. W. in the setting of fires and thereby the destruction of a number of haystacks in Stanislaus county, in the month of June, 1917, and also the like destruction of a stable, garage, and a large quantity of hay in the city of Modesto in the month of October of that year. He also testified that at the meetings of the I. W. W. the use of violence and the commission of crimes as the means for terrorizing the people into submission to the political vagaries and revolutionary notions of the I. W. W. were matters of common discussion and advocacy. Townsend, as stated, gave a statement of the principles and purposes of the I. W. W. and the determination of that organization to carry out its plans by means of acts of sabotage and other crimes.

Arada testified that he was employed in August, 1917, on McDonald island, about 15 miles south of Stockton, by the Scata Company, being engaged in the digging of potatoes. There was a large number of other laborers employed in the same work. The men slept in one large room in what was known as the bunkhouse on the ranch. A few days after these men were so engaged some 14 other men called at the place and asked for employment. The owner of the property gave them employment, and they worked all of the afternoon of the day they made their appearance there, and at night slept in the large room so occupied by the other workmen. The next morning the 14 men referred to left the premises without obtaining breakfast or demanding or receiving compensation for their labor the day before. Arada, a short time before noon of that day, and while employed in the field, felt a burning sensation in his feet. The pain grew in intensity until he was required to remove his shoes, and, upon doing so, he found that his feet were seriously blistered, and also discovered what appeared to be white powder in his shoes. The white powder proved to be potassium hydroxide, which, so testified an expert chemist, will destroy "organic matter or human flesh," and would cause one's feet, if brought in contact with them, to bleed, and would cause much pain and suffering. The story, as he told it herein, of the severity of his injuries, and how he was compelled to go to the county hospital for treatment, where he remained over a year before he was able to use his feet, is told in the case of People v. Roe, 58 Cal. App. 695, 209 Pac. 381. He further testified that I. W. W. papers were found in the bunkhouse the morning the 14 men referred to left the premises, and stated that no such literature had been seen there before.

Davis, the deputy sheriff above referred to, told about the fires in Stanislaus county on the morning of July 21, 1917. He stated that some eight or nine haystacks a short distance from Modesto and within a radius of a few miles of each other, belonging to different persons, were found to be burning simultaneously. He also testified as to the incendiary fires resulting in the destruction of the buildings in the city of Modesto, and above referred to, and stated that these several fires were in progress at about the same time. The people introduced in evidence a large amount of literature of the same general character as that introduced and referred to in the cases of the People v. Taylor, 187 Cal. 378, 203 Pac. 85; People v. Roe, 58 Cal. App. 690, 209 Pac. 381; People v. Flanagan et als. (Cal. App.) 223 Pac. 1014; People v. Wagner (Cal. Sup.) 225 Pac. 464. Some of this literature involved publications under the authority of the I. W. W. organization, which openly advocated the resort to crimes and acts of violence for the purpose of carrying out the ultimate plans of said organization. Much of this constituted publications appearing prior to the enactment of the syndicalism law. But Townsend testified that the same propaganda of violence and crime was advocated by the organization at their meetings and in divers other places long after the Syndicalism Act was placed upon the statute books; for illustration, a songbook, published under the authority of the I. W. W. in the year 1918, and containing a number of different so-called songs which involved somewhat veiled yet plainly apparent suggestions of the necessity for pursuing a course of criminal violence to accomplish the main purposes of the organization, was introduced in evidence. It was claimed at the trial that this book had been supplanted by a new songbook from which the objectionable songs referred to had been eliminated after the passage of the Syndicalism Act. But Townsend stated that, notwithstanding that the objectionable songs were not contained in the new book, they were, nevertheless, still sung at the meetings of the I. W. W. and at other places when there was a considerable number of them together. But, as stated, above, there is no necessity for setting forth herein even in substance the vast amount of literature that was introduced by the people in support of the charge. It is enough to say that all of this literature, as was shown in the cases heretofore decided by this and the Supreme Court, contained incendiary utterances against our government and society generally as it is governed to-day.

Some of the defendants and other witnesses, members of the I. W. W., testifying for the defense, declared that the organization never did advocate the commission of crime or acts of violence in the carrying out of its principles. Some of these witnesses testified that they never heard at any I. W. W. meeting any suggestion that acts of violence should be resorted to for any purpose connected with the organization, but, to the contrary, the leaders thereof had often advised against criminal acts or violence of any character in the pressing of the principles of the organization upon the people. A resolution adopted by the I. W. W. organization, after the passage of the syndicalism law, declaring that the Industrial Workers of the World "do hereby declare that said organization does not now and never has believed in or advocated either destruction or violence as a means of encompassing industrial reform," was introduced by the defense. Several other similar statements published under the authority of the organization were also introduced in evidence.

The testimony thus presented by the defendants merely had the effect of creating a conflict in the evidence which it was the duty of the jury to determine.

[2] The counsel for the defendants insists that the testimony presented by the people disclosing acts of violence in the years 1917, 1918, and 1919 "was too remote," and for that reason should not have been received. While

it is true the criminal acts shown to have been done in the years mentioned were rather remote from the date of the trial, yet the objection on the ground of remoteness goes to the weight of the testimony rather than to its competency. Besides, Townsend, as we have seen, testified that, while it was true the organization after the enactment of the criminal syndicalism law proclaimed itself as against the commission of crime or acts of sabotage or other acts of violence, such proclamation or the resolution containing such proclamation was wholly a subterfuge, and intended for the sole purpose of hoodwinking the public into the belief that the organization had in good faith changed its tactics in that particular; that after the resolution referred to was adopted the members still advocated and urged the commission of acts of violence and sabotage as they had prior to the enactment of the criminal syndicalism law. Indeed, the jury could well have doubted the sincerity of the organization in the adoption of the resolution denouncing violence of any character as a means "for encompassing industrial reform" upon comparing the statement therein contained that said organization "does not now and never has believed in or advocated either destruction or violence" with the vast amount of testimony brought before them which showed that, as a matter of fact, the organization or its members had committed the most atrocious crimes for the purpose of terrorizing the people in the futile hope that it would intimidate them into yielding to the demands of the organization.

[3] There are a number of assignments involving objections to said literature that was offered and received in evidence. We have examined these assignments, and find that, generally speaking, they are without legal force. Those errors in rulings upon the evidence which might be subject to a degree of criticism, in view of the strong case made against the accused, were without prejudice. The ruling admitting in evidence a contemptuously satirical article published in one of the official newspapers of the I. W. W. concerning the passing of the late President Harding is especially complained of, the contention being that the article was irrelevant and incompetent as evidence and tended strongly to prejudice the defendants in the minds of the jury. The article was aimed, not particularly at the late President as an individual, but as a political system established for the orderly government of society. In other words, the attack contained in the publication was an attack upon our political system and institutions. While it was not necessary to introduce the article in evidence in this case, yet there was nothing in the article any more radical than statements contained in other newspapers, magazines, and pamphlets admittedly published by and under the authority of the organization and which were properly received in evidence as in proof of the general attitude of the organization toward the governments of this country, and, indeed, toward all constituted authority, whether involving democratic, aristocratic, or other rational forms and systems of government.

[4] The statement of counsel for the defendants that, to constitute criminal syndicalism, "there must not only be acts of violence committed, but those acts of violence must be employed with the direct purpose of effecting the political or industrial changes named in the statute" does not altogether involve a correct view of the law. The law, as will be observed, provides that the act of teaching or advocating or aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence, or unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership or control, or effecting political change, by any organization or assemblage of persons, constitutes criminal syndicalism. It will thus be noted that the mere teaching, etc., is sufficient, and that the actual acts of violence or the actual commission of crime are merely evidentiary, and tend to show the character of the organization, and the fact that it does teach and advocate such methods.

[5] The objection is made that the court erred in refusing to give certain instructions preferred by the defendants. We think that there was no error in disallowing said instructions. The charge of the court covers every principle of law applicable to the case, and was expressed in lucid language. In this connection it may be observed that the court, in its charge, in defining criminal syndicalism, not only set forth section 1 of the act, but also gave an instruction clearly and positively stating that, in order to convict the defendants, the jury must find that the defendants and each of them "did discover and know that the organization referred to as the I. W. W. was an organization for the purpose of advocating, teaching, aiding, and abetting criminal syndicalism."

The judgment and the order as to each of the appealing defendants are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

(67 Cal. App. 81)

PEOPLE v. WARE et al. (Cr. 1014.)

(District Court of Appeal, Second District, Division 2, California. April 30, 1924.)

1. Insurrection and sedition 🔑2—Crime of organizing and assisting in organizing not committed by being member.

Where I. W. W. had been organized before accused's acts of bringing in members, he was not guilty of organizing or assisting in organizing such group of persons.

2. Insurrection and sedition 🔑2—Verdict finding accused guilty of membership in I. W. W. held not sustained.

Where accused did not become member of I. W. W. in county in which he was indicted for membership, and there was no evidence that he was ever in county prior to indictment, verdict of guilty, under Criminal Syndicalism Act, § 2, subd. 4, could not be sustained.

3. Criminal law 🔑97(1)—Person never within state may be found guilty of conspiracy, if coconspirators commit overt act within county.

Under Pen. Code, § 27, notwithstanding accused has never been in state, he may be found guilty of conspiracy to commit criminal syndicalism, if within three years prior to indictment coconspirators commit overt acts within county.

4. Criminal law 🔑97(½)—Person never within county cannot be found guilty of criminal syndicalism.

Person never within county prior to indictment cannot be found guilty of substantive crime of criminal syndicalism.

5. Criminal law 🔑419, 420(1)—When testimony of statements as to purposes and principles of I. W. W. admissible, stated.

In prosecution for criminal syndicalism, unlawful character of organization must be proved, and testimony of witness as to statements by persons whom he believed to be members of I. W. W., of which accused was member, as to purpose and objects of organization is inadmissible as hearsay, but testimony as to statements, speeches, and declarations of members at recognized meetings of organization, or sanctioned by it, and as to conversations with recognized leaders, is admissible.

6. Criminal law 🔑448(12)—Testimony must be confined to substance of statements or speeches authorized by I. W. W.

Witness testifying as to statements or speeches to show objects and principles of I. W. W. must not give his inferences as to meaning of language used, but must confine testimony to substance thereof; exception to rule in case of libel and slander not being applicable.

7. Criminal law 🔑1169(1)—Admission of incompetent testimony as to teachings of I. W. W., subsequently greatly modified, held prejudicial error.

Where accused contended that since 1918 violence and sabotage were no longer taught or justified by I. W. W., it was prejudicial error to admit hearsay and incompetent testimony based in part on speeches and declarations occurring prior to 1918.

8. Insurrection and sedition 🔑2—Instruction defining criminal syndicalism held erroneous as including peaceful demonstrations.

In prosecution for criminal syndicalism, it was error to instruct that criminal syndicalism included any form of direct action to abolish present social system, leading jury to believe it included peaceful public demonstrations.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Paul Ware and others were convicted of criminal syndicalism. From the judgment and from an order denying new trial they appeal. Reversed.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. The defendants Ware, Kohn, Nolan and White, who with 18 others were jointly charged with the crime of criminal syndicalism, have appealed from the judgment of conviction and from the order denying their motion for a new trial.

The indictment contains two counts in each of which the defendants are charged with criminal syndicalism alleged to have been committed in the county of Los Angeles. The first count, drawn under subdivision 4 of section 2 of the Criminal Syndicalism Act (St. 1919, p. 281), charges that defendants did "organize and assist in organizing and knowingly become and were members" of the Industrial Workers of the World, the nature and character of which organization is then averred. For brevity the organization will be referred to as the I. W. W. The second count is so inartificially drawn that we are left in doubt as to whether it is an attempt to charge a conspiracy to commit some one of the crimes denounced in section 2 of the act or to charge a violation of subdivision 3 of that section, i. e., the crime of publishing printed matter of the character condemned in that subdivision. The appellants Ware, White, and Nolan were convicted under the first count and acquitted under the second; the appellant Kohn was convicted under the second count and acquitted under the first.

[1] There is no evidence that Ware, White or Nolan ever organized or assisted in organizing the I. W. W. That society was completely organized and in existence before appellants had anything to do with it. And the act of bringing in or assisting to bring in members is not the equivalent of "organizing or assisting in organizing" such a group of persons. People v. Thurman (Cal. App.) 216 Pac. 394; People v. Thornton (Cal. App.) 219 Pac. 1020. Neither Ware nor White became a

member of the I. W. W. in the county of Los Angeles, they having joined the organization outside of this state, but each of those two defendants continued to retain his membership in, and he was in fact a member of, the I. W. W. while he was in the county of Los Angeles and within three years prior to the filing of the indictment.

[2] Nolan not only did not become a member in Los Angeles county, but there is no evidence to show that he was in that county at any time prior to the indictment, and therefore there is no evidence that he was a member in Los Angeles county as charged in the indictment. As to him, therefore, the evidence unquestionably is insufficient to support the verdict.

[3, 4] It was stipulated that Kohn was not in the state at the time of the filing of the indictment. If the second count of that pleading must be construed as charging a conspiracy to commit the crime of criminal syndicalism, and if the several publications of the printed matter described therein are to be regarded as nothing more than overt acts done to effect the object of such conspiracy; then, notwithstanding Kohn was not in the state prior to the indictment, it nevertheless is possible that he could be found guilty of such conspiracy, if, within three years prior to the indictment, any of his coconspirators committed any one of such overt acts within the county of Los Angeles. See Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, and section 27 of the Penal Code. If, on the other hand, the second count is to be construed as an attempt to charge the substantive offense of criminal syndicalism and not a conspiracy to commit it, then it unquestionably must be held that the evidence is insufficient to support the verdict against Kohn, who at no time prior to the returning of the indictment by the grand jury did anything personally in the county of Los Angeles which is denounced by the Criminal Syndicalism Act. See People v. Leonard (Cal. App.) 225 Pac. 461. There is substantial ground to support the conclusion that the second count is an attempt to charge one or more of the substantive crimes defined in section 2 of the act and not an attempt to charge a conspiracy to commit any one of such crimes. That count commences as follows:

> "And for a second and separate cause of action against the said defendants, * * * and being a different statement *of the same offense as that charged in count 1* of this indictment, (italics ours) the said defendants * * * are accused," etc.

Not only this, but, with the evident purpose of complying with section 951 of the Penal Code by making a general statement of the "legal appellation" of the crime intended to be charged, the second count, in its commencement, declares that the defendants are accused by the grand jury "of the crime of criminal syndicalism, a felony." As aids to construction, these statements in the commencement of the second count lend color to the theory that the grand jurors intended to charge the defendants with the commission of one or more of the substantive crimes defined in section 2 of the act, and not to charge them with a conspiracy to commit any of such crimes. We do not find it necessary, however, to pass upon this question. For though the evidence might possibly be sufficient to support the verdict against Kohn if conspiracy be the crime with which he is charged in the count upon which he was found guilty, there are errors in the record of so grave a character as to necessitate a reversal as to all of the appellants.

[5] One of the most serious errors of which appellants justly complain is the admission against them of hearsay evidence and of incompetent opinions and conclusions. In prosecutions under the Criminal Syndicalism Act, where it is charged that the accused is a member of an organization which advocates criminal syndicalism or that he published written or printed matter which advocates or teaches the purposes or principles of such an organization, it is incumbent upon the people to prove in each case the unlawful character of the organization. People v. Thornton, supra. In making such proof the following rules of evidence, sanctioned by authority and fortified by reason, should be observed: The testimony of a witness as to talks which he had with persons whom he believed to be members of the organization, whether such belief be founded upon membership cards shown to the witness or upon declarations made to him by such supposed members, and in which talks the persons whom the witness so believed to be members made statements of what purported to be the purposes, objects, principles, or teachings of the organization, is hearsay testimony, and as such is inadmissible. State v. Gibson, 115 Wash. 512, 197 Pac. 611; State v. Cantwell, 119 Wash. 665, 206 Pac. 362. It may be that the persons quoted by the witness were not members of the organization, though they claimed to be. They may have obtained their membership cards through some species of fraud, or it may be that they were not acquainted with the principles and teachings which they professed to know. These are matters which the defendants in such actions should have the right to search out by cross-examining the persons who vouchsafed the information given to the witness. State v. Gibson, supra. Testimony as to statements, speeches, and declarations made in the hearing of the witness by, or in the presence of, members of the organization, at recognized meetings thereof in its headquarters or halls or in such places and on such occasions as are proved to have received the sanction and countenance of the

organization, is admissible. State v. Pettilla, 116 Wash. 589, 200 Pac. 332. Also witnesses may testify as to conversations had with members of the organizations whose membership is proved by competent evidence and is of such a character as to show that it carried with it the authority of the organization to make declarations as to its purposes, objects, principles, and teachings, as, for example, where, by competent evidence, the conversations are shown to have been had with leaders and officers of the organization in the course of the performance of their duties as such. State v. Pettilla, supra; State v. Kowalchuk, 116 Wash. 592, 200 Pac. 333.

[6] A witness testifying to statements, speeches, or declarations made in his presence by members of the I. W. W., at recognized meetings or in places and upon occasions which have received the organization's sanction and countenance, or to conversations had with officers or leaders whose membership and rank have been proved by competent evidence, and whose official positions are such as to carry authority to make on behalf of the organization declarations of its purposes, objects, principles, and teachings, must not give his inference as to the meaning of the language heard by him, but must confine his testimony to recounting the substance of the statements, speeches, declarations, or conversations, so far as his memory will enable him to recall it; that is to say, a witness to such speeches, declarations, or conversations may give the substance of the language as he remembers it, but he may not give his inferences drawn from what was said to him or in his presence. He must not be allowed to place his construction upon the language by stating what he understood it to mean. It is for the jury, not the witness, to determine from the language used at the meetings or in the conversations with the authorized leaders or officers what were the teachings or principles promulgated, or what were the objects or purposes had in view by the organization. The general rule is that a witness may not state his impression as to the meaning of the language heard by him or as to the intention of the speaker. Braley v. Braley, 16 N. H. 426; Hibbard v. Russell, 16 N. H. 410, 41 Am. Dec. 733; Kingsbury v. Moses, 45 N. H. 222; Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155. In the case last cited our Supreme Court says:

> "The trial court did not err in excluding from evidence the conclusions of the plaintiff as to the meaning defendant intended to convey by certain statements made to her. She was allowed to state fully the substance of what he said, and it was for the trial court to determine the meaning thereof from the words used and the circumstances under which they were spoken."

To this general rule an exception is made in actions for libel or slander, where the libelous or slanderous statement depends upon the effect which the words produced in the minds of the readers or hearers. 11 R. C. L. pp. 567, 568. Also an exception to the rule is permissible where there is something besides the mere words used which goes into the making of the inference or conclusion deduced by the hearer, as, for example, when gestures, tones, and innuendoes which are incapable of description accompany a speech or a conversation, and so affect the meaning of the spoken words that a mere recounting of the words without the accompanying circumstances will not convey the real meaning of what was said. Note to State v. Pruett, L. R. A. 1918A, 738, 739. This last exception to the general rule is but an application of the well-established doctrine that a witness may state his conclusion where the facts perceived by the senses are so complex and subtle as to make it difficult or impossible adequately to describe them to the jury, and the conclusion or inference is so simple and so well within the range of common experience that the witness may relate what he has observed more accurately, as well as more easily, by stating his conclusions than by attempting to detail the evidential facts. But this reason for making an exception to the general rule is not applicable here. There is no claim that the language of any of the statements, speeches, declarations, oral teachings, conversations, or writings heard or read by any of the witnesses in this case was accompanied by gestures, tones, or other conduct which so affected the meaning of the spoken or written words that a mere recounting of the substance of the language would not convey the real meaning of the person who spoke or wrote the words.

Tested by the foregoing it must be held that the trial court erred in overruling appellants' objections to innumerable questions calling for hearsay testimony and for the witnesses' interpretations of the language which they heard or read. Thus one of the witnesses for the prosecution, a police officer who formerly was a member of the I. W. W., after giving what appellants' counsel describes as "a series of exegeses as to the witness' interpretation" of a certain pamphlet, was asked these further questions as to the meaning of the language of the pamphlet, and gave the following answers:

> "Q. Now, Mr. Townsend, as far as you have gone, I will ask you whether or not the explanation you have given as you have gone along was the explanation of the literature that you learned in this school of instruction? A. Yes, in it, and being a member of the I. W. W., *talking to members as individuals, as members.* (Italics ours.)
>
> "Q. Is there any further passage there? A. Yes.
>
> "Q. All right, if you will just go ahead and read that and give the explanation of it. A. (Reading) 'It is as a negation of and as a reaction against such methods that the I. W. W.

preaches its own form of economic direct action.' That is a statement against craft unionism; that they want to teach that by direct action. Here is the best one of all: 'We want to stir the workers into personal activity and participation in the struggle for a new society.' Now, what is that personal activity that they want to stir the workers into? Direct action sabotage, the things that I have previously named; to destroy the industries. Personal activity means—

"Q. I will ask you whether that explanation is what you learned at the schools of instruction? A. Yes.

"Q. And from conversation with officials *and the rank and file members* of the I. W. W.? (Italics ours.) A. Yes."

By these excerpts from the witness' testimony there is shown, not only a violation of the rule which forbids the witness giving his conclusions and inferences, but a violation also of the rule against hearsay evidence. A portion of the witness' information may have been gained by him through hearing speeches at recognized meetings of the I. W. W., through secret instruction given him by authorized teachers of the organization's real purposes and aims, or through his conversations with officers of the I. W. W.; but he did not pretend to say what portion of his information was so acquired and what portion was obtained by him from private conversations had with members or purported members of the organization—with those whom he referred to as "the rank and file members." As in State v. Cantwell, supra, the witness was testifying, in part, as to what he had learned from supposed members of the organization who were not shown to have had authority to speak concerning the organization's purposes and principles. Another witness, who testified that he had joined the I. W. W. for the purpose of getting information for the government, testified as follows:

"Q. And from your knowledge *of the organization* (italics ours) I will ask you if you know the attitude of the I. W. W. towards military establishment? A. Yes, sir."

Thereupon the defendants, who were not represented by counsel, all of them having elected to conduct their own defense in person, interposed the following objections and motions which were met with the following adverse rulings:

"Mr. Kohn: May it please the court, we object—he has not been a member since 1919, and anything he can claim to know or think to know can only be hearsay, or conclusions. * * *

"The Court: * * * Objection overruled.

"Mr. White: I move that the literature of the I. W. W. be used as the best evidence, and not this man's testimony.

"The Court: Objection overruled."

Thereupon the witness proceeded as follows:

"Q. By Mr. Hill (the public prosecutor): The question is, What is their attitude toward the military establishment? A. They support every movement for the reduction of the army and navy; they discourage enlistments in the army and navy, the national guard, and so on, without exception.

"Q. Why? A. To increase their chances of success when the time comes for a revolution.

"Mr. White (a defendant): I certainly object to the answer and the question both, and ask that it be stricken out and the jury instructed to disregard them as plainly a conclusion of the witness, why these members of the I. W. W. done this.

"The Court: Motion denied."

[7] In this testimony we have an example of a flagrant violation of the rule which forbids a witness to place his interpretation upon language heard or read by him or to give his inferences as to the meaning of spoken or written words. Another witness, a former mayor of Seattle, was permitted to testify that during his incumbency of the office of mayor of that city he read official copies of certain resolutions published in the Seattle Union Record, a newspaper which he testified was owned by the Central Labor Council. The prosecuting officer, over defendants' objections that it called for the conclusion of the witness, was then permitted to ask the question, "And by whom was the Central Labor Council controlled at that time?" To which the witness answered: "The Central Labor Council was controlled at that time by members of the Industrial Workers of the World." A more glaring violation of the rule forbidding a witness to state his conclusion could not well be imagined. The record before us, covering almost 7,000 pages, is replete with just such errors, a few of which we have culled at random for the purpose of illustration. That these errors were prejudicial is shown beyond the shadow of a doubt. It was the contention of the defendants at the trial that since the year 1918 the literature issued by the I. W. W. and the teachings of that organization have undergone a radical change, and that ever since that year violence and sabotage no longer have been taught or justified by that group of men. It was important, therefore, that the jury should be apprised of the principles, policies, aims, and purposes of the organization within the three-year period immediately preceding the filing of the indictment, and not be led astray by hearsay evidence and incompetent conclusions based, in part at least, upon speeches, declarations, and conversations occurring prior to the time when, as the defendants claimed, the principles, purposes, and teachings of the organization were greatly modified.

[8] But one further error needs consideration. After having read to the jury the Criminal Syndicalism Act, the trial court gave the following instruction:

"You are instructed that the word 'criminal syndicalism' is defined in the law I have read to you, and you are to be governed by that definition. It is defined in Webster's New International Dictionary as follows: 'It aims to abolish the present political and social system by means of the general strike, and direct action, which is any kind of action that is directly effective, whether it be a simple strike, *a peaceful public demonstration*, sabotage or revolutionary violence.'" (Italics ours.)

This instruction was misleading, and tended to confuse the jury. It could hardly have failed to create in the minds of the jurors the erroneous notion that not only is there no conflict between the law's definition and Webster's definition, but that criminal syndicalism is a crime which embraces any and every aim to abolish the present political and social system by any directly effective action, even though such action amount to no more than a peaceful public demonstration.

It is but fair to say that the Attorney General, in the brief filed by him, virtually concedes that the judgment should be reversed.

The judgment against each appellant and the order denying the motion for a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

66 Cal. App. 726

GANDALFO v. GANDALFO. (Civ. 2684.)

(District Court of Appeal, Third District, California. April 25, 1924.)

1. **Appeal and error 🔑1011(1)—Allowance of charge on entry in account book contrary to oral evidence was question for trial court.**

The allowance of a charge against one partner, based upon an entry in a partnership account book by the other partner, was question for the trial court, there being a conflict between the oral evidence and the account book.

2. **Appeal and error 🔑932(1)—In absence of showing by record, it is assumed that amount allowed for hauling was proper.**

Where the record does not show what credit the court allowed for certain hauling, it will be assumed on appeal that the amount allowed was proper, error not being presumed.

3. **Appeal and error 🔑930(1)—Reviewing court assumes as true all facts appearing by reasonable inference from evidence.**

The reviewing court will assume as true all facts appearing by reasonable inference from evidence in record, so far as they may support the findings.

4. **Trial 🔑377(2)—Refusal to admit further evidence after submission, held proper.**

After a case was submitted to the trial court, refusal of a motion to set aside the submission and to allow further evidence to be introduced, where the parties produced conflicting affidavits concerning the motion, was justified.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Joseph L. Gandalfo against Jo Gandalfo. From judgment for plaintiff, defendant appeals. Affirmed.

J. T. B. Warne and J. B. Curtin, both of Sonora, for appellant.

J. C. Webster, of Sonora, for respondent.

YOUNG, Justice pro tem. This is an action for the dissolution of a partnership and for an accounting. The trial court made and filed findings of fact, and judgment was entered thereon. By the judgment it was, among other things, orderd that the plaintiff recover from the defendant the sum of $3,728.17. Defendant appeals.

That portion of the judgment which orders such recovery from defendant is based upon finding 4 of the findings, which is as follows:

"That during the existence of the said partnership of J. Gandalfo & Co. and from and after said October 8, 1914, to the time of the trial of this action the said partnership became indebted to plaintiff for a balance on account of money paid out and contributed to and for the benefit of said partnership and for labor performed and for use of his motor vehicles in the sum of $5,308.08 to which the said partnership is entitled to an offset on account of moneys of said partnership collected by plaintiff and for gasoline used amounting to the sum of $1,313.50, leaving a balance of $3,994.58 now due and payable and owing by the said partnership to the plaintiff on the said account. That during said time there was collected, received and retained by defendant money belonging to the said partnership to the amount and value of $4,191.97, and the said defendant paid out and contributed to the funds of said partnership the sum of $763.00, leaving a balance of $3,428.97, which is due and payable to the said partnership from the said defendant. That the sum of the said account owing from the said partnership to the said plaintiff, to wit: $3,994.58 and the said amount owing by defendant to the said partnership, to wit, $3,428.97, equal the sum of $7,423.55, one-half of such amount or the sum of $3,711.775 is due and owing from the said defendant to the plaintiff in settlement of their said partnership accounts and defendant is also indebted to plaintiff for a balance of $17 on their individual accounts which by consent of the parties hereto has been determined in this action, making a total of $3,728.775 due and owing from the defendant to the plaintiff herein."

The principal ground urged by defendant for a reversal of the judgment is that finding 4 is not supported by the evidence.

Plaintiff, a nephew of defendant, and defendant, entered into articles of copartnership in February, 1913, and their principal business consisted in conducting a hotel and a saloon in the city of Sonora. They also ran a grocery store for a while, and also occasionally engaged in farming. Plaintiff was called to serve in the United States Army in August, 1917, and did not thereafter participate in the actual affairs of the partnership business.

The documentary evidence introduced at the trial consisted of bank statements, checks, notes, letters and the account books of the partnership. The parties to the action relied upon oral testimony to establish many of their respective claims. Many witnesses were sworn and examined, and the testimony as to many items was extremely conflicting. Plaintiff gave testimony as to many items contributed by him for the benefit of the partnership (some of which testimony was corroborated by other witnesses), which had never been entered in the books of the partnership, and also offered oral testimony—his own and that of other witnesses—as to many sums of money collected for the partnership by defendant for which the partnership had not been credited. Defendant contested many of these items, and gave testimony in his own behalf as to items advanced by him for the benefit of the partnership for which no credits had been given on the books of the partnership, and also as to amounts collected by plaintiff for the partnership and not accounted for. There is no finding as to the items which were included in the totals found in finding 4, nor is there anything in the record which shows authoritatively these items. In making up the totals found in finding 4, the trial court had before it many items for consideration, many of which were necessarily excluded by it. We reach this conclusion from an examination of the transcript on appeal, from which we gather that, had the court accepted all the items claimed by plaintiff, plaintiff's credit would have been much larger, and, had it accepted as true the testimony offered by defendant, plaintiff's recovery would have been much less. The only suggestions before us as to the items included in these totals are found in the respective briefs of plaintiff and defendant, and these do not agree.

[1] Defendant, in his brief, calls our attention to certain items which he asserts the trial court erroneously included in the total sum found in favor of the plaintiff; also certain items which he asserts were erroneously included in the total sum charged against defendant. He contends that the court included in the total charge made against defendant an item of $780.15, which was the total sum of other items also included in the total charge of finding 4. On page 120 of the partnership account book introduced in evidence there appeared the following entry in defendant's handwriting: "Apr. 23, 1918—Recd. from Andy $738.15." On the same page, 120, and on page 118 of the same book, were many other items set out as having been received, with date of receipt and the name of the person from whom received. Defendant testified that the item "$738.15" was the total of the other items found on pages 118 and 120, and that they were collected by one Andy Devoto and entered in the account book as collected, and paid over to him by Andy Devoto and that he (defendant) had added them up and made the entry above specified. The allowance of this charge against defendant—if it was allowed—was entirely a question for the trial court. The original entries were before it, and it was for the court to say whether or not it would accept the record evidence contained in the account book, or the oral statement of defendant. In this connection it may also be well to observe that we have examined the items which, defendant testified, made the total of $738.15, and find that the total of the items is a much larger sum. Defendant complains that the court credited plaintiff with an item of $626 upon plaintiff's testimony that his father had paid a bill for the partnership to the Tacoma Bottling Company. Defendant denounces this as error, and argues that plaintiff did not pay it himself, and that, his father not being a party to the action, the credit should not have been allowed. Defendant's father was sworn as a witness and testified that he had made the payment for and in behalf of his son. If this credit was allowed by the court it was entirely proper. Defendant complains that the court credited the plaintiff with $676.08 for picking up and hauling 2,625 sacks of grain, and that this sum was an excessive charge and should not have exceeded $80. The plaintiff sets forth in his brief that the court gave plaintiff credit for only $76.08 in this behalf. The record does not show what credit the court allowed, and therefore we assume that it only allowed such sum as was shown by the evidence to be proper. Defendant again complains that the court allowed plaintiff credit for $789 for the use of his individually owned tractor in plowing land for the partnership, and in his brief says: "Just how that sum was arrived at we cannot understand." In connection with this transaction plaintiff testified that he had plowed 460 acres of land for the partnership with his tractor, and that the going charge for such plowing was $3 per acre, thus making a total of $1,380, with which he sought to charge the partnership. Defendant testified that plaintiff plowed only 363 acres of land for the partnership. Thus we see that, if the court did allow plaintiff credit for $789 for plowing, this sum was arrived at by the court accepting defendant's testimony as against that of plaintiff. Defendant asserts that the court allowed a charge of $58.95 against him as money collected from M. E. Knaus, which was part of a total of $364.50, also charged against him. An examination of the transcript and a computation made by us discloses that the item of $58.95 was not included in the total charge of $364.50.

[2, 3] It is further claimed by defendant that the court included in the charges against him an item of $310 as collected from Angelo Pararia, and that the evidence shows the amount collected by him to be $210. The partnership account book shows this amount

to have been $210, and if it were satisfactorily shown that the excess of $100 was included in the finding, it would be error. The record, however, does not show that this item was allowed against the defendant as $310, or at all. There is ample evidence in the record to support the total amount allowed against defendant in finding 4, irrespective of this amount, and the appellate court will not, therefore, assume that the trial court made an erroneous charge. The reviewing court will assume as true all facts which appear by reasonable inference from the evidence contained in the record on appeal, so fas as they may support the findings. Cosby v. Cline, 186 Cal. 700, 200 Pac. 801.

It is held in Estate of Aufret, 187 Cal. 34, 200 Pac. 946, that error cannot be presumed on appeal, all intendments being in favor of the judgment.

In O'Meara v. Swortfiguer (Cal. Sup.) 214 Pac. 975, it is held that in determining whether or not a judgment is supported by the evidence, the appellate court will accept the view most favorable to respondent.

It is further claimed by defendant that the court credited plaintiff with $860 for the use of his Ford car as a delivery car in the business of the partnership at the rate of $20 per month for the period of 43 months. He contends: First, that the plaintiff did not originally intend to make a charge for the use of his car in the business; second, that he charged for a greater period of time than the car was actually used in the business, and, third, that the charge of $20 per month for the rental of the car was excessive, especially in view of the fact that the evidence shows that the partnership paid for the upkeep of the car while used as a delivery car. As to the first point urged by defendant, it is true plaintiff testified that he did not originally intend to charge for the car. On the other hand, defendant testified that he expected the partnership would have to pay a reasonable amount for the use of the car while in the use of the partnership. Here again the record fails to show whether or not the court did, in fact, include this credit in its findings, and the appellant court will, therefore, assume that the trial court did not allow an excessive amount.

There are several other items for which defendant urges that the court erroneously allowed plaintiff credit, and still others that he claims were allowed against defendant erroneously, but an examination of the transcript shows that the testimony with regard to all of them was conflicting, and that if they were included in the totals found in finding 4, it was entirely a matter for the trial court to determine.

[4] After the case was submitted to the trial court defendant moved to set aside the submission for the purpose of introducing further evidence. He offered affidavits in support of his motion, and plaintiff offered affidavits in opposing the motion. The motion was overruled, and defendant complains of this ruling as an abuse of discretion on the part of the trial court. The affidavits were conflicting, and the court was justified in ruling as it did.

Defendant has failed to show that the findings and judgment are not supported by the evidence, and has failed to show that there was any error on the part of the trial court.

It is therefore, ordered that the judgment be affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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66 Cal. App. 703

PEOPLE v. WHITE. (Cr. 1042.)

(District Court of Appeal, Second District, Division 1, California. April 24, 1924.)

1. Larceny ⚷65—Evidence of defendant's appropriation of complaining witness' money supported conviction of grand larceny.

Evidence of defendant's appropriation of proceeds of complaining witness' check, intended to be deposited in escrow as part payment on property, *held* to support conviction of grand larceny.

2. Larceny ⚷3(2)—Intention to defraud necessary element of grand larceny by fraud, trick, or device.

To convict one of crime of grand larceny by fraud, trick, or device it is necessary that evidence show that it was accused's intention at time he procured property to defraud owner out of it.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Frederick Grant White was convicted of forgery, grand larceny, and embezzlement, and he appeals. Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

CURTIS, J. The defendant was charged with the crime of forgery. An indictment was also filed against him containing six counts, in four of which he was charged with the crime of grand larceny and in the other two with embezzlement. Both cases were tried together, and the jury rendered verdicts finding the defendant guilty of all seven charges. Defendant appeals from the judgments entered against him, and also from an order denying his motion for a new trial.

[1] The only argument made by defendant is upon his contention that the evidence is insufficient to support the judgments rendered against him on the four charges of grand larceny. While the facts in support of

these four charges are entirely different, in so far as the names of the parties and the amounts involved are concerned, yet the general plan or scheme followed by the defendant in securing the various sums of money from the several complaining witnesses was practically the same in each of the four transactions. It will not, therefore, be necessary to detail the testimony relating to all four charges, and we will, for the sake of brevity, confine ourselves to a review of the testimony involved in the charge set forth in count one of the indictment. The facts in the case are undisputed, as the defendant offered no evidence in his behalf. The defendant represented to J. Q. Alexander, the complaining witness in count No. 1, that he had an option on a bungalow, including the furniture, situated at No. 4380 Denker avenue, in the city of Los Angeles, for $6,300, and that $750 would handle it; that he could sell and make from $1,000 to $1,500 on the deal; that the option would expire at noon on that day; that if Alexander wanted the option he could have it at the price quoted. Thereupon Alexander gave to the defendant the former's check for $750. Defendant accepted the check, and informed Alexander that he would escrow the deal with one of the title companies in said city, and that a card would be received by Alexander in a short time from said title company informing him of said escrow. Just before he left Alexander the defendant voluntarily gave his own check to Alexander for $850, remarking at the time. "I am going to leave you just $100 in excess of your investment, to show you my faith in it." The check for $750 was cashed by the defendant, but he failed to place it, or the money received thereon, or any papers, in escrow as agreed, but converted the proceeds of said check to his own use. The evidence further shows that the defendant had no option to purchase the property, as represented by him to Alexander, nor was there any such property as described by defendant at No. 4380 Denker avenue, nor was there any such number as 4380 Denker avenue. Alexander ascertained these facts, and endeavored to find the defendant, but learned that he had left the city of Los Angeles. He then presented the defendant's check for $850 to the bank upon which it was drawn for payment, which was refused. Later the defendant returned to Los Angeles, and Alexander made numerous attempts to have the defendant repay to him the $750, all of which were unsuccessful. These negotiations continued for about a month, when the defendant left said city and later was located and arrested at Springfield, Mass., and returned to this state for trial.

Defendant now contends that these facts are insufficient to support a verdict finding him guilty of the crime of grand larceny. He insists on the other hand that, if he is guilty of any crime, it is that of obtaining money by false pretenses and not grand larceny. The distinction between the crime of grand larceny, when the property in question is obtained by fraud, trick, or device, and the crime of obtaining property by false pretenses, is well established as a matter of law. It is often difficult to determine from a given state of facts of which one, if either, of these crimes the accused is guilty. The law governing this subject is well settled and is stated in People v. Shwartz, 43 Cal. App. 696, 699, 185 Pac. 686, 687, as follows:

> "In larceny the owner of a thing has no intention to part with his property therein to the person taking it, although he may intend to part with possession. In false pretenses the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. People v. Delbos, 146 Cal. 734, 81 Pac. 131."

[2] There is nothing in the evidence in the case before us tending to show that the check given by Alexander to the defendant was at any time to become the property of the latter. On the other hand, it is quite evident from the testimony in this case that the complaining witness, at the time he delivered this check to the defendant, intended that he should deposit the same in escrow with the title company as part payment on the so-called Denker avenue property. The title to the money, therefore, never passed to the defendant, nor did it pass out of the complaining witness. The title to the money remaining in the complaining witness, it was subject to larceny as his property, and, when the defendant appropriated the proceeds thereof to his own use, he was guilty of larceny. People v. Delbos, 146 Cal. 734, 81 Pac. 131. It should also be stated that, in order to convict a person of the crime of grand larceny by fraud, trick, or device, it is necessary that the evidence show that it was his intention at the time he procured the property to defraud the owner out of the same. The fact that the defendant in this case had no option to purchase the property as represented by him to Alexander would justify the belief that defendant's intention, at the time he made such false representations, was to defraud Alexander out of his property. No other reasonable conclusion can be drawn from the conduct of defendant. Evidently the jury so construed his actions, and in our opinion there was ample evidence in the case to justify them in so doing.

Defendant intimates that the giving by him of his check for $850 to Alexander in some way changed the nature of the transaction to his advantage. The check was given voluntarily on the part of the defendant and after he had received Alexander's check for $750. A similar device was attempted by the defendant in the case of People v.

Tomlinson, 102 Cal. 19–22, 36 Pac. 506, 507, concerning which the Supreme Court said:

> "The jury were justified in believing that defendant's voluntary presentation of the note was a mere trick to get possession of the money."

So in the case at bar the voluntary giving by the defendant of his worthless check was apparently in furtherance of his dishonest scheme to obtain Alexander's check, and did not convert this fraudulent transaction into a legitimate one. We are satisfied that the evidence in all respects supports the judgments.

The judgments and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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66 Cal. App. 754

Ex parte WILKINS. (Cr. 785.)

(District Court of Appeal, Third District, California. April 26, 1924.)

1. Bail 🔑44—Criminal law 🔑1148—Bail, pending appeal from judgment not imposing fine only or imprisonment for misdemeanor, discretionary, and reviewable only for abuse.

Discretion, under Pen. Code, § 1272, to admit to bail, pending appeal from judgments not imposing fines only or imprisonment for misdemeanors, is vested primarily in trial court, whose determination should not be disturbed or ignored, except for manifest abuse.

2. Bail 🔑44—Admission to bail, pending appeal, after conviction and sentence to state penitentiary, discretionary with trial court.

Under Pen. Code, § 1272, admission to bail pending appeal from conviction, under section 476a, for making and delivering fictitious check with intent to defraud, is not matter of right, but discretionary with trial court after sentence to imprisonment in state penitentiary as for felony, though court could have sentenced defendant to county jail as for misdemeanor.

3. Habeas corpus 🔑113(12)—Sufficiency of evidence to support conviction not considered pending determination on appeal.

Pending determination of legal sufficiency of testimony to sustain conviction on appeal, defendant is presumed guilty, and appellate court will not weigh evidence on application for writ of habeas corpus to secure his release from custody.

Application by W. C. Wilkins for writ of habeas corpus to sheriff of Placer county to secure release from custody on bail. Writ denied.

C. M. Fickert, of San Francisco, and H. Hugh Sydenham, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., and Orrin J. Lowell, Dist. Atty., of Auburn, for respondent.

PLUMMER, J. This is a petition for a writ of habeas corpus for the purpose of admission to bail. It appears from the petition in this matter that on or about the 28th day of February, 1924, W. C. Wilkins was convicted of the offense of having made and delivered a certain fictitious check with intent to defraud the county of Placer in the state of California. The check in question was as follows:

"The People's Bank 90–32.
"Commercial and Savings 12 No. ——.
"Sacramento, Cal., Aug. 30, 1922.
"Pay to the order of M. Stone (J. P. Roseville, $50.00, fifty & $^{00}/_{100}$ dollars.
"W. C. Wilkins.
"Indorsed on back: M. Stone, J. P."

After conviction, sentence was pronounced of imprisonment in the state prison, state of California, at San Quentin, for such period as might be provided by law. The conviction and sentence were had under the provisions of section 476a of the Penal Code, which section specifies that upon conviction imprisonment may be imposed in the county jail for not more than 1 year or in the state prison for not more than 14 years. Within due time after the imposition of sentence the petitioner took an appeal to this court, which is now pending, and thereupon applied to the trial court for admission to bail pending such appeal. This application was denied. The real question before this court upon this application is whether the order of the superior court denying admission to bail constitutes an abuse of discretion.

[1] No question of illness of the petitioner is presented nor any matters of an extraordinary character occurring since the denial of the petitioner's application for bail in the trial court are presented to us upon this application. No attempt is made to bring this case within the provisions of the law set forth in the cases of People v. Cornell, 28 Cal. App. 654, 153 Pac. 726; Ex parte Turner, 112 Cal. 627, 45 Pac. 571; People v. Perdue, 48 Cal. 552; People v. January, 70 Cal. 34, 11 Pac. 326; and a number of others which we need not enumerate, all holding that matters of an extraordinary nature must be shown before an appellate court will interfere with the determination of the trial court upon applications for bail after conviction. The law is well settled that "the discretion mentioned in the statute relating to the admission to bail is vested primarily in the trial court and the determination of that court should not be disturbed or ignored except in instances of manifest abuse." The petitioner in this case insists: First, that he is entitled to bail as a matter of right; secondly, that the denial of his application for bail by the trial court was a manifest abuse of discretion; and, thirdly, that this court has the right

and that it should review the evidence to ascertain whether the lower court has or has not abused its discretionary power in denying bail.

Section 1272 of the Penal Code, in relation to the admission to bail reads as follows:

> "After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:
>
> "1. As a matter of right, when the appeal is from a judgment imposing fine only.
>
> "2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.
>
> "3. As a matter of discretion in all other cases."

[2] It is argued that, by reason of the fact that under the provisions of section 476a of the Penal Code the trial court is vested with the discretion as to the place of punishment when pronouncing sentence, and that, if the place of punishment is fixed in the county jail, the offense thereafter is known to the law as a misdemeanor and bail may be insisted upon as a matter of right, it follows as a necessary conclusion that, if the trial court fixes the place of imprisonment as the state penitentiary, and the offense thereafter in law is known as a felony, the same rule as to admission to bail after conviction applies, and that bail is still a matter of right and not a matter of discretion. To support this contention the appellant relies upon the case of Ex parte Hoge, 48 Cal. 3, wherein it is apparently held by Chief Justice Wallace, speaking for himself alone and not for the court, that in cases where a defendant has been convicted of the offense for which the court may thereafter, in its discretion, impose upon him a sentence for a felony or for a misdemeanor, he is entitled to bail pending appeal as a matter of right. This conclusion is based upon the reasoning that the offense of which the defendant has been found guilty is the same in either case, and that the rights of the defendant are not to be adjudged or lessened by the exercise of the trial court of the discretion vested in it in such instances. With this reasoning we cannot agree. If the rights of the defendant are the same both before and after the imposition of sentence, we do not very well see how the Legislature could very well invest the trial court with the discretion conferred by the statute in question. It is for the very purpose of determining the rights of the defendant in such instances according to the character of the offense and all the attendant circumstances connected therewith that the discretion is vested in the trial court to take away from the defendant the privilege (if we may use that word) of being confined in a county jail and to sentence the defendant to a state prison. The statute, by its very terms, authorizes the trial court in its discretion to adjudge the status of the defendant according to the enormity of the offense committed by the defendant, and which, under the statute, calls for the exercise of the legal discretion of the trial court in order that suitable punishment may be meted out to offenders.

After such determination has been had, and the character of the offense has been fixed in the manner provided by law, we think that the rule governing admissions to bail in cases of other felonies is applicable to cases of felonies ascertained and determined under section 476a of the Penal Code.

[3] The petitioner next calls our attention to the case of People v. Frey, 165 Cal. 140, 131 Pac. 127, and insists that under the holding of this case the petitioner will undoubtedly be granted a new trial upon his appeal, and therefore he is entitled to bail. In response to this point, counsel for the people call our attention to certain stipulations contained in the transcript which, it is alleged, obviates the holding in the case of People v. Frey, supra. A cursory inspection of the transcript shows that, in order to determine the merits of the contending parties, this court must pass upon the legal sufficiency of the testimony when the petitioner's appeal is presented for determination. Pending that time and until the appeal is determined, the law is well settled that any one convicted of an offense is presumed to be guilty, and even where the question is only one of admission to bail, we do not think the rule is different and that we should weigh and consider the evidence to ascertain the legal sufficiency of the same to support the conviction. Upon the question of whether the testimony may be considered for the purpose of ascertaining whether the trial court has or has not abused its discretion in denying bail we content ourselves in this case with the statement that a cursory examination of the testimony shows that it is by no means certain that the holding of the case of People v. Frey, supra, is determinative of the issues that may be presented for consideration upon the petitioner's appeal now pending in this court.

In the case of Ex parte Smith, 89 Cal. 79, 26 Pac. 638, an application for a writ of habeas corpus to be admitted to bail pending appeal contained, among other reasons assigned for admission to bail, the following:

> "That the trial court committed errors of law that appear from the face of the record, and that the evidence at the trial was insufficient to justify a conviction."

The court refers to the case of Ex parte Smallman, 54 Cal. 35, as outlining the general character of facts necessary to exist upon which to base an exercise of discretion and admission to bail, and, also, of circumstances of an extraordinary character that must intervene to warrant the admission to bail of a person convicted of felony, and then holds as follows:

"The petition in this case shows no such circumstances. We cannot, in this proceeding, examine into the alleged errors of law committed by the lower court, and thus prejudge the case before it comes before us upon its merits."

The application for bail was denied. If it be true, as contended by the petitioner, that the evidence in this case is not legally sufficient, as was contended in the Smith Case, were we to examine into the testimony and determine such fact we would simply be prejudging the defendant's appeal before the time prescribed by law, and also the method and manner when such questions may come before us and be properly adjudged. If this rule were adopted, then every appellant, the legality of whose conviction might be seriously or otherwise argued in an appellate court, would be entitled to bail and the discretion lodged by the Legislature in the trial court would become a nullity whether that discretion is abused or exercised with the greatest circumspection and precision.

As analogous to the questions presented upon this petition relative to a consideration of the evidence we may well consider the cases having to do with writs of habeas corpus for discharge after conviction. In the case of In re Graham et al., 74 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174, the Supreme Court of Wisconsin having to do with this question decides the matter tersely as follows:

"We deny the writs, for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on writ of error [citing a number of cases]. But the judgments are not void. * * * The court had jurisdiction of the persons and subject-matter or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of errors in law or irregularities in the proceedings. * * *"

In Ex parte Sternes, 77 Cal. 156, quoting from page 162 (19 Pac. 277, 11 Am. St. Rep. 251), the Supreme Court of this state, upon application for a writ of habeas corpus, uses the following language:

"When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside, or reversed by a direct proceeding."

In the recent case of Ex parte Drew, 188 Cal. 717, 207 Pac. 249, the Supreme Court of this state again held upon an application for a writ of habeas corpus that:

"The scope of inquiry upon a writ of review extends only to the question of the jurisdiction of the court which rendered the judgment sought to be reviewed."

Again, in the case of In re Selowsky, 189 Cal. 331, 208 Pac. 99, upon an application for discharge on a writ of habeas corpus it was decided that:

"In a proceeding in habeas corpus to obtain release [of petitioner] from custody under a judgment of contempt, the only inquiry that can be made is with reference to the jurisdiction of the court which made the judgment of which the imprisonment is a part."

There is no question as to the jurisdiction of the court in the instant case. It is only the errors of law committed by the court and the sufficiency or insufficiency of the testimony to support the conviction which, of course, again goes to the correctness or incorrectness of the order of the trial court in granting or denying a new trial that are urged in this application. These questions do not touch the subject of jurisdiction, and were we to consider them now would be in effect to decide the defendant's appeal upon petition to be admitted to bail.

We do not find any reason for holding that the trial court abused its discretion in denying bail, and it therefore follows that the petitioner's application to be admitted to bail by this court must be and the same is hereby denied.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 745

TETENMAN v. EPSTEIN et al. (KAUFFMAN et al., Interveners). (Civ. 3936.)

(District Court of Appeal, Second District, Division 2, California. April 25, 1924.)

1. Mortgages 🔑608½—Findings held insufficient to sustain judgment declaring deed absolute to be mortgage.

Finding that deed absolute from mortgagor to mortgagee was intended to convey mortgaged property in satisfaction of mortgagee's claim, and that neither party at time knew the property was greatly enhanced in value, *held* insufficient to sustain judgment declaring deed a mortgage only.

2. Mortgages 🔑32(2)—Court without power to hold deed intended as absolute conveyance a mortgage.

Where deed from mortgagor to mortgagee was intended as conveyance of equity of redemption and not as security, court is without power to hold same a mortgage.

3. Contracts 🔑93(5) — Equity will freely grant rescission for mistake of parties.

Equity will freely grant rescission of contract for mistake of both parties as to material collateral matter, vital to and forming an essential part of contract.

4. Reformation of instruments 🔑1—Reformation of contract presupposes same does not express intent of parties.

Reformation of contract presupposes same does not express intent of parties.

5. Mortgages 🔑32(1)—Mere inadequacy of consideration will not warrant finding deed absolute was mortgage.

In the absence of fraud or oppression, mere inadequacy of consideration alone does not warrant finding deed absolute was intended as mortgage.

6. Mortgages 🔑297—Fraud of mortgagee in securing mortgagor's deed of property in satisfaction of debt held not established.

That mortgagors, without knowledge of their legal rights, gave mortgagee deed to mortgaged property in satisfaction of debt at time when neither party knew that same had increased in value and when supposed value was less than the mortgagor's debt, *held* insufficient to establish fraud.

7. Sales 🔑36—Seller's ignorance of true value of property sold not ground for setting aside sale.

Under Civ. Code, § 1577, relating to rescission of contract for mistake consisting of "belief in the existence of a thing material to the contract which does not exist," mere ignorance of the true value of property by one selling it is not a ground for setting aside sale.

8. Mortgages 🔑38(2)—Evidence must be clear to warrant holding deed absolute was mortgage.

To justify decree that deed absolute was intended as mortgage evidence must be clear and free from doubt.

9. Mortgages 🔑297—Deed of equity of redemption not presumed fraudulently obtained.

Until it appears that execution of deed of equity of redemption by mortgagor to mortgagee was traceable to the inequality of the positions of the parties, no basis exists for the presumption that mortgagee used some form of oppression to obtain it nor for application of the equity rule designed to especially protect right to redeem.

10. Mortgages 🔑297—Statute declaring one, acquiring property by mistake, involuntary trustee, held inapplicable.

Civ. Code, § 2224, declaring one who gains a thing by mistake an involuntary trustee, is without application to an action to declare a deed absolute a mortgage, in absence of any showing that the same was the result of a mistake within sections 1577, 1578.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Aaron Tetenman against B. Epstein and Mrs. B. Epstein, wherein Mitchell Kauffman and Annie Kauffman intervened. Judgment for interveners, and defendants appeal. Reversed.

E. F. Gerecht and C. W. Hall, both of Los Angeles, for appellants.

W. N. Goodwin, of Los Angeles, Roland G. Swaffield, of Long Beach, and Goodwin & Morgrage, of Los Angeles, for respondents.

CRAIG, J. This is an appeal from a judgment in favor of the interveners against the defendants decreeing that interveners were the owners and entitled to possession of certain lots in Orange county, and that a deed thereof, executed by interveners, constituted a mortgage to secure payment to Epstein of a promissory note and taxes, aggregating $461.17.

Plaintiff instituted an action praying specific performance of a contract in the form of an option given by Epstein to plaintiff upon the property in suit on January 5, 1921. Defendant Epstein answered, denying the allegations of the complaint, and alleging that his wife was not a party to the option, and that she refused to sign a deed of conveyance, and that plaintiff had obtained such option by means of the concealment of material facts regarding the value of the property. Thereupon the Kauffmans intervened, claiming ownership of the same property, which they alleged consisted of four lots, numbered 15, 16, 17, and 18, in block 802, of the Vista del Mar tract.

Upon the trial the interveners, under the direction of the court, filed an amended complaint in intervention to conform to the proof, and therein alleged, among other facts, that Epstein had paid taxes amounting to $162; that the reasonable market value of the lots on November 22, 1920, was $2,000, but that neither of the parties knew at that time of their increased value, and that this increase was caused by the discovery of oil in the immediate vicinity; that interveners did not learn of such discovery or of the advancement in value until just before the commencement of this suit. Ownership in the interveners is also alleged, with the prayer that they be adjudged the owners, and that the deed executed by them to Epstein be declared a mortgage to secure the payment of principal and interest due on the loan, and taxes paid by Epstein.

The trial court rendered judgment that the plaintiff take nothing; that the deed executed by interveners conveying the four lots mentioned be declared a mortgage and a lien upon all of said lots to secure the payment to B. Epstein of the sum of $461.17, representing the principal and interest on the note, and the taxes.

The principal contention of appellants is that neither the allegations of interveners' amended complaint, nor the findings, contain sufficient facts to legally justify the judgment rendered. In so far as the findings affect the controversy between the Epsteins and the Kauffmans, they recite that all of the allegations contained in paragraphs numbered 1 to 4, inclusive, of interveners' amended complaint are true, which amounts to a finding affirmatively upon each fact so alleged. The essential facts so found are that the defendant B. Epstein loaned to interveners $250 upon the promissory note of the latter, secured by mortgage on the four lots, and payable seven months thereafter; that defendant demanded payment when the note was overdue; that interveners were poor and without funds, and unable to pay said amount and were ignorant and unfamiliar with the law relative to foreclosure and the right of redemption; that interveners were foreigners, unable to speak English perfectly, and that they thought that by virtue of having executed said mortgage they had placed themselves in Epstein's power; that while in such state of mind Epstein proposed to them that they give him a grant deed to all the lots in full satisfaction of their indebtedness, and that believing that the value of the lots did not exceed the amount of the note, on November 22, 1920, they executed and delivered to Epstein a grant deed to the entire property, which Epstein accepted believing that the value of the lots did not exceed the amount due him; that the reasonable market value of said property on November 22, 1920, was at least $2,000, but that none of the parties at such time knew this fact; that the increased value was due to the discovery of oil in the vicinity, but that interveners were not aware of such discovery until just prior to the commencement of this action; and that Epstein did not execute or file a satisfaction of said mortgage until January 10, 1921, at which time said lots were of the value of at least $3,000.

[1, 2] Based upon these facts alone, we are unable to perceive any theory upon which the judgment can be upheld. The trial court adjudged that the deed was a mortgage, and yet there is no finding that it was the intent of either of the parties that the instrument was given as security for the payment of any obligation or the performance of any act. On the contrary, it was expressly found that Epstein proposed that interveners execute a deed to all four lots, and that they "executed and delivered to said Epstein a grant deed conveying said four lots." Upon such a finding, the deed not being given as security, but as a conveyance of the equity of redemption, it was obviously not within the power of a trial court to make over into a mortgage the instrument intended by the parties who executed it to be a deed. Hochstein v. Berghauser, 123 Cal. 681, 56 Pac. 547. When the facts warrant, a deed conveying the equity of redemption, so called, will be set aside, leaving the mortgagee still possessed of his mortgage security and the court may decree that the debt represented thereby be satisfied in the usual manner from the mortgaged premises. But the court in the instant case has not set the deed aside and revived a mortgage of February 4, 1919, the foreclosure of which was threatened before the deed was executed, but has declared that the deed itself is a mortgage, which, as we have indicated, the findings do not warrant.

[3-5] In effect the intervention is for reformation. The decree rendered grants that relief. The complaint in intervention is not to rescind the deed of November 22, 1920. Had such rescission been sought and decreed, the deed might possibly have been canceled and the original mortgage would then remain as a lien upon the property in question. Equity will freely grant rescission where there has been a mistake of both parties as to a collateral matter which was vital to the contract and formed an essential element thereof. Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42; Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094. But in contrast with rescission, reformation of a contract presupposes that it does not express the true intent of the parties, which intent being other than that stated in the agreement is substituted by apt language, provided by the decree of court. Even though the distinction between actions for reformation and for the rescission of an instrument were to be disregarded (and this is a fundamental difference and not one merely of form), still, under the authority of De Martin v. Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115, in the absence of fraud or oppression the mere inadequacy of consideration could not alone serve as a basis for granting the intervener relief.

[6] From the record before us it is impossible to ascertain upon what legal theory the judgment was rendered. Some facts are contained in the findings which might be regarded as elements proper for consideration in the granting of relief where the deed had been obtained by fraud, or by mutual mistake, or under coercion; yet the facts fall far short of establishing constructive fraud, which is negatived by the ignorance of all parties as to valuations at the time the deed was made, and we do not understand the respondents to rely upon this ground. It is true that the court finds the Kauffmans were not aware of their legal rights, and, particularly, of the existence of an equity of redemption, and that they believed that Epstein could do what he pleased with their property; but this is quite insufficient as a finding that Epstein or any one in his behalf defrauded them, or exercised any undue influence, or compulsion, to force them to sign the deed.

[7] In connection with the possible ground of mistake, which seems to be principally relied upon by respondents, the only material fact concerning which that claim could be asserted is that the parties believed the lots in question to be of a value far less than

their actual value at the time the transaction was consummated. The findings of the trial court which he have mentioned do not permit consideration of the claim that there was any mistake as to the contents or legal effect of the instrument itself. All of the parties knew that it was a deed and not a mortgage. It appears that in the beginning Epstein loaned the interveners $250, and that after they had failed to pay taxes for some time the property was about to be sold on that account, and he paid these items. The whole amount due at the time of the trial was found to be $461.17, and Epstein and the interveners at the date of the deed believed the lots to be worth about $100; whereas, they were in fact worth $500 each. The court found that the change in values was the result of the discovery of oil in the vicinity of the premises. Respondent cites section 1577 of the Civil Code, to the effect that mistake may consist of "belief in the existence of a thing material to the contract whch does not exist," etc.; also section 2224, Civil Code, which provides that one who gains a thing by mistake is an involuntary trustee of the thing gained for the benefit of the person who would have had it. If the mere ignorance as to the true value of property by one who sells it, where the sale is for a sum considerably less than its value, were a ground to set aside a deed, no transaction would be final until the validity thereof had been determined by a suit to quiet title. We are cited to no case holding that such ignorance or erroneous belief as to the mere value of property amounts to mistake of fact as defined in section 1577, Civil Code. In Hannah v. Steinman, supra, our Supreme Court, construing certain sections of the Civil Code, including section 1577, said:

> "It cannot be doubted that plaintiff would not have consented to the lease but for this mistake. The principal question in this connection is whether it was 'material to the contract' within the meaning of those words as used in our statute. That it was material in the sense that but for it plaintiff would not have considered for a moment the making of the contract we have seen, but that clearly is not enough. The same thing might be said as to mistaken expectations of both plaintiff and defendant as to plaintiff's ability to obtain tenants for the building he proposed to erect on the leased land, and, of course, a mistake in that regard would not furnish ground for rescission, although plaintiff never would have entered into the contract but for such mistaken belief."

We have said that a contract may be rescinded where there has been a mutual mistake as to some collateral fact the existence of which constitutes the essence of the agreement. For example, in the case last mentioned, the mutual ignorance of the parties of the fact that the lot leased by the plaintiff had just been placed within the fire limits so that wooden buildings could not be erected thereon was held to be a mutual mistake of such character as to justify rescission of a lease contract, where the parties understood that the lot was to be used for the erection of wooden buildings. In the instant case the existence or nonexistence of oil was not considered by the parties at any time. It cannot be said, nor was it found, that they, under the mistaken belief that oil did not exist in the vicinity of these lots, made this contract, and that such belief served as an inducement, much less constituted an element thereof. The most that can be said is that they gave no consideration or thought to the possibility of oil being located near the premises.

[8] The general rule is that clear evidence, free from doubt, is necessary to establish that the real intention of the parties was to execute a mortgage, in order to justify a decree to that effect where the deed is absolute in form. Henley v. Hotaling, 41 Cal. 22, 26; Mahoney v. Bostwick, 96 Cal. 53, 58, 30 Pac. 1020, 31 Am. St. Rep. 175; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954.

[9] The respondent insists that a different rule prevails where a mortgagor has deeded his equity of redemption to the mortgagee than that applied to other transactions. Without doubt this is true where the theory of the common-law mortgage obtains. There is no question that the right to redeem is one generally especially protected by courts of equity. This is upon the theory that the mortgagee having received a common-law mortgage occupies a position superior to that of the mortgagor so that the parties cannot be said to have dealt with one another upon a basis of equality, hence for the mortgagee to retain the benefit of a deed from the mortgagor of the equity of redemption it must be shown that no undue influence, no fraud, and no compulsion operated to cause the mortgagor to execute the instrument of conveyance. In all such cases the advantage allowed the mortgagor in court, which in some instances has been held to amount to a presumption against the mortgagee, springs from the fact that the mortgagee has the mortgagor in his power through having obtained control of the mortgaged premises. The opinion in De Martin v. Phelan, supra, elucidates the fundamental principle involved in this phase of the discussion, and establishes for this state a different rule from that prevailing in some other jurisdictions, because of the fact that here the mortgagee secures only a lien upon the mortgaged premises, and does not receive title or possession thereof. Until it appears that the execution of the deed was traceable to the inequality of the positions of the parties, no basis exists for the presumption that the mortgagee used some form of oppression to obtain it. In the case at bar, as we have shown, the findings negative the idea that the deed was

executed as a result of fraud; they also are inconsistent with the conclusion that coercion or oppression caused the interveners to make an absolute conveyance. It is expressly found that the parties all believed the property to be worth $100 per lot, or a total of $400. Had this been true, Epstein would have received less than his debt. It is found that the Kauffmans did not learn that the lots were more valuable than they had supposed until just before the bringing of this suit. The conclusion is unavoidable from these findings that when the deed was executed the interveners were satisfied to secure the cancellation of their debt in that way. Such being the facts, the underlying reason for the rule favoring the mortgagor's right to redeem has no application if the mortgagor contracted freely; no substantial argument is apparent for limiting his power to contract and relieve himself of a debt through the transfer of a property right.

But aside from these considerations it will be noted that the actions cited by respondent, and other cases in which courts of equity have shown a willingness to set aside deeds made by mortgagors conveying their equities of redemption to mortgagees, have been suits to rescind or to redeem; proceedings in which the mortgagor, though tardy, has either come forward and tendered the amount necessary for redemption, or has sought rescission on the ground of fraud or undue influence or advantage taken by the mortgagee over the mortgagor.

[10] Of course, section 2224 of the Civil Code can have no application to the facts of this case, except it be first established that the deed was made as a result of mistake, as provided in sections 1577 and 1578 of the Civil Code.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

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67 Cal. App. 111

LEE v. NATHAN. (Civ. 2650.)

(District Court of Appeal, Third District, California. April 30, 1924.)

1. Master and servant 🔑302(1)—Master liable for servant's negligence in business.

If master is to be held responsible for negligence of servant it must appear that in doing act out of which negligence arises servant is representing master at the time or engaged in his business or in some act incidental thereto.

2. Master and servant 🔑302(6)—Master not responsible for negligence of servant pursuing own ends.

Master is not responsible for negligence of servant while latter is pursuing his own ends even though injury complained of could not have been committed without facilities afforded to servant by his relation to master.

3. Master and servant 🔑302(6)—Automobile owner not liable for negligence of driver on own errand.

Where, at time of collision, servant was driving defendant's automobile, for sole purpose of conveying himself home from garage where car was kept, defendant was not liable, even though on other occasions he had permitted such use of the car.

Appeal from Superior Court, Sacramento County; C. O. Busick, Judge.

Action by King H. Lee against Charles P. Nathan and another. Judgment for plaintiff, and defendant named appeals. Reversed.

White, Miller, Needham & Harber, of Sacramento, for appellant.

P. G. West, of Sacramento, for respondent.

YOUNG, Justice pro tem. This is an appeal from a judgment entered in favor of plaintiff against the defendant Charles P. Nathan and his codefendant Leland R. Apperson in an action to recover for the alleged damage to plaintiff's automobile as the result of a collision between plaintiff's said automobile and a Packard automobile owned by defendant Nathan, and driven by his codefendant Apperson. The defendant Nathan appeals, and the only point urged by him for a reversal of the judgment is that the evidence is insufficient to support a certain finding of the trial court to the effect that at the time of the collision the defendant Apperson was driving the Packard automobile as the agent of the defendant Charles P. Nathan. The testimony touching this phase of the case was given by appellant, Apperson, and one George Sellinger, Jr., all called as witnesses by plaintiff.

It appears from the evidence that Apperson had been in the employ of appellant as receiving clerk in appellant's department store in Sacramento for many years. In addition to this employment, for some three or four years prior to the time of the collision, Apperson had also been driving appellant's automobile when called upon by him to do so. Appellant also looked to Apperson to see that the automobile was kept in running order. The automobile was kept in a garage on I street, between Fifth and Sixth streets. Appellant did not himself drive the car, nor did any member of his family. It was quite usual for Apperson to drive appellant to his home at 2027 F street to lunch at noon, and also to dinner in the evening, and frequently, especially in pleasant weather, Apperson would, after getting his evening meal downtown or at his home, return to appellant's home and take him driving around town for an hour or so. He also frequently drove him to club meetings in the evening, and to the theater. On several occasions when out late at night in the car after attending club meeting or the theater, appellant directed Apperson to drive by the garage where the car was kept and get one of the employees of the garage to go with them to take the car back to the garage after first taking appellant home, and then taking Apperson to his home at 3019 Fifth avenue, in Oak Park, in the south part of the city of Sacramento. All the witnesses agree that this was done only when appellant was out as late as 10:30 or 11 o'clock at night. On other occasions when out riding in the evening Apperson would, afer taking appellant home, go to the garage and leave the car, or would himself ask one of the boys at the garage to go home with him and bring the car back to the garage. Appellant testified that he did not know of Apperson getting the boy on his own account to go home with him, and that he had never given him permission to do so. There is no testimony contrary to this statement.

On the evening of the accident Apperson had taken appellant for a ride and had left him at his home about 8 o'clock. He then drove the car to the garage. Apperson testifies that "after I saw the boy was not busy, I asked him to jump in and take me home." The boy got into the car and Apperson was driving in the direction of his home when the collision resulting in this action occurred at Twenty-First and M streets. It is conceded by appellant that there is sufficient conflict in the evidence to justify the finding of the trial court to the effect that plaintiff's car was injured as the result of Apperson's negligence.

[1] If the master is to be held responsible for the negligence of his servant, it must appear that in doing the act out of which the negligence arises the servant is representing the master at the time, and engaged in his business or in some act incidental thereto. Hall v. Puente Oil Company (Cal. App.) 191 Pac. 39; Higgins v. Western Union Telegraph Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537; Chamberlain v. California Edison Co., 167 Cal. 500, 140 Pac. 25; Gousse v. Lowe, 41 Cal. App. 715, 183 Pac. 295; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 Pac. 697.

[2] The master is not responsible for the negligence of his servant while the servant is pursuing his own ends, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master. (26 Cyc., p. 1536; Stephenson v. S. P., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223; Brown v. Chevrolet Motor Car Company, 39 Cal. App. 738, 179 Pac. 697; Kish v. California State Automobile Association (Cal. Sup.) 112 Pac. 27.

In Kish v. California State Automobile Association, above cited, it is held that—

> "In determining whether or not a particular act was done in the course of the servant's employment, the act of the servant must be connected directly or indirectly with the business of the employer, and be in furtherance of the object for which the servant was employed. In other words, if the act is for the benefit of the employer, either directly or incidentally, the act is within the general scope of the servant's employment, but if the act performed is not in any way connected with the service for which he is employed, but for his own particular and peculiar purpose, then the act is not within the scope of the employment."

[3] There is no conflict in the evidence as to the fact that Apperson was at the time of the accident driving the car for the sole purpose of conveying himself home from the garage where the car was kept. On the evening of the accident, the main object for which Apperson was employed was to take his employer riding. When the employer had finished his ride and had gotten out of the car at his home, the main object of Apperson's employment for that day had therefore been accomplished, and there then remained nothing further for him to do in the business of his employer as driver on that day, other than to take the automobile to the garage where it was to be housed for the night. When Apperson reached the garage with the car, there then remained nothing further for him to do in the master's business. He was thereafter his own master and was free to go home or elsewhere according to his own peculiar pleasure or inclination, and, if he chose to go home, he was free to go by whatever means he elected. His use of his employer's automobile in going home did not spring from any duty that he owed to his employer. His employer could not be benefited directly or incidentally thereby. Respondent argues that from the fact that appellant had at times authorized Apperson to have a boy from the garage take him home that it can be inferred that a course of practice had been established from which it can be fairly implied that Apperson's use of the car on the evening of the accident was authorized by his employer. We think that no such inference can be reasonably drawn. Even if it is conceded that such an inference can be drawn, Apperson was nevertheless using the car at the time of the accident solely for his own convenience and accommodation, and the authority conferred by the master amounted only to the master's permission that he might use the car for his own ends and purposes, and when so using it he was not acting within the scope of his employment, and hence his master is not liable for his negligence. In the opinion of the court in the case of Hall v. Puente Oil Co., supra, it is said:

> "We are unable to draw any distinction between a case where the use of the car by a servant for his own purpose is without the master's consent and that where such use is permissive."

It is our opinion that the evidence is insufficient to support the finding that Leland R. Apperson was driving the Packard automobile at the time of the accident as the agent of the defendant Charles P. Nathan. We therefore think that the judgment should be reversed; and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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66 Cal. App. 778

DAVIS-HELLER-PEARCE CO. v. RAMONT et al. (Civ. 2757.)

(District Court of Appeal, Third District, California. April 29, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Process 🔑96(1)—Affidavit for publication by disinterested stranger familiar with facts sufficient.

As Code Civ. Proc. § 412, does not designate person by whom affidavit for publication of summons shall be made, affidavit of disinterested stranger to action, who is familiar with facts, is sufficient.

2. Process 🔑96(4)—Affidavit for publication on information and belief as to defendant's place of residence sufficient.

Affidavit for publication of summons on information and belief as to defendant's place of residence in another state is sufficient, where affiant shows due diligence in acquiring information.

3. Process 🔑96(3)—Affidavit for publication held to show existence of cause of action by reference to complaint, though latter was not verified.

Affidavit for publication of summons, stating that affiant "has read the complaint * * * and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief," sufficiently referred to and adopted allegations of complaint, and hence showed existence of cause of action, though complaint was not verified.

4. Affidavits 🔑17—Chief test of sufficiency is whether indictment for perjury may be sustained if false.

Chief test of sufficiency of affidavit is whether it is so clear and certain that indictment for perjury may be sustained on it if false.

5. Process 🔑96(4)—Affidavit for publication on nonresident need not state that no certificate of residence has been filed.

Affidavit for publication of summons on ground that defendant resides out of state need not state that no certificate of residence has been filed, as provided by Civ. Code, § 1163, where such service is sought on ground that defendant cannot be found within state after due diligence.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Davis-Heller-Pearce Company against W. F. Ramont and George Biaggi, for whom R. J. Biaggi was substituted. From order denying substituted defendant's motion to quash service of summons on defendant George Biaggi and set aside default and judgment against him, substituted defendant appeals. Affirmed.

William R. Biaggi, H. A. Gabriel, and George W. Waldorf, all of San Jose, for appellant.

J. M. Walthall and E. H. Zion, both of Modesto, for respondent.

FINCH, P. J. This appeal is from an order denying the motion of defendant R. J. Biaggi, substituted as defendant for George Biaggi, "to quash the service of summons" on the latter and "to set aside and vacate the default and judgment against" him. The court ordered service of summons by publication upon George Biaggi. In lieu of such publication, he was personally served with a copy of the summons and complaint in the state of Arizona, which service, under the provisions of section 413 of the Code of Civil Procedure, "is equivalent to publication and deposit in the post office." The only question presented by the appeal is whether the affidavit for publication is sufficient. The affidavit reads as follows:

"L. L. Dennett, being duly sworn, deposes and says:

"That he is an attorney at law, residing at Modesto, in the county of Stanislaus and state of California; that he is personally acquainted with W. R. Biaggi, the brother of George Biaggi, defendant above named; that he was the attorney for W. F. Ramont in a suit in the superior court of the county of Stanislaus and state of California, in which George Biaggi was plaintiff and W. F. Ramont was defendant, and W. R. Biaggi was attorney for said defendant, which said case is now on appeal from the judgment of the superior court of the county of Stanislaus and state of California; that he has corresponded with W. R. Biaggi, the brother of said George Biaggi, and was informed by him that said George Biaggi was out of the state in a hospital, and that the summons and complaint in the above-entitled action was sent to the sheriff of the county of Santa Clara, state of California, which was the county of the former residence of said defendant, George Biaggi, with instructions to serve the said summons and complaint upon said George Biaggi, but that the said summons and copy of summons and complaint were returned by the said sheriff with a statement by H. A. De Lacy, undersheriff, that said George Biaggi is in a hospital at Tucson, Ariz., and that the said sheriff was so informed by the brother of said George Biaggi, to wit, by W. R. Biaggi, and that affiant is informed and believes, and so states the fact to be, that said George Biaggi does not reside in the said state of California, but now resides out of the state of California, and that his present address is Tucson, Ariz.

"Affiant further states that he has read the complaint on file herein, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true."

[1] It is contended that the affidavit was insufficient because, in so far as appears from the record, it was made by a stranger to the action. It is only required that the necessary facts appear "by affidavit to the satisfaction of the court, or a judge thereof." Code Civ. Proc. § 412; Rue v. Quinn, 137 Cal. 651, 655, 66 Pac. 216, 70 Pac. 732. In Gardner v. Steadman, 31 Cal. App. 447, 160 Pac. 834, it is said:

"Section 396 of the Code of Civil Procedure provides that the affidavit of merits upon motion for change of place of trial must be filed by the defendant. * * * We see no reason for holding that an affidavit of merits may not be made by any person on behalf of the defendant who is sufficiently familiar with the facts of the case to make the same."

Since the statute does not designate the person by whom the affidavit shall be made, it would be illogical to hold that the affidavit of a disinterested stranger to an action, who is familiar with the facts, is not entitled to as much weight as that of an interested party.

[2] It is urged that affiant's statement that George Biaggi's residence was in Tucson, Ariz, was insufficient because made on information and belief. The contention is without merit. Rue v. Quinn, supra. As a general rule it would be impracticable to state the place of residence of a person in another state except on information and belief. Affiant showed due diligence in acquiring information upon which to base his belief.

"Oftentimes affiant's knowledge of matters stated in his affidavit must of necessity rest upon information derived from others, and where this is the case it is generally sufficient if he aver that such matters are true to the best of his knowledge and belief." 2 C. J. 355.

[3] It is argued that the affidavit does not show that a cause of action existed against George Biaggi. The complaint was not verified. Affiant, however, "states that he has read the complaint on file herein, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true." The only allegation of the complaint relative to George Biaggi which is stated on information and belief is to the effect that he had or claimed some interest in the land described in the complaint. In Ligare v. California S. R. R. Co., 76 Cal. 610, 612, 18 Pac. 777, 779, it is said:

"The affidavit could refer to any document on file, and adopt its contents. In such case, the oath to the affidavit is an oath to the truth of the document referred to. The affidavit here did refer to the original complaint and adopt its contents, and this complaint stated a cause of action. The fact that a cause of action existed, therefore, appeared from the affidavit. And, as above shown, it made no difference that the document which was then performing the functions of a complaint was not verified."

[4] Appellant urges, however, that the affidavit "does not refer to and adopt the allegations of the complaint." It is not apparent in what manner the affiant could have more certainly referred to and adopted the averments of the complaint without setting them out at length. If the facts stated in the complaint are not true, then the affiant committed perjury.

"The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false." 2 C. J. 348.

[5] The affidavit does not show that George Biaggi had not filed the certificate of residence provided for by section 1163 of the Civil Code. The statute, however, requires such showing only where service is sought to be made upon a person by publication upon the ground that he cannot, after due diligence, be found within the state. The order for publication of summons is based upon the ground, as stated therein, "that the said defendant resides out of the state, and is now a resident of Tucson, Ariz." It was not necessary, therefore, for the affidavit to state that no certificate of residence had been filed.

The motion to vacate the judgment appears to be without merit from either legal or equitable considerations. George Biaggi was personally served on the 19th day of September, 1921. His default was not entered until February 1, 1922. Judgment was thereupon entered, and pursuant thereto the property in controversy was sold by the sheriff February 25, 1922. December 30, 1922, notice was filed stating that the motion would be made on the 8th day of January, 1923.

The order is affirmed.

We concur: PLUMMER, J.; HART, J.

67 Cal. App. 148

BITSEKAS v. PARECHANIAN et al.
(Civ. 2733.)

(District Court of Appeal, Third District, California. May 6, 1924.)

1. Evidence 🔑588—Inconsistencies held not to stamp testimony as inherently unbelievable.

Inconsistencies between statements in deposition and testimony *held* not to stamp testimony as inherently unbelievable.

2. Trial 🔑140(1)—For trial court to analyze, sift, and weigh testimony.

Where evidence of witness was inconsistent and some of it probably untrue, it was for the trial court to analyze, sift, and weigh the testimony, and to determine whether any of it was entitled to credence.

3. Witnesses 🔑288(1)—Adverse party called for cross-examination under statute may be examined by own counsel as to matters not brought out in cross-examination.

Defendants called for cross-examination by plaintiff under Code Civ. Proc. § 2055, could be examined by their own counsel as their own witnesses regarding matters pertinent to case which were not brought out by cross-examination by counsel for plaintiff.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by John Bitsekas against M. Parechanian, alias, etc., and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Collins & Collins and B. M. Benson, all of Fresno, for appellant.

Gallaher, Simpson & Hays, of Fresno, for respondents.

HART, J. The plaintiff, as a judgment creditor of the defendant Parechanian, brought this action to set aside a deed executed by the latter to the defendant Sarkisian, conveying a half interest in a tract of 40 acres of land situated in Kings county, on the ground that said deed of conveyance was the result of a fraudulent conspiracy between the two defendants to prevent the plaintiff from securing satisfaction of a judgment previously obtained by plaintiff and against Parechanian in the superior court of Fresno county for the sum of $2,153.90.

According to the complaint, the plaintiff brought an action against Parechanian in the above-mentioned superior court, and on June 19, 1921, was awarded judgment for the amount above stated; that execution upon said judgment was issued on the 13th day of September, 1921, and the writ thereupon placed in the hands of the sheriff of the county of Fresno for execution, and said writ returned unsatisfied; that thereafter, and on the 13th day of October, 1921, "a similar writ of execution was placed in the hands of the sheriff of the County of Kings, * * * for execution, and that said writ has likewise been returned unsatisfied." The complaint, in appropriate legal nomenclature, alleges the facts constituting the alleged fraud at the bottom of the transaction climaxing in the transfer of the property above referred to by Parechanian to Sarkisian, and charges that said transfer was the result of a conspiracy between the said two defendants fraudulently to prevent plaintiff from securing satisfaction of his judgment against Parechanian; that said transfer was made and executed at a date subsequent to the date of the entry of said judgment, to wit, on the 29th day of June, 1921, and that the same was made without valuable or any consideration; that said Parechanian, by making said transfer and putting out of his possession all other property belonging to him, became insolvent and "rendered himself incapable of paying said indebtedness," or "execution proof."

The relief asked for is that the deed of conveyance be adjudged and declared fraudulent and void, and that the land thereby purporting to have been conveyed be adjudged subject to the lien of the plaintiff's judgment against Parechanian and the "writ of execution" thereupon issued.

After their demurrer to the complaint on the general ground was overruled, the defendants jointly answered the plaintiff's pleading by specifically denying all it has to say of material importance concerning the transaction.

The cause was tried by the court, sitting without a jury.

The court found that the conveyance in question was made by Parechanian to Sarkisian after the obligation of Parechanian to the plaintiff arose, but before said obligation had been reduced to judgment; that at the time said conveyance was made and consummated said Sarkisian did not know that the said defendant Parechanian was indebted to the plaintiff in this action or was under any obligation whatever to plaintiff; that said conveyance was made by Parechanian to Sarkisian for the consideration of $10,000, paid by the latter to the former; that, at the time of the making of said conveyance, there was a mortgage incumbrance on the property so conveyed, given to secure a promissory note for the sum of $7,500, which mortgage incumbrance and obligation the said Sarkisian assumed and agreed to pay as part of the consideration for said transfer and conveyance; "that said sum of $10,000 was paid by the said Sarkisian to the said Parechanian by the payment in cash of the sum of $1,500, a part of which money was paid prior to the date of said conveyance, and a part thereof after the date of said conveyance, but prior to the commencement of this action, and the remainder of said sum of $10,000 was paid by the delivery to the said Kasbar Parechanian by the said defendant Sarkisian of a promissory note held by the said Sarkisian against the said Parechanian for the sum of $8,500, which said promissory note had theretofore been given to the said Sarkisian by the said Parechanian as part payment of the purchase of his said one-half interest in said described lands from the said Sarkisian; that said sale and conveyance of said land was made for a valuable consideration, to wit, for the consideration of $13,750 (?); that said conveyance was made in good faith and with no intent on the part of the said defendants or either of them to defraud the plaintiff."

The conclusions of law and the judgment harmonize with the findings, and are in favor of the defendants.

The plaintiff appeals from the judgment upon a record prepared according to the alternative method.

The points made by the plaintiff are that the findings are not sufficiently supported and that the court committed prejudicial error by allowing certain evidence to be received over the objections of plaintiff.

[1, 2] The defendants, as we understand from the record, are Armenians, and each in testifying expressed himself in broken English. Theirs was the principal testimony introduced in support of the averments of the complaint, the plaintiff having called them to the witness stand under the authority of section 2055 of the Code of Civil Procedure for examination or "cross-examination." Their testimony supports the findings of the court as to the facts and circumstances of the transaction culminating in the execution of the conveyance by Parechanian to Sarkisian. Indeed, the findings of the court faithfully follow their testimony in the main. It is therefore unnecessary to detail herein their testimony as they gave it under cross-examination and direct examination by the counsel for the respective parties. It is true that the testimony of these witnesses appeared to be inconsistent in some particulars with declarations they made previously to the trial and while their depositions to be used in the trial of this case were being taken. Whether these inconsistencies were due to the fact that the witnesses, who are foreigners, apparently uneducated, and with but little experience in the use of the English language, were unable to grasp clearly the significance of the questions propounded to them, or because the several transactions to which they testified did not occur as they sought to make it appear that they occurred, it is difficult for a court of review to determine. Counsel for the plaintiff seem to assume that the very fact of the inconsistencies to which we have referred is sufficient to stamp their testimony as inherently unbelievable. This is, however, not a sound assumption. It may be that there were some statements made by the witnesses that were not strictly in accord with the truth, but it does not necessarily follow that, because the testimony of a witness may not be consistent in all its parts, or that there may be some particulars as to which he may have departed from the truth, the testimony of such witness is to be held earmarked as intrinsically untruthful. It was for the trial court in this case to analyze, sift, and weigh the testimony according to those tests which are peculiarly available to trial courts and to determine whether, in the main, the testimony of such witnesses is entitled to credence and is sufficient to justify findings upon the vital issues either one way or the other, and where this is done upon evidence, which, upon its face, is sufficient to support the conclusion of the trial judge as to the facts, such findings are conclusive upon reviewing courts. It is true that the fact of the transfer of the property by Parechanian after the plaintiff's cause of action arose against him might properly be considered a suspicious circumstance upon the question of the good faith of the transaction, so far as said defendant was concerned. But it was for the trial court to determine whether said circumstance did or did not weigh against or detract from the probative value of the testimony of both defendants, not contradicted by an affirmative showing, or contradicted only in so far as the apparent inconsistencies in their testimony might be regarded as contradictory thereof, to the effect that the transfer was made in good faith and upon the payment by Sarkisian to Parechanian, as a consideration for the conveyance, the sum of $13,750 (or $10,000) for the latter's interest in the property, the greater part of which consideration was not in cash but in a promissory note given Sarkisian by Parechanian as in part payment for the interest in the land which the former had previously conveyed to the latter.

[3] Counsel for the appellant, in the cross-examination of the defendants, under section 2055 of the Code of Civil Procedure, called the attention of each to his deposition taken prior to the trial and asked if he had not given certain testimony which was read by counsel from said deposition to the witness. The purpose of this cross-examination was to show that the declarations of the witnesses made then were in conflict with certain portions of the testimony of said witness given at the trial. On examination of the defendants by their counsel, each was asked if he had given certain other testimony at the time of the taking of his deposition regarding the transactions involved herein, reading the same to the witness. To this examination counsel for the plaintiff objected on the ground that it was "not proper cross-examination," in that the part of the depositions as to which counsel for the defendants proposed to question the defendants was not

pertinent to those portions of the depositions concerning which counsel for the plaintiff examined the defendants. It is true that several questions were asked by counsel for the defendants as to certain statements made by the defendants when their depositions were taken that had no direct connection with those portions of their depositions about which counsel for the plaintiff examined them, still a considerable portion of their depositions brought out by the examination of counsel for the defendants was pertinent and was repeated by the defendants in their testimony in the trial. As seen, the defendants were called for cross-examination by the plaintiff and when turned over to the attorney for the defendants for examination the latter in examining them had the right to question them concerning any matter as to which they had testified in the cross-examination. But we go further and say that we know of no reason why the attorney for the defendants should not have been permitted at that time to make the defendants their own witnesses and question them regarding other matters pertinent to the case which were not brought out by their examination by counsel for the plaintiff.

We have given the case full consideration, and our conclusion is that the findings, from the viewpoint of a court of appeal, are immune from successful attack.

No prejudicial error in rulings admitting and excluding evidence has been found.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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66 Cal. App. 635

CASTRO et al. v. MALCOLM et al. (AMERICAN SURETY CO. OF NEW YORK, Intervener.) (Civ. 2700.)

(District Court of Appeal, Third District, California. April 19, 1924. Hearing Denied by Supreme Court June 16, 1924.)

1. Highways ⟹113(4)—Defaulting contractor's assignment of funds due held not to affect county's right to use funds in completing work.

Where county had right under road construction contract to withhold compensation to be paid for proposed improvement, and, if abandoned by contractor, to use any money due or to become due thereon to complete work that was left undone, contractor could not make any assignment of any funds due to him at time of abandonment that would affect county's right to use funds in payment of expenses of completing work.

2. Subrogation ⟹7(1)—Rights as between defaulting contractor's surety and his assignee as to funds due him in county's hands.

Where, at time of contractor's default in road construction contract entitling county to withhold compensation so far as necessary to pay expenses of completing work, county had in its possession moneys due contractor, rights of surety who had advanced sums to pay materialmen's and laborers' claims on account of contract *held* paramount, by virtue of subrogation to rights of county, to right of contractor's assignee who advanced no money on the assignment, and whose previous advancements had gone into contractor's general banking account on which checks were drawn by contractor in prosecution of at least four separate and distinct contracts.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Lee Castro and W. E. Blaisdell, doing business under the firm name and style of Castro & Blaisdell, against the Empire Securities Company, a corporation, and others, in which the American Surety Company of New York, a corporation, intervened and filed a cross-action against named defendant. Judgment for plaintiffs and intervener, and named defendant appeals. Affirmed.

Kennicott & Williams, of Los Angeles, for appellant Empire Securities Co.

Oscar Lawler and James E. Degnan, both of Los Angeles, and T. F. Allen, of Bakersfield, for respondent American Surety Co. of New York.

John M. Bowen, of Los Angeles, for respondent Coast Const. Co.

O'Melveny, Millikin & Tuller and Warren B. Pinney, all of Los Angeles, for respondent Bricker.

G. C. De Garmo, of Los Angeles, for respondent California Hardware Co.

Emmons & Johnstone, of Bakersfield, for respondents Castro & Blaisdell and Good Roads Machinery Co.

J. R. Dorsey, of Bakersfield, for respondent Kern County.

Anderson & Borton, of Bakersfield, for respondents Western Water Co. and Western Water Co. as assignee of California Market Company; Austin-Western Machinery Co., Western Pipe & Steel Co., Louis F. Mesmer, doing business under the name of Mesmer & Rice, and Bannister Grain Co.

W. B. Beaizley, of Bakersfield, for respondents Union Oil Co. and King Lumber Co.

T. N. Harvey, of Bakersfield, for respondents A. L. Young Machinery Co., M. & F. Garage, and Heck Bros.

W. W. Kaye, of Bakersfield, for respondents Haas, Baruch & Co., and Haas, Baruch & Co., as assigns of Swift & Co.

Alfred Siemon and W. C. Dorris, both of Bakersfield, for respondents W. W. Harris, assignee of defendant labor claimants John Linborn and L. Race.

PLUMMER, J. On the 13th day of June, 1916, an agreement was entered into between the county of Kern, acting through its board of supervisors, as the party of the first part, and the Coast Construction Company, a partnership consisting of Stephen V. R. Malcolm and others, as party of the second part, for the construction and improvement of 7.56 miles of that certain highway in the county of Kern, known as and called the McKittrick-Maricopa road, for the estimated sum of $44,766.15, to which was thereafter added, as extras, the sum of $1,017.42. At the same time, and as a part of the same transaction, there was delivered to the board of supervisors of said county of Kern and made a part of said agreement two certain bonds, executed by the American Surety Company of New York, the cross-complainant and respondent in this action. One of said bonds was for the faithful performance of said contract and executed in the sum of $11,191.54. The second bond was given for the security of materialmen and laborers, and was in the sum of $22,383.08.

The agreement was conditioned in the usual form, and provided for progress payments in the sum of 75 per cent. of the estimated value of the work and the retention by the county of Kern of the sum of 25 per cent. until 35 days after the final completion of the work agreed to be performed. The bonds were conditioned as is usual in such cases.

Thereafter, and on or about the 30th day of June, 1916, the Coast Construction Company, the contractor in the agreement above mentioned, entered into an agreement with the Empire Securities Company, the appellant in this action, whereby the execution of the contract for the work above provided to be done by the Coast Construction Company was set forth, also the execution of the two bonds given by the American Surety Company of New York. The amount of the contract and other matters were set forth. It was mentioned that the contractor desired to borrow money for the purpose of enabling the contractor to carry out the aforesaid contract, and the Securities Company was willing to lend money for that purpose. It was agreed that the Securities Company would advance to the contractor in installments, as requested from time to time, money not in excess of 75 per cent. of the work done and materials furnished under the aforesaid contract, etc.; it was further provided that an agent of the Securities Company might be at all times upon the work with authority limited to the keeping of the time of employees, the paying of bills for labor and material, and seeing that all labor and material previously furnished had been paid for, etc. As security for such advances the agreement assigned to the Securities Company all the right, title, and interest of the contractor in and to the moneys that might become due and payable under the agreement for the improvement of the road above mentioned.

Under this agreement with the contractor the Securities Company loaned the sum of $32,284.65, all of which was entered into and became a part of the general banking account of the Coast Construction Company.

The contractor entered upon the performance of the work early in July, 1916, and proceeded with the same until on or about the 11th day of December, 1916, when it abandoned the same and discontinued work thereunder. At the time of the abandonment of the work, five units, upon which 75 per cent. estimates had been made, were completed. Of these, four estimates in the aggregate of $20,304.94 had been paid. The fifth estimate, approved by the highway commission, but not by the board of supervisors, in the sum of $3,867.25, remained unpaid. It is this sum that is in controversy in this action. The trial court awarded this sum to the American Surety Company, and it is from this part of the judgment or decree of the trial court that the Securities Company appeals.

At the conclusion of the trial it was adjudged that laborers and materialmen had enforceable claims against the Surety Company in the total sum of $15,703.38. It was also found by the trial court that at the time of the abandonment of the contract the status of the contract and the amount of money still in the county treasury in the county of Kern was as follows:

Contract price	$44,766 15
Extras	1,017 42
Total	$45,783 57
Payments to contractor	20,304 94
Balance available for completion	$25,478 63

The amount last stated was made up as follows:

Retained percentages	$ 8,057 39	
Fifth estimate, approved by highway commission but not by supervisors, exclusive of retained percentage of 25 per cent.	3,867 25	
Unearned balance of contract price	13,553 99	
Unexpended balance		$25,478 63
It was further established that the county of Kern had forfeited such contract and had elected to and did complete the work therein provided for, expending in connection therewith, after allowance of certain credits, the sum of		$18,660 26
Leaving in the hands of the county for such disposition as the court might direct, the sum of		$ 6,818 37

As to the payment made by the contractor for labor and material the trial court found as follows:

"Approximately the sum of $20,000 was proven by said contractors to have been expended in connection with said contract, but a substantial part of said last-named amount was expended for purposes other than material and labor. Whether such sum was paid from the fund so furnished by said Empire Securities Company, or from moneys borrowed by said contractors from other sources, because of the mingling of said funds, to the knowledge and with the consent of said Empire Securities Company, it is impossible to determine."

The trial court also found that the Securities Company at the time the assignment of $3,867.25 was made to it by the Coast Construction Company advanced nothing of value, and did not pay out any money represented or covered by said assignment towards the discharge of the claims of the materialmen for the payment of labor on account of the improvement of said highway; that the only promise made by the Empire Securities Company was that, if a representative of the Coast Construction Company would go to Bakersfield, and there assign to the Empire Securities Company said claim or estimate in the sum of $3,867.25, the Empire Securities Company would then consider the making of a further advance. This advance was desired to meet a pay roll of the Construction Company then due. This advance was never made. The court further found that the Securities Company desired the assignment for the intent and purpose of appropriating to its own use the amount of money represented thereby, and not for the purpose of applying the sum towards the payment of labor performed upon or materials used in construction work on the highway referred to. These findings are challenged as well as one involving the good faith of the Securities Company. This latter, however, for the reasons hereinafter stated, we do not deem material. The testimony shows without conflict that the Coast Construction Company had at least four contracts for work and improvement during the pendency of the agreement involved in this action in which the Securities Company, the appellant in this action, was doing the financing; that all the money received from the Securities Company went into and became a part of the general banking account of the Coast Construction Company, and the funds thereof so intermingled that their identity became lost. The testimony also shows that, while the Empire Securities Company had a representative on the scene of the work, no special effort was made to ascertain if the funds were being properly applied by the Coast Construction Company. The witness who had charge of the financial affairs of the Empire Securities Company during the period in question testified as follows: "I made no special effort to know that the money paid to them was paid to any particular creditor, or material man of any kind." Also, that he knew that the Construction Company was keeping its accounts at the Merchants' National Bank. In relation to the assignment of the fifth estimate, hereinbefore referred to, this witness also testified in substance as follows: That he knew Mr. Farish, one of the partners composing the Coast Construction Company; that on or about the 21st or 22d day of November, 1916, he had a conversation with Mr. Farish in relation to money needed to meet the pay roll then owing by the company; that he paid Mr. Farish the sum of $12.65 to meet the traveling expenses of Mr. Farish in going to and returning from Bakersfield; that, if Mr. Farish would go to Bakersfield and make an assignment of the fifth estimate to the Securities Company, the Securities Company would then consider the question of further advances. No further advances, however, were made. It appears that Mr. Farish went to Bakersfield, indorsed an assignment on a warrant, returned to Los Angeles, and reported his action to this witness. The warrant, however, does not appear to have been delivered to the Securities Company, nor does it appear just what was done with the warrant thereafter. This witness also stated that Farish reported to him that the affairs of the Coast Construction Company were in bad shape, and that another member of the Coast Construction Company had deliberately and willfully deceived him (Mr. Farish) as to the condition of the company.

[1, 2] It is by virtue of this assignment of the fifth estimate that the Securities Company claims to be entitled to the sum of $3,867.25 as hereinbefore stated. To support its contention the appellant relies upon the cases of Los Angeles Rock & Gravel Co. v. Coast Construction Co., 185 Cal. 586, 197 Pac. 941; Slayden v. O'Dea, 182 Cal. 500, 189 Pac. 1066; Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880; Hunt v. Empire Securities Co., 50 Cal. App. 43, 194 Pac. 744. These cases, however, have no application to the issues presented to this court for decision. In those cases the contracts were awarded under the provisions of the Vrooman Act (St. 1885, p. 147, as amended) or the Improvement Act of 1911 (St. 1911, p. 730), contain no provisions as to the retention of any portion of the contract price, and also were instances in which the contracting parties had no rights in any portion of the amount agreed to be paid to which a surety upon performance could be subrogated. In the case at bar the county of Kern had control, and in its treasury the entire sum agreed to be paid to the contractor and the provisions of the contract not only gave the county the right to withhold 25 per cent. of the stipulated amount to be paid as compensation for the proposed improvement, but also had the right, in the event of the abandonment of the contract by the contractor, to use any moneys due or to become due on the contract to complete the work that might be left undone by the contractor. Section 106 of the agreement between the Coast Construction Company, the contractor, and the county of Kern provided for such contingency, and gave the county the power above stated. After specifying what the county might do towards completing the work should it be left undone by the contractor, that section contains this language:

> "All expenses charged under this paragraph shall be deducted and paid by the county out of any moneys then due or to become due the contractor under the contract or any part thereof; and in such accounting the county shall not be held to obtain the lowest figures for the work of completing the contract or any part thereof, or for insuring its proper completion, but all sums actually paid therefor shall be charged to the contractor."

By the very terms of this section the county of Kern was given the right to use all moneys due the contractor under any circumstances, and was not limited to the 25 per cent. specified to be retained by the county in other portions of the contract. In other words, the county was not required to reserve any portion of the fund or exercise any priority in the expenditure thereof in the completion of the work. In other words, it could use the money claimed by the Securities Company as assignee herein and also of the American Surety Company by reason of its subrogation to the rights of the county to whatever might be left of the 25 per cent. reserve fund hereinbefore mentioned. Or, to state the matter in a different manner, the contractor could not make any assignment of any funds due to him at the time of the abandonment of the contract that would affect the right of the county to use that fund in the payment of the expenses of completing the work. If this is true, it would seem that the Surety Company, under the instruments to which we have heretofore referred, the existence of which the Empire Securities Company in its agreement admits knowledge would, if it advanced money to the county of Kern to pay for the completion of the work or the discharge of the claims of laborers and materialmen, be subrogated in equity to the rights of the county. The transcript shows that the American Surety Company advanced the sum of $15,703.25, and that of the retained percentages which amounted to $8,057.39 in the first instance the Surety Company was entitled to receive the remaining balance, which had been cut down to $6,818.37. In other words, the American Surety Company is not awarded under the judgment the amount to which it would otherwise legally be entitled under the contract on account of retained percentages, for the simple reason that the county of Kern was entitled to and did deduct therefrom a little over $2,000 in making payment to the persons who finished the work, the net loss to the surety company being the difference between $6,818.37 awarded to it from the county and the sum of $15.703.38 paid out by it on account of labor and materials going into the improvement of the highway in question.

In so far as the assigned warrant is concerned which is involved in this case, the Securities Company stands in the position of a general creditor. No money was advanced on account thereof, as heretofore stated, and as also shown all moneys advanced by the Securities Company went into the general banking account of the Coast Construction Company upon which checks were drawn in prosecution of at least four distinct and separate contracts for that many different specified improvements. In this particular the language of the court in Title Guaranty & Surety Co. v. Dutcher (D. C.) 203 Fed. 167, quoting from page 169, is directly applicable:

> "All the money borrowed by the contractor went into his general bank account with other of his money. During the time involved he had four separate contracts with the city. No account was kept of the particular work upon which disbursements were made, and it is not shown how much, if any, of the money borrowed, or other money of his, was paid upon the contract in question."

Under such circumstances it was held that the rights of the surety were paramount. A large number of cases were also cited by the court in the above-mentioned decision. To the same effect is the case of First Nat. Bank of Seattle v. City Trust, etc., 114 Fed. 529, 52 C. C. A. 313. In that case the rights of the surety on account of moneys advanced by it to discharge claims for unpaid labor and material were held paramount to that of the bank which founded its claims upon money loaned to the contractor, which likewise went into the contractor's general banking account.

In Re McGarry & Son, 240 Fed. 400, 153 C. C. A. 326, it is held:

> "That the surety, on payment of labor and material claims, was subrogated and that its equity attached as of the date of the bond, and that a mere volunteer's rights would be subject to those of the surety who pays the labor and material bills"—citing Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412.

In that case it was held that the rights of the surety on account of moneys paid for materialmen and labor were superior to those of an assignee of the contractor. In that case it was also held that the fund under the contract was for a particular class of creditors to which class the assignee did not belong. This is true of the case at bar.

In the case of Wasco County v. New England Equitable Ins. Co., 88 Or. 465, 172 Pac. 126, L. R. A. 1918D, 732, Ann. Cas. 1918E, 656, the Supreme Court of Oregon speaks of the rights of the respective parties as follows:

> "When the bank loaned its money it knew that before Cromer entered upon the performance of his contract he had given a bond signed by a surety, and that the law required the county to reserve 25 per cent. of each monthly estimate. From the date of the contract of suretyship the bank was bound to know that the in-

surance company had an equity in the funds to be reserved; and when the bank loaned its money it did something that it was not obliged to do, and it must be deemed to have acted with a full knowledge of the right of the surety. The contractor and the bank could not create a lien in favor of the bank upon the reserved fund and make it paramount to a prior and then existing lien of the surety"—citing a number of authorities to the same effect.

The federal cases, heretofore cited, are supported by the decision in the case of Prairie State Bank v. United States, supra. Whether the law required the retention of 25 per cent. is wholly immaterial, as the contract of which all parties had notice so specified. An almost identical question was before this court in the case of Maryland Casualty Co. v. Shafer, 57 Cal. App. 580, 208 Pac. 192. In that case, this court, speaking through the presiding justice, said:

"The further provision for retention by the county of sufficient funds to pay claimants who filed verified claims was equally a part of plaintiff's contract and was for the protection of the surety as much as for that of claimants. To the extent that such provision was observed, the liability of the surety was lessened. The fund retained was beyond the control of Shafer and no assignment by him could prejudice the rights of the parties for whose benefit the fund was created. To hold otherwise would be to nullify the stipulation of the contract for the retention of the fund and to destroy the security intended for the benefit of claimants bringing themselves within its terms as well as for the protection of the surety."

This statement of the law is supported by a large number of authorities there collated. This case also shows the difference in the application of the principle or rule of law relating to the rights of the parties where the party contracting for the work has control of the fund and may lawfully contract to reserve a certain percentage thereof and cases in which no such power exists. In one case the rights of the sureties can and will be protected; in the other it is found impossible so to do.

To summarize this case we have these facts: The contractor was carrying on four contracts; all of its money was placed into and withdrawn from a general banking account; the money was not traced; the appellant claims the thirty-eight hundred odd dollars on account of an assignment indorsed upon the fifth estimate upon which no money was advanced by the assignee, but which it was understood, as shown by the testimony which we have quoted, the matter of advancing money would be taken up and further considered; the contractor defaulted in his work; at the time of the default the county had in its possession something over $8,000 in retained percentages, as well as other sums of money due and to become due the contractor; the surety advanced over $15,000 to pay the claims of materialmen and laborers on account of the contract.

In view of this summary, and of all that we have hereinbefore stated, we think that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 720

KAMMERER v. MARINO et al. (Civ. 2740.)

(District Court of Appeal, Third District, California. April 24, 1924. Rehearing Denied May 24, 1924. Hearing Denied by Supreme Court June 23, 1924.)

1. Appeal and error 🔑607(2)—Trial court's power to permit amendment of notice to clerk to prepare papers should be freely exercised.

Power of trial court under Code Civ. Proc. § 473, to permit amendment of notice to clerk to prepare papers on appeal, should be freely and liberally exercised.

2. Appeal and error 🔑958—Order denying leave to amend notice to prepare papers not reversed in absence of clear abuse of discretion.

Order denying leave to amend notice to clerk to prepare papers on appeal will not be reversed, unless record clearly shows abuse of trial court's discretion.

3. Appeal and error 🔑607(2)—Relief from mistakes of law as well as fact may be had by amendment of notice to clerk to prepare papers on appeal.

Under Code Civ. Proc. § 473, amendment of notice to clerk to prepare papers on appeal may be allowed to afford relief from mistakes of law, as well as fact, on proper showing.

4. Appeal and error 🔑607(2) — Affidavits supporting application for leave to amend notice to clerk to prepare papers on appeal held insufficient.

Affidavits supporting application for leave to amend notice to clerk to prepare papers on appeal *held* insufficient as not showing by whose inadvertence, mistake, or neglect notice did not include request for reporter's transcript of evidence, why such transcript would be of value, or its materiality in presenting questions tendered for review.

5. Appeal and error 🔑607(2)—What affidavits supporting application to amend notice to clerk must show, stated.

Affidavits supporting motion to amend notice to clerk to include copy of reporter's notes of evidence in papers on appeal should show clearly questions desired to be presented for review and necessity of such copy to properly present them, before it can be said that trial court abused discretion in denying leave to amend.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by John Kammerer against Guiseppe Marino and others. Judgment for plaintiff, and, from order denying application of defendants Marino and others for leave to amend notice to clerk to prepare papers on appeal, they appeal. Affirmed.

Donald R. Green, V. L. Hatfield, Martin I. Welsh, and W. H. Hatfield, all of Sacramento, for appellants.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for respondent.

PLUMMER, J. This is an appeal from an order of the superior court of Sacramento county denying the application of defendants, Guiseppe Marino, Charlie Roparty, also known as Charles Rafti, and Steve Kamer, for leave to amend their notice to the clerk to prepare papers on appeal. It appears from the transcript that, after the trial had been had and judgment entered in the above-entitled action, the defendants, last above named, desiring to appeal therefrom caused to be filed with the clerk of said court on the 15th day of May, 1923, the following notice, to wit:

"Notice to Clerk to Prepare Papers on Appeal.

"To the Clerk of the Above-Entitled Court: Please take notice that the defendants Guiseppe Marino, Steve Kamer and Charlie Roparty, also known as Charles Rafti, intend to appeal from the judgment heretobefore rendered in the above-entitled action, and request that a clerk's transcript to include the judgment roll herein together with all of the papers and matters used and all rulings and orders made upon said defendant's motion for a new trial herein be made up and prepared.

"Dated this 15th day of May, 1923.

"V. L. Hatfield.
"Martin I. Welsh.
"W. H. Hatfield."

Subsequently to said date it was discovered that said notice did not ask for a copy of the reporter's notes of the testimony, and on the 19th day of June, 1923, the defendants and appellants in this action served notice that on the 25th day of June, 1923, they would move the trial court for an order permitting them to amend their notice to the clerk of the above-entitled court to prepare papers on appeal herein by adding thereto a request to prepare a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel and all matters to which the same relate. That said motion would be made upon the ground that said matter requested to be added to said request theretofore filed was omitted therefrom through inadvertence, surprise, mistake, and excusable neglect. This motion was supported by the affidavit of W H. Hatfield filed on the same date, which affidavit is as follows:

"State of California, County of Sacramento—ss.: W. H. Hatfield, being first duly sworn, deposes and says:

"That he is one of the attorneys for the moving defendants herein; that it was agreed between affiant and one of his associates, Donald R. Green, that said Green would prepare the notice of appeal and the notice to the clerk to prepare papers on appeal herein; that affiant asked said Green to include in said request both a reporter's transcript and a clerk's transcript, together with all papers connected with the motion for a new trial herein; that due to inadvertence said notice did not include the request for the usual reporter's transcript; that affiant did not learn this until on or about the 15th day of June, 1923, when the clerk's transcript was submitted to him for examination.

"Wherefore, affiant prays for an order of this court allowing the said notice to prepare papers on appeal herein to be amended to include therein a request for the usual reporter's transcript on appeal. W. H. Hatfield."

Subsequently an affidavit by Donald R. Green was also filed in support of said motion. This affidavit is as follows:

"State of California, County of Sacramento—ss.: Donald R. Green, being first duly sworn, deposes and says:

"That he is attorney of record for Steve Kamer, one of the defendants herein; that immediately after the denial of the motion for a new trial in the above-entitled matter he consulted with W. H. Hatfield about the matter of an appeal from the judgment herein; that he stated to Mr. Hatfield that he had never taken an appeal to the Supreme Court or to the District Court of Appeal; that Mr. Hatfield stated to him that he had considerable experience in those matters and was thoroughly familiar with the procedure and had just recently taken an appeal to the District Court of Appeal, Third Appellate District, wherein practically the same point was raised as here, i. e., failure to find on a material issue; that Mr. Hatfield stated to affiant that as he was busy he would have to ask affiant to attend to preparing the necessary papers and arranging the matter of the transcript with the reporter; that appreciating the fact that he had never taken an appeal before, and appreciating the fact that Mr. Hatfield had, he discussed the contents of such papers on appeal fully with Mr. Hatfield; that through mistake, inadvertence and a misunderstanding on his part, he understood that a reporter's transcript was unnecessary; that affiant did not discover his mistake until after the clerk's transcript was presented to Mr. Hatfield for inspection; that as soon as said error was discovered, said W. H. Hatfield prepared and filed his notice of motion for an order permitting defendants to amend their notice to the clerk by adding thereto a request to the clerk for a transcript of the testimony offered at the trial; that the said notice was given with the knowledge and consent of affiant, and was for the purpose of correcting the said mistake of affiant. * * *"

No opposing affidavits were filed. The trial court denied the motion and the matter is now before this court on appeal from that order. On the part of the appellants it is contended that the trial court abused its discretion in denying such motion, and on the part of the respondents it is contended that there was no showing of such abuse.

[1, 2] Two propositions of law in relation to the exercise of discretion in such matters by the trial court seem to be definitely settled: First, that the power vested in trial courts by section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that cases should be disposed of according to their substantial merits rather than upon mere technical matters of procedure. Sofuye v. Pieters-Wheeler Seed Co. (Cal. App.) 216 Pac. 990; Roland v. Kreyenhagen, 18 Cal. 455; Brasher v. White, 53 Cal. App. 545, 200 Pac 657. Secondly, that, unless the record clearly shows the trial court has abused its discretion in denying a defendant's motion for relief, its order will not be reversed on appeal. Horne v. Standard Auto Sales Co. (Cal. App.) 216 Pac. 970; Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165; Alferitz v. Cahen, 145 Cal. 397, 78 Pac. 878.

Other cases might be cited following the rules above set forth, but these are deemed sufficient.

[3] It also seems to be well settled in this state that relief under section 473 of the Code of Civil Procedure may be had from mistakes of law as well as from mistakes of fact when a proper showing therefor is made. Douglass v. Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; Mitchell v. California, etc., Co., 156 Cal. 576, 105 Pac. 590; 14 Cal. Jur. 1044.

It seems, however, that the mistake of an attorney justifying relief must be other than that arising from mere ignorance of the law. This question was before the court of this state in Garroway v. Jennings, 189 Cal. 97 (207 Pac. 554) where it is held (we quote from the syllabus):

> "A motion under section 473 of the Code of Civil Procedure to set aside a default for failure to answer a complaint after a demurrer thereto was overruled was properly denied where the only showing made in support of the motion was that the defendant was an attorney at law who had never been in active practice and was not familiar with the rules of practice and procedure of courts and believed that an order overruling a demurrer was appealable and an appeal taken therefrom would stay all further proceedings until the appeal was determined."

It was also stated that:

> "All of these things he could have readily and easily ascertained by taking the trouble to read the provisions of the Code of Civil Procedure relating thereto and the numerous decisions of this court directly holding that no appeal lies from an order overruling a demurrer."

[4] With these principles of law in mind, let us consider the two affidavits upon which the motion is based. In the affidavit of Hatfield it appears that the affiant asked Donald R. Green to prepare the notice of appeal and the notice to the clerk and asked said Green to include in said request both a reporter's transcript and a clerk's transcript and that due to inadvertence said notice did not include the request for the usual reporter's transcript. Whose inadvertence, mistake, or neglect it was does not appear from this affidavit. There is nothing in the affidavit of affiant Hatfield which states any reason why a reporter's transcript of the evidence would be of value or its materiality in presenting any questions which may be tendered to an appellate court for review upon appeal. There is nothing stated in this affidavit which would call to the attention of the trial court any necessity whatever for such a transcript or any reasons whatever given why all questions which were intended to be presented to a reviewing court might not be tendered, presented, and considered upon the record already made. In other words, there is nothing in this affidavit showing how the appellants would be benefited by the granting of their motion, and, necessarily, nothing shown as to how they would be prejudiced by a denial thereof.

We come next to a consideration of the affidavit filed by Donald R. Green. This affidavit states that affiant had never taken an appeal to the Supreme Court or to the District Court of Appeal; that affiant Hatfield had stated to him that he (Hatfield) had had considerable experience in those matters and was thoroughly familiar with the procedure and had just recently taken an appeal to the District Court of Appeal, Third Appellate District, wherein practically the same point was raised as here, i. e., failure to find on a material issue; that Hatfield was busy and would have to ask affiant to attend to preparing the necessary papers; that through mistake, inadvertence, and misunderstanding on his part affiant understood that a reporter's transcript was unnecessary; that affiant did not discover his mistake until after the clerk's transcript was presented to Mr. Hatfield for inspection. Here, again, there is no showing in the affidavit of the necessity of a reporter's transcript of the testimony or why there should be a reporter's transcript of the testimony made or how the appellant represented by Mr. Green or any of the other appellants would be benefited by the granting of the motion to amend, and, hence, necessarily not showing how they would be prejudiced by a denial of such motion. In so far as the application is based upon the affidavit showing unfamiliarity with the law in such cases, the Garroway Case, above cited, seems to apply.

[5] We do not find any cases which hold that the actual merits of an appeal must be set forth in the affidavit supporting a motion to be relieved from a default for failure to

serve or file statements or bills of exception on appeal within time, but there must be some showing of merit in the motion, that is to say, the affidavits in this case should show clearly and distinctly the questions desired to be presented for review by the appellate court and that a copy of the reporter's notes was necessary in order that such questions might properly be presented and considered on appeal. Then, in the event such motion is denied or granted, the appellate court would be in a position to determine whether the trial court had or had not abused its discretion. Without such showing the mere fact that a mistake has been made, whether of law or of fact, and the party making the mistake has not been relieved therefrom, does not authorize or justify an appellate court in finding that the trial court has abused its discretion. We do not need to hold that the trial court in this case either has or has not abused its discretion. The papers presented to us do not clearly show such abuse and under the law we have but one thing to do and that is to affirm the judgment.

The judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

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66 Cal. App. 761

PEOPLE v. GALBRAITH. (Cr. 1168.)

(District Court of Appeal, First District, Division 2. California. April 28, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. **Perjury ⚷34(4)—Evidence held sufficient to sustain conviction.**

Under Pen. Code, § 1103a, relating to corroboration of a chief witness in a prosecution for perjury, evidence *held* sufficient to sustain a conviction.

2. **Perjury ⚷34(5)—Not necessary for testimony of chief witness to be directly proved by "corroborating circumstances."**

Under Pen. Code, § 1103a, providing that perjury must be proved by two witnesses or one witness and corroborating circumstances, it is not necessary that the truth of the testimony of the chief witness be directly proved by "corroborating circumstances" which relates to circumstances tending to corroborate the facts offered in evidence to show the falsity of the statements of defendant on trial.

[Ed. Note.—For other definitions, see Words and Phrases, Corroborating Circumstances.]

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

James C. Galbraith was convicted of perjury, and he appeals. Affirmed.

Frank M. Carr and Stanley R. Sterne, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., Ezra W. Decoto, Dist. Atty., and Ralph E. Hoyt, Deputy Dist. Atty., both of Oakland, for the People.

NOURSE, J. The defendant was charged with perjury alleged to have been committed in the course of his testimony as a witness in the case of People v Jeff Galbraith and others, who were charged with the robbery of the Pergola Café, a resort located 17 miles out of Oakland, on the night of January 13, 1923. The information charged that during the course of said trial the defendant herein, after being duly sworn as a witness, testified that he had met Jeff Galbraith in the city of Tulare, Cal., early in the morning of the 13th of January, and had spent the whole day with him, leaving him about 5 or 5:30 o'clock p. m.; that he had driven with him out to a camp called Liggett's, which place he left at about 4 p. m. with the said Jeff Galbraith, driving with him back to the town of Tulare; that he left Jeff on the street in Tulare, and went to his own home, and then to the freight yards, where he took a train out of Tulare the same night.

[1] The evidence at the perjury trial consisted of the direct testimony of one George Ducker directly showing the falsity of all the testimony given by the defendant herein, and the corroborating testimony of other witnesses tending to show that the entire story of the defendant was a fabrication. Ducker testified that between the hours of 4 and 5 p. m. on the 13th of January, 1923, he picked up Jeff Galbraith and two others at a place in Modesto, which was shown to be 137 miles from Tulare; that he carried these parties in his automobile through the San Joaquin valley through Tracy, and down to Oakland, a distance of 86 miles, where they all had their dinner, and then from Oakland out to the Pergola Café, a distance of 17 miles, where the occupants of the car held up and robbed the café at about 10:30 or 10:45 p m. of that night. It was shown that, if Jeff Galbraith had traveled this route from Tulare, he would have covered a distance of 240 miles in about five hours, and it was also shown that no trains left Tulare for the north within the time mentioned. The witness Ducker gave a detailed account of the automobile ride from Modesto to the café, and his testimony that Jeff Galbraith took part in the robbery of the café at 10:30 that evening was expressly corroborated by another witness who saw him on that occasion. Though the corroboration of the testimony of Ducker is meager, all the circumstances and inferences to be drawn from the evidence before the jury tended in themselves to corroborate his story of the movements of Jeff Galbraith on the day in question and to demonstrate the impossibility of the facts related by the defendant in his testimony.

In addition to this the defendant himself, in his endeavor to bolster up the story which he had previously given, testified that he fixed the time of his visit with Jeff Galbraith as the 13th day of January as the time when he boarded a freight train at Tulare shortly after 5:30 p. m., and proceeded to the town of Pixley, where he traded a waybill for a ticket, and that, pursuant to his employment by a man by the name of Smith, he boarded a cattle train at Pixley and took charge of the cattle in the course of their transportation to Los Angeles. He also testified that on the said 13th day of January he and Jeff Galbraith had breakfast in the City Restaurant in Tulare, and were waited upon by a girl, who was expressly named by him. This whole story proved to be false. The girl testified that she had not seen these men on January 13th, and that she had not worked in the restaurant mentioned by the witness until some time in June following. As to the cattle train incident, it was shown without question that the freight train did not stop in Tulare on that day; that he could not have taken a freight train to Pixley on that evening; that he had not been employed by Smith to take charge of cattle or in any other capacity at that time; that no waybill had been given to him and no ticket had been issued for his transportation to Los Angeles; and that he had not had charge of a shipment of cattle to Los Angeles at that time. On cross-examination in his own defense in the present case the defendant admitted that his previous testimony relating to the ticket and cattle incident was untrue; he also made certain denials regarding his testimony in the former case which were shown to be untrue by the production of the record.

[2] The whole case on appeal is based upon the ground that the evidence was insufficient to corroborate the direct evidence of Ducker showing the falsity of the appellant's former testimony and that the instructions of the court were incorrect in regard thereto. This attack presents but one question, and that is whether in a prosecution for perjury, where the people depend upon the testimony of one witness and corroborating circumstances, it is necessary that these corroborating circumstances must be proved by direct testimony specifically corroborating the testimony of the main witness. The purpose of the statute is to prevent an injustice to one individual by having him stand before a jury to answer the testimony of another charging him with falsification. In such a case the jury would be called upon to choose between the sworn testimony of the witness and the defendant. To prevent this, section 1103a of the Penal Code provides that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances. It is appellant's contention that because of this section it is necessary that the corroborating circumstances must directly prove the truth of the chief witness, but this is not the meaning of the section. "Corroborating circumstances" in the section relate to circumstances which tend to corroborate the facts which are offered in evidence to show the falsity of the statements of the defendant on trial. Thus in People v. Casanova, 54 Cal. App. 439, 442, 202 Pac. 45, 47, the appellate court said:

> "The statute respecting the quantum of evidence necessary in perjury cases will be satisfied if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged."

We have made a very careful review of the entire record in this case, and are satisfied therefrom that the appellant was given a fair and impartial trial, and that he was convicted upon evidence which was sufficient within the terms of the statute.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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67 Cal. App. 56

HOWARD v. HOWARD et al. (Civ. 4661.)

(District Court of Appeal, First District, Division 1, California. April 30, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Quieting title 🔑1—Object to finally settle all conflicting claims.

The object of an action to quiet title under Code Civ. Proc. § 738, is to finally settle and determine as between parties all conflicting claims to property in controversy, and to decree to each such interest or estate therein as he may be entitled to.

2. Appeal and error 🔑1042(2)—Plaintiff held not injured by striking paragraphs from complaint where evidence thereof admitted.

Plaintiff, in action to quiet title under Code Civ. Proc. § 738, was not injured by ruling striking certain paragraphs from complaint, where all material facts stricken were subsequently admitted in evidence.

3. Deeds 🔑38(1)—Sufficiency of description of premises.

A deed will be sustained if it is possible from description to ascertain and identify land intended with reasonable certainty, either by calls of instrument as applied to land, or by descriptive features.

4. Deeds 🔑38(1)—If property can be identified by competent surveyor, nothing more required.

If property can be identified by description in a deed by competent surveyor, with or without aid of extrinsic evidence, nothing more is required.

5. Homestead ⚷57(3) — Evidence held to support finding that land could not be identified.

Evidence *held* to sustain finding that lands described in a declaration of homestead as bounded on three sides by the lands of mere squatters could not be identified with reasonable certainty.

6. Appeal and error ⚷1047(2)—Failure to rule upon admissibility of declaration of homestead held immaterial.

Failure of court to finally rule upon admissibility of declaration of homestead was immaterial where court held that parol evidence was insufficient to aid in location of homestead with reasonable certainty.

7. Judgment ⚷580—Judgment appealed from not evidence in bar of recovery in another action.

Where an appeal is pending, a final judgment, unless satisfied, is not evidence in bar of recovery in another action for the same cause, since only final judgment can be pleaded or proven as res adjudicata.

8. Appeal and error ⚷499(3)—Exclusion of testimony not considered in absence of showing in record that it was offered or marked for identification.

A contention that court erred in sustaining objection to introduction in evidence of testimony of witnesses, since deceased, in another case, cannot be sustained where record does not show that such testimony was offered or marked for identification.

Appeal from Superior Court, Mendocino County; H. S. Preston, Judge.

Action by Mack Howard, as administrator of the estate of Rachael Howard, deceased, against W. H. Howard and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. L. Wessel, of Ukiah, and Chas. A. Shurtleff, of San Francisco, for appellant.

Will Van Dyke, Chas. Kasch, and Mannon & Mannon, all of Ukiah, and Eden & Koepsel, of Santa Ana, for respondents.

ST. SURE, J. This is an action and appeal by Mack Howard, as administrator of the estate of Rachael Howard, deceased, for the benefit of the heirs of the said Rachael Howard, to quiet the title of said heirs to a tract of land, comprising some 445.37 acres, which, it is claimed, Rachael Howard owned in fee simple in her lifetime by virtue of survivorship of her husband, Mark W. Howard. The said Mark W. Howard had, on July 26, 1861, executed and recorded a declaration of homestead which it is claimed covered the tract in question, and grant title to which he afterward acquired for adequate consideration from grantees of the patentee of the United States, though at the time of such declaration he was merely a squatter under the purchase of squatters' rights on what he believed to be the public domain. Grant title to the property was obtained on December 17, 1867, and November 20, 1871. The title of Rachael Howard is claimed to be paramount to and to avoid all titles or claims in said lands claimed to be derived under four deeds executed by Mark W. Howard alone in the years 1890 and 1892 to Lucy S. Howard, Phalby Ann Cleveland, and Thomas B. Howard, three children of Mark W. Howard and Rachael Howard, covering four parcels, which together make the whole of the tract claimed to be covered by the declaration of homestead. Plaintiff, as part of his relief, asked that these deeds and other conveyances and incumbrances thereunder be canceled. Section 3412, Civ. Code. The defendants and respondents are surviving children of Mark W. Howard and Rachael Howard, representatives and heirs of other children of said couple, and the grantees, tenants for life, remaindermen, distributees, and mortgagees of the grantees under the aforesaid four deeds of Mark W. Howard, under conveyances, decree of distribution and incumbrances executed January 29, 1917, April 17, 1919, April 17, 1918, November 15, 1919, and May 6, 1920, by the grantees of the aforesaid deeds and their successors, and thereafter recorded in the office of the county recorder of Mendocino county, where the land is situate.

Trial resulted in a judgment adverse to plaintiff's claims, and he appeals from the judgment and order denying his motion for a new trial.

A former action, brought on April 17, 1918, by the administrator of the estate of Ann Cleveland, the same person called Phalby Ann Cleveland, and a grantee under one of the aforesaid four deeds of Mark W Howard, against Mack Howard, as administrator of the estate of Rachael Howard, deceased, to quiet title to that portion of the tract here in dispute covered by the deed to Phalby Ann Cleveland by Mark W. Howard, resulted in judgment in favor of the defendant and against any interest of the plaintiff in the particular parcel in controversy there. An appeal was noticed from said judgment, but no further steps were taken on such appeal because of a stipulation entered into between the respective parties to that action to the effect that Mark Howard, as administrator of the estate of Rachael Howard, deceased, should bring an action to have determined that another parcel of land also included in the tract here in controversy, was the property of the heirs of Rachael Howard, subject to the administration of her estate, and that no further steps need be taken in the appeal aforesaid until the judgment in the action to be so brought should have become final. Plaintiff appellant claims, as part of his contentions, that the judgment in the case of Hopkins v. Howard is res adjudicata as to the matters there in dispute, and which were again raised in the present action by the plaintiff in the Hopkins Case.

Plaintiff-appellant thereafter brought the present action, in which as administrator he seeks to quiet title in the heirs of Rachael Howard, not only to the parcel mentioned in the stipulation made in the action of Hopkins v. Howard, but to the land in controversy in said action, the parcel with respect to which the stipulation was made, and a further piece, all three parts lying together in roughly parallel strips, and forming as a whole, from south to north in the order given, the tract covered by the complaint. It comprises in all 445.37 acres, having the Russian river for its western boundary.

The entire tract of land in controversy here was part of the great Yokayo Rancho grant of over 35,000 acres, made by the Mexican government through Governor Pio Pico to Cayetano Juarez in 1845, and confirmed to him in 1846. By the treaty of Guadalupe Hidalgo these lands came into the possession of the United States. The claim of Juarez for confirmation of his title by the United States was first rejected, and on appeal later confirmed to him, the final adjudication being made on April 17, 1863, and patent issued on March 8, 1867. Under the administration of the United States, and prior to the final confirmation in 1863, and possibly until 1867, when the patent issued, and survey made in 1866–67 on behalf of the grantees of Juarez, the lands of the vicinity were believed by early settlers to be public domain to be surveyed and open to be filed on at some later day. In this belief squatters settled there, holding various tracts at distances from each other sufficient to make each an occupant of the customary quarter section or 160 acres. Just prior to 1858 men named Beason and Stephens occupied part of the tract and had a house and other buildings thereon; land to the east of them was held by one Potter, to the north by Abbott, and to the south by "Bill" Stevens.

Mark W Howard, husband of the plaintiff's intestate, was living in Sonoma county in 1858 with his wife and 11 children, having arrived there after brief sojourns in other California counties following their arrival from Missouri in 1856. Mr. Howard came to Mendocino county in advance of his family, and bought the squatters' rights of Beason and Stephens, paying probably between $500 and $600 for them. He then brought his family to Mendocino county in September, 1858. Here they settled and lived continuously until the death of Mark W. Howard in 1900 and his wife in 1902. The year following their arrival in the county (1859) one Samuel Ackerman took possession of the land to the north formerly occupied by Abbott, and he, with Howard, proceeded to erect a fence between their holdings. From the time of the arrival of Mark W. Howard in the county until 1866–67 there were no known titles to the land, and though purchases of squatters' rights were said to be made of definite acreages no documents evidencing such purchases were produced.

By judicial deed to one S. Clinton Hastings in September, 1859, of the whole rancho, followed by reconveyances of shares therein by him to Currey, Currey to Carpentier, quitclaim from Cayetano Juarez to Currey, and conveyance of another share by Currey to Carpentier, the ranch Yokayo finally came, by power of attorney and deeds from Hastings, Currey, and Carpentier, to William Doolan, in 1867 and 1869. On December 17, 1867, a deed from Hastings, Currey, and Carpentier to Mark W. Howard, executed by William Doolan as attorney in fact, conveyed lot 93, 172 acres, as shown by "Healey's survey and map of the Yokayo Rancho," for the consideration of $2,000. On May 12, 1871, Doolan, for himself and as attorney in fact for Hastings conveyed to Mark W. Howard, for $450, another piece of the Rancho Yokayo adjoining lot 93 to the east, and being the southerly part of lot 98, containing 200 acres. On November 12, 1871, for the expressed consideration of $615.17, Hastings and Doolan, by conveyance of Doolan to M. W. Howard, transferred property having a slightly different description and referring to Healey's survey, but seeming to cover the same territory conveyed by the deed of May 12, 1871, with the addition of acreage to 273.37 acres. This is further described as the southeasterly part of lot 98, and with the addition of the 172 acres of lot 93 make up the 445.37 acres covered by the complaint here.

On June 6, 1892, one of the deeds sought to be canceled was executed by the same Mark W. Howard, to Lucy S. Howard, a daughter, for the expressed consideration of $5,000, covering 200 acres forming the central strip of lots 93 and 98 from west to east. "House furnishings and goods" were also included in this conveyance, but a life estate reserved to the grantor. On January 29, 1917, Lucy Howard by gift deed conveyed the same land to W. H. Howard, Taylor Howard, and Mack Howard (three brothers), and the survivor of them, for life, with remainder to Howard Martin and Grace Agnes Prichard. The consideration expressed is love and affection. Lucy Howard is dead, and Mack Howard was the administrator of her estate.

On June 16, 1892, a deed was executed by Mark W. Howard to Phalby Ann Cleveland, a daughter, of the part of lots 93 and 98 lying south of that conveyed to Lucy Howard, comprising 64 acres, for $300. Phalby Ann Cleveland is dead. Lucia Hopkins, her administratrix, was the plaintiff in the action of Hopkins v. Howard concerning this land, heretofore referred to several times.

February 25, 1890, for $1,000, Mark W. Howard deeded to Thomas B. Howard, a son, the northerly part of lot 93, bounded on the south line by Howard creek, and part of Lucy Howard's grant, of 40 acres, and on June 10, 1892, for the expressed consideration of $300, he conveyed to the same son the northerly balance of lot 98, 65 acres.

Thomas Howard died, probate of his will had been had, and decree of final distribution made on November 15, 1919, of the land covered by the deeds of February 25, 1890, and June 20, 1892, to Thomas B. Howard, referred to above, as well as other land and personal property. The decree recites that Mark W. Howard, the son, was entitled to all of the property of the estate under his father's will, but had conveyed a half interest therein to his mother by deed of April 17, 1919, of record. Distribution was made of the real property equally to the mother, Florence G. Howard, and the son, Mark W. Howard. On May 6, 1920, the son, Mark W. Howard, with his wife, Antoinette Howard, joined in a mortgage to Joseph Cunningham of the land described in the above deed from the son to his mother as security for a note of $6,000.

The various surviving children of the original Mark W Howard, the grantees, representatives, and heirs, devisees, and mortgagee under these instruments, are defendants here.

[1, 2] Errors assigned by appellant are grouped and separately denominated "issues." Thirteen "issues" are presented for our decision.

Under the first issue the point is made that the trial court erred in sustaining the motions of defendants to strike from the complaint certain enumerated paragraphs. The action is one to quiet title under section 738, Code of Civil Procedure. The object of such an action is to finally settle and determine as between parties all conflicting claims to property in controversy, and to decree to each such interest or estate therein as he may be entitled to. Peterson v. Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107. The complaint, from which the court expunged all irrelevant and redundant matter, presents a cause of action under section 738, Code of Civil Procedure. It avers the death and intestacy of Rachael Howard and the appointment and qualification of the administrator, plaintiff-appellant herein; the death of certain heirs of said Rachael Howard, their testacy, and the appointment of executors, who are made defendants; the death of other heirs intestate and the appointment of administrators of their estates, also made defendants; the description of the land in question is given, and in connection therewith it is alleged that the senior Howards, father and mother, since deceased, during the year 1858, in good faith, for the purpose of actual settlement and acquiring a home for themselves and family, entered upon and into actual possession of the land; that said "Rachael Howard became, and was, and ever since and until the time of her death has been, the owner in fee simple" of the premises described, "and of each and every part thereof"; that the defendants named claim an interest in the premises adverse to the heirs of Rachael Howard, deceased, and the ownership of said heirs, and to the possession thereof by said heirs and this administrator, which claim or claims constitute a cloud upon title and are without right. Here we have every element of a complaint to quiet title. Gray v. Walker, 157 Cal. 381, 384, 108 Pac. 278. It further appears that material facts, which appellant claims were improperly stricken by the trial court from the original complaint, were thereafter properly admitted in evidence at the trial. It is therefore apparent that plaintiff was not injured by the ruling of the court in this particular.

Issues 2 and 3 appertain to the validity of the homestead and the identification of lands therein described by parol evidence. Appellant complains that the trial court committed error in holding the declaration void on its face for uncertainty. It appears from the record that the trial court did not hold the homestead void on its face, but did hold, after parol testimony had been introduced in an attempt to identify the land, that the description contained in the declaration was such that the lands intended to be impressed with the homestead could not be identified with reasonable certainty.

[3, 4] Both appellant and respondents agree that the main question presented on this appeal is whether or not the description contained in the declaration of homestead can be applied, with the aid of extrinsic evidence, to the tract of land aggregating 445.37 acres involved in this action. Both agree that a description in a declaration of homestead need not be more particular than is required in the case of a deed. Generally speaking, a deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed with reasonable certainty, either by the calls of the instrument as applied to the land, or by the descriptive features of the grant. If the property can be identified by the description by a competent surveyor, with or without the aid of extrinsic evidence, nothing more is required. 9 Cal. Jur. § 157.

[5] The declaration of homestead upon which appellant's action is founded is as follows:

> "Know all men by these presents, that I, M. W. Howard, of the county of Mendocino and state of California, do hereby certify and declare that I am married and that I do now reside with my family on the lot of land and premises situated in the county of Mendocino, state of California, bounded and described as follows, to wit: Bounded on the north by Samuel Ackerman's tract, on the south by William Stevens, on the east by Thomas Owens, on the west by Russian river—containing 160 acres, more or less.
>
> "And that it is my intention to use and claim the said lot of land and premises, together

with the dwelling thereon, and its appurtenances as a homestead, under the provisions of the act of the Legislature of the state of California, entitled 'An act to amend an act to exempt the homestead and other property from forced sale in certain cases,' passed April 21, 1851, approved April 28, 1860 and the act thereby amended.

"[Seal.] [Signed] M. W. Howard."

Appellant's counsel says at page 234 of the opening brief:

> "It is an elementary proposition of law that the question as to whether or not a tract of land is capable of being identified is a *pure question of fact*." (Italics appellant's.)

In connection with the historical facts hereinabove narrated it is well to keep in mind the description contained in the declaration of homestead:

> "Bounded on the north by Samuel Ackerman's tract, on the south by William Stevens, on the east by Thomas Owens, on the west by Russian river—containing 160 acres, more or less."

A reading of this description evokes the impression that it should be possible for not only a surveyor, but a mere layman, to identify with reasonable certainty the land upon the face of the earth. The fact of the matter is that the only boundary mentioned capable of location with any degree of certainty is the Russian river. Ackerman, Stevens, and Owens were squatters upon the unsurveyed public domain. Their claims, nebulous in character, inchoate, imperfect, undefined, never ripened into right or title of any kind, and, so far as the record before us discloses any attempt to identify the land with the aid of the description in the declaration would be mere conjecture.

Ackerman never obtained title to any tract, and never owned at the time the said declaration of homestead was filed, or afterward, any tract of land in that vicinity. Owens never obtained title or owned any tract of land to the east of lands subsequently purchased by Mark W. Howard. Stevens never received title to any lands whatsoever. The record does not show what lands any of these squatters claimed in 1861 at the date of the filing of the declaration of homestead.

More than 30 years elapsed between the execution of the first deed and the filing of the complaint in this action. Almost 29 years elapsed between the execution of the remaining deeds and the filing of the complaint herein. No attack was made on these deeds during the lifetime of Rachael Howard, though she lived for 10 years after the execution of the last deed, and no attack was made upon these deeds for a period of 19 years subsequent to the death of Rachael Howard.

The testimony of plaintiff's witnesses Peter and Mack Howard, sons of Mark W. Howard and Rachael Howard, evidently did not disclose to the trial court's satisfaction the location with reasonable certainty of any boundary lines between the various holders, although there was an abundance of hearsay and contradictory evidence on the subject stricken out on objection or found against. These witnesses, aged 71 and 65 years, respectively, at the time of the trial in the lower court in October, 1921, were boys of 8 and 2 years when their parents came to Mendocino county, and 11 and 5 at the date of the declaration of homestead. The testimony of witness Peter Howard, upon which main reliance is placed by appellant, was not only inconsistent and ambiguous, but on cross-examination was materially impeached by that given by him on some of the same points in the former action of Hopkins v. Howard.

W. H. Howard, a son about 20 years of age at the time of the declaration of homestead, was also called as a witness for the plaintiff, but on cross-examination made admissions from which it might be inferred there was doubt as to the quantity of land included in the homestead.

There was also presented to the trial court for its consideration the testimony of R. E. Donahue, whom appellant admits is a civil engineer and land surveyor of ability. Mr. Donahue heard the testimony of Peter and Mack Howard, and was asked, assuming that such evidence was true, and taking the description contained in the declaration, whether or not he could locate the land. We think it may be fairly said that his answer was in the negative. But as this question was one of "pure fact" it was for the trial court to decide, and after a careful reading and consideration of a voluminous and somewhat difficult record we cannot say that the trial court was wrong in its holding.

Under issue 4 the question is asked:

> "Did the court err in sustaining the objection of counsel for defendants to the introduction in evidence of the declaration of homestead," and "in omitting to pass upon a subsequent offer in evidence * * * before the termination of the case or at all?"

The record disposes of appellant's contentions in this regard. It shows that at the trial in the lower court counsel for appellant offered the declaration of homestead in evidence four or more times. Three times he withdrew the offer. When the instrument was offered for the last time the trial judge expressed doubt as to whether or not a proper foundation had been laid for its introduction. He said that he would admit it subject to motion to strike, which was then made.

"The point I had in mind," said the court, "was that I could decide this question when all the evidence was in, and decide the whole thing at the same time. It might be better to reserve the ruling upon the homestead until that is all in.

"Mr. Wessels: So far as that is concerned I don't believe there would be any objection on our part to wait until the evidence is all in with reference to the admission of this homestead with the permission to renew our offer after the testimony is put in by the defendants."

And after appellant had rested the trial judge said:

"It is considered that the homestead is not in evidence, but it is offered, and the ruling on it will be reserved."

Thereafter respondents rested, and the court said:

"Anything further?"
"Mr. Wessels: Before we rest we now offer in evidence the declaration of homestead heretofore offered and under the ruling of the court with permission to reoffer the declaration of homestead.
"By the Court: It is already considered offered, and the ruling of the court upon its admission is reserved."

[6] Appellant complains that the record does not show that the court finally ruled upon the admissibility of the homestead, and that such omission is error. It is clear that the procedure followed by the court was with the acquiescence of appellant. The record shows that the principal subject of inquiry during the trial was concerning the identification of the lands described in the declaration of homestead. It seems to us to be wholly immaterial whether or not the declaration of homestead was admitted in evidence during the course of the trial, because if it had been admitted the court might well have held, as it did, that the parol evidence was insufficient to aid in the location with reasonable certainty of the land described in the instrument. Surely it is obvious that the ruling of the court was against the validity of the homestead; otherwise we would not now be considering this appeal.

Under issue 5 appellant argues that the deeds relied upon by respondents were invalid because not executed by both husband and wife. It is conceded that, if there was a valid declaration of homestead, the deeds relied upon by respondents conveyed no title. Under issue 6 appellant specifies that the trial court erred in overruling his objections to the admission of said deeds. This likewise relates to the question of the validity of the declaration of homestead, and requires no discussion.

In issue 7 appellant says that there was error by the trial court in not sustaining a motion to strike the deeds from evidence or to decide the point of their admissibility before the termination of the case. The record shows, as with the declaration of homestead, that the deeds were offered in evidence, there was an objection, and the deeds were admitted subject to a motion to strike, the trial court reserving its ruling.

The specification of error in issue 8 is as follows:

"The court erred in not holding and deciding that the judgment rendered by the superior court of Mendocino county on August 20, 1918, in the case wherein Lucia C. Hopkins, as administratrix of the estate of Ann Cleveland, deceased, was plaintiff, and Mack Howard, as administrator of the estate of Rachael Howard, deceased, was defendant, was res adjudicata as to the same issues and between the same parties in this action, and in sustaining the objection of counsel for the defendants to the introduction in evidence of the judgment roll in that case."

Before this action was commenced a stipulation was entered into between the parties to the cause referred to in issue 8, which provided in part:

"(2) That the plaintiff need take no further steps on her appeal aforesaid until after the judgment in such action, so to be commenced (referring to the case at bar), shall have become final and that the time of said plaintiff and appellant to file her transcript on appeal or her opening brief or to take any other step necessary to perfect her record on appeal shall be and is hereby extended to and including 30 days after judgment in said action so to be brought shall become final—it is the intention hereof that the said plaintiff and appellant shall have the right and she is hereby given the right to have said judgment appealed from reviewed on appeal on the facts and the merits in case final judgment shall be that the Lucy Howard land is not the property of the estate of Rachael Howard, deceased;
"(3) That, should it be finally adjudged that the Lucy Howard land is the property of the estate of Rachel Howard, the appeal from the judgment in Hopkins v. Howard shall be immediately dismissed and the land in controversy deemed a portion of the estate of Rachael Howard."

[7] It appears from the foregoing that the judgment in the case of Hopkins v. Howard was appealed from, and the effect of this stipulation is to regard that appeal as pending. Where an appeal is pending a final judgment, unless satisfied, is not evidence in bar of recovery in another action for the same cause. Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589. Only final judgment can be pleaded or proven as res adjudicata. Estate of Ricks, 160 Cal. 467, 117 Pac. 539.

[8] In issue 9 appellant complains that the trial court erred in sustaining the objection to the introduction in evidence of the testimony of certain witnesses (now dead) in the case of Hopkins v. Howard. The record does not show that such testimony was offered or marked for identification, and there is nothing before this court which will enable us to determine whether the testimony was admissible.

Issue 10 is directed toward the rulings of the court in passing upon the admission of certain evidence. It is insisted that error was committed in sustaining objections to numerous questions asked and answered. Ruling on the admission or rejection of the evidence was rendered difficult by the fact that the principal witnesses testifying had lived for years on or near the land, and very naturally were inclined to state as facts relating to the time of entry on the land, and the time of the making of the declaration of homestead, and the extent of the land entered on, not only their conclusions, but matters which were clearly shown to have been established several years later, or matters which had been accepted for many years as current neighborhood tradition. We have read the record, and we believe that the learned trial judge committed no errors in passing upon the admissibility of evidence which are made the subject of this assignment.

In issues 11 and 12 appellant attacks the findings and judgment of the trial court as being contrary to law. It is also claimed that the findings and judgment are not supported by the evidence. These issues are submitted on the entire record. Likewise issue 13, which is that the court erred in denying appellant's motion for new trial. For the reasons heretofore herein given by us, it is manifestly unnecessary to discuss these last assignments of error.

Our opinion, based upon a painstaking study of the evidence and consideration of the points advanced by appellant and the law appertaining thereto, is that the judgment and order of the trial court appealed from should be affirmed. It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

66 Cal. App. 526

MAGNAUD et al. v. TRAEGER, Sheriff. (Civ. 4683.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1924.)

1. Forcible entry and detainer 🔑45—Sheriff held bound to execute writ of possession despite stay of execution pending appeal.

In view of Code Civ. Proc. § 1176, in an action of unlawful detainer, it was sheriff's duty to execute a writ of possession, notwithstanding an order staying execution pending appeal, where judge issuing such order was not the judge before whom case was tried and judgment rendered, and the fact that the case was tried in an extra session of the superior court pursuant to section 67b is wholly inconsequential.

2. Mandamus 🔑143(1)—Writ of mandate cannot be issued until 60 days after rendition of judgment.

The District Court of Appeal could not issue its writ of mandate to compel a sheriff to proceed with the execution of a writ of possession until expiration of 60 days designated for his return.

3. Forcible entry and detainer 🔑41—Writ of possession held functus officio as a writ of execution, where no levy made prior to return day and execution not stayed.

A writ of possession in unlawful detainer proceedings becomes functus officio in so far as it is a writ of execution commanding sheriff to satisfy that part of judgment awarding damages to plaintiffs, where no levy is made on judgment debtors' property prior to return day, and there is no order staying execution.

4. Forcible entry and detainer 🔑41—Writ of possession does not become functus officio by sheriff's failure to levy on property before return day.

Though a writ of possession in unlawful detainer for restitution of premises has become functus officio in so far as it is a fieri facias by sheriff's failure to levy on property before return day to satisfy the judgment for damages, it is still good, as it directs him to make restitution and may be executed after the return day.

5. Mandamus 🔑54 — Ordinarily proper to compel sheriff to enforce writ of possession.

Ordinarily mandamus is proper to compel a sheriff to enforce a writ of possession.

6. Sheriffs and constables 🔑98(3) — Sheriff will be protected when acting in obedience to court's writ or order showing jurisdiction on its face.

If a writ or order commanding a sheriff to do or to refrain from doing an act be legal upon its face and show an apparent jurisdiction, and court has jurisdiction of subject-matter, officer will be protected, when acting in good faith in obedience to such writ or order.

7. Sheriffs and constables 🔑98(2)—Under no legal obligation to obey a void judgment.

If a judgment be void for any reason, a sheriff is under no legal obligation to obey, and, even though jurisdiction of the subject-matter does exist, he may disregard court's fiat with impunity.

8. Mandamus 🔑54—Held proper to require sheriff to execute writ of possession in unlawful detainer proceedings.

Where sheriff refused to execute a writ of possession in unlawful detainer proceedings because of a void stay order, a writ of mandate would lie to compel him to execute the writ.

9. Sheriffs and constables 🔑98(2)—Will not be protected if obeying void precept of court.

If a court or judge is without jurisdiction of the subject-matter, a sheriff may not only refuse to obey court's precept, but will not be protected if he does obey it.

Application by Joseph Magnaud and another for a writ of mandate directed against William I. Traeger, Sheriff of Los Angeles County, to compel him to execute a writ of possession. Writ granted.

Cassell & Stafford, of Los Angeles, for petitioners.

Charles L. Chandler, of Los Angeles, and Melvin E. MacKinnon, for respondent.

FINLAYSON, P. J. This is an original proceeding in mandamus to compel respondent, the sheriff of Los Angeles county, to execute a writ of possession issued out of the superior court for that county in an action of unlawful detainer wherein these petitioners were the plaintiffs.

The action was tried in an extra session of the superior court for Los Angeles county before Hon. William P. Cary, a judge of the superior court for San Diego county, who presided in such extra session pursuant to the provisions of section 67b of the Code of Civil Procedure. On December 21, 1923, judgment was rendered in favor of petitioners for the restitution of the premises and for damages, and on December 31, 1923, the formal judgment, signed by Judge Cary, who meanwhile had returned to his own county, was filed. On January 2, 1924, a writ was issued out of the superior court for Los Angeles county and delivered to respondent whereby he was commanded as sheriff to place the plaintiffs in possession of the unlawfully detained premises. The writ, which was made returnable within 60 days after its receipt by respondent, also commanded the latter to satisfy the judgment for damages out of property of the judgment debtors. It thus will be seen that the writ partook of the nature of both a writ of possession for restitution of the premises and a writ of execution for the satisfaction of that part of the judgment which awarded damages to the plaintiffs in the action. No stay of proceedings upon the judgment was ever directed by Judge Cary. On December 29, 1923, a written order was signed and filed by Hon. Paul Burks, one of the judges of the superior court for Los Angeles county, ordering execution upon the judgment to be stayed pending any appeal by the defendants in the action, upon the filing of an undertaking in the sum of $2,000 pursuant to section 945 of the Code of Civil Procedure. On January 2, 1924, the defendants filed their notice of appeal from the judgment and gave the undertaking required by Judge Burks' order. Judge Burks refuses to set aside his order and respondent insists upon obeying it. Hence the application to this court for a writ of mandate commanding respondent to proceed with the execution of the writ delivered to him on January 2, 1924.

[1] It was the duty of the sheriff to place petitioners in possession notwithstanding the order of Judge Burks. That order was a nullity. Only Judge Cary, before whom the case was tried and by whom the judgment was rendered, had jurisdiction to stay proceedings upon the judgment. In an action of unlawful detainer "an appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs." Code Civ. Proc. § 1176. This section of the Code has been under review in several cases, among them the following: McDonald v. Hanlon, 71 Cal. 535, 12 Pac. 515; Gross v. Kelleher, 73 Cal. 639, 15 Pac. 362; Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50; Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048; Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922; Sarthou v. Reese, 151 Cal. 96, 90 Pac. 187; Kaiser v. Hancock, 25 Cal. App. 323, 143 Pac. 614. The language of the section is clear and unambiguous and is not in need of interpretation. By it the Legislature has declared in no uncertain terms that there can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer unless the trial judge by whom the judgment was rendered so directs. The fact that the case was tried in an extra session of the superior court is wholly inconsequential. There is nothing in section 67b of the Code of Civil Procedure which in any wise affects the force of section 1176 and its unequivocal declaration.

It is contended by respondent that even though the order of Judge Burks be invalid the writ of mandate should not issue in this proceeding. The reasons assigned for this contention are: (1) That the life of the writ issued in the unlawful detainer action expired with the expiration of the return day named therein; (2) that because the stay order made by Judge Burks is regular upon its face respondent is neither obliged nor permitted to question it, but must obey it; and (3) that by this proceeding petitioners are attacking an order of the superior court, and that mandamus may not be used to accomplish that purpose.

[2] Has the writ which was issued to respondent as sheriff of Los Angeles county ceased to have any force? That writ, it will be recalled, was received by respondent on the day of its issuance, January 2, 1924, and was made returnable within 60 days thereafter. The present proceeding in mandamus to compel respondent to proceed with the execution of the writ was initiated in this court January 22, 1924. Not only has the full period of 60 days within which to make return of the writ now elapsed, but in the very nature of things no writ of mandate could have been issued by this court within the time designated for the sheriff's return, even though we had rendered our judgment immediately upon the submission of this proceeding. One-third of the time fixed for the sheriff's return had elapsed before the petition for mandamus was filed here; and this court has no jurisdiction to issue its writ of mandate until the expiration of 60 days from the rendition of its judgment. People v. District Court of Ap-

peal (Cal. Sup.) 222 Pac. 353. The inquiry is thus reduced to the question whether the writ which was issued under the judgment in the unlawful detainer action has become functus officio by lapse of time.

[3] In so far as the writ is of the nature of a fieri facias, i. e., in so far as it is a writ of execution commanding respondent to satisfy that part of the judgment which awards damages to the plaintiffs in the action, its force has unquestionably been spent. No levy ever was made upon the property of the judgment debtors prior to the return day. In the enforcement of a writ of execution issued upon a common-law judgment for money the levy is the essential act by which the property is set apart for the satisfaction of the judgment, and the officer's authority to make the levy is limited to the return day of the writ. Southern California L. Co. v. Hotel Co., 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115. Petitioners have cited authorities which support the proposition that when a stay of proceedings is ordered the time of the stay is not to be computed as part of the time in which the writ runs to the return day. We have no quarrel with this rule nor with the authorities which sustain it. But here there was no order staying execution. What purports to be such an order was a mere nullity. It was a stillborn, lifeless thing, and in the eye of the law was inexistent.

[4] Though the writ has become functus officio and ineffective in so far as it is a fieri facias commanding the sheriff to satisfy the judgment for damages it still possesses life and efficacy in so far as it is a writ of possession directing the sheriff to make restitution of the premises. In precepts for the sale of property under a decree foreclosing a lien upon specific real property the time within which the sale is directed to be made is but directory, and the sale may be made after the return day. Southern California L. Co. v. Hotel Co., supra. In such cases the lien is not created by a levy, nor is it created by or under the writ. So, also, in cases of unlawful detainer, the right to dispossess is not the outgrowth of the writ. The judgment gives in terms the right of re-entry and restitution. The only office of the writ of possession is to enforce such right. In cases of that character the writ is the visible authority for doing in fact that which the judgment determines as done in law already. The position of the parties to the unlawful detainer action is the same before the return day as after, and no greater reason can exist why the writ of possession in such cases should be executed in whole or in part within the 60 days than must arise on a writ for the sale of real estate under a decree of court. It would seem, therefore, that the two writs are analogous, and that both may be fully executed after the return day. It was so held in Witbeck v. Van Rensselaer, 2 Hun, 55, affirmed in 64 N. Y. 27. Mr. Freeman, referring to this New York case, says that—

> "The latest and best-considered decision on the subject indicates that such writs [of possession] remain in force irrespective of the lapse of time, until their actual execution." Freeman on Executions (3d Ed.) vol. 3, § 473.

[5] The fact that the order which Judge Burks signed is regular upon its face does not present an insuperable barrier to the issuance of a writ of mandate to compel respondent to restore petitioners to possession. The authorities are unanimous in holding that mandamus, under ordinary circumstances, is the proper means for compelling a sheriff to enforce a writ of possession. Fremont v. Crippen, 10 Cal. 211, 70 Am. Dec. 711; North Pacific Coast R. Co. v. Gardner, 79 Cal. 213, 21 Pac. 735; Quan Wo Chung & Co. v. Laumeister, 83 Cal. 384, 23 Pac. 320, 17 Am. St. Rep. 261; Webster v. Ballou, 108 Me. 522. Indeed, this much seems to be conceded by respondent. He insists, however, that it is not a sheriff's duty to sit in judgment upon judicial acts, and that therefore where, as here, a judge of the trial court has made an order staying proceedings, mandamus will not lie to compel him to disobey that order even though it be a nullity.

[6, 7] Without doubt, if a writ or an order commanding a sheriff to do or to refrain from doing an act be legal upon its face and show an apparent jurisdiction, and if the court issuing the writ or making the order has jurisdiction of the subject matter, the officer will be protected when in good faith he acts in obedience to the writ or to the order. But the rule which justifies an officer who acts under an apparently regular order or process is one of protection merely. It is a shield, but not a sword. Wilson v. Sawyer, 37 Ala. 631. If the court have jurisdiction of the subject-matter, then, even though its judgment be void, as, for example, if it be void for want of jurisdiction over the person, the officer, if sued for damages, may defend under the writ. 24 R. C. L., title "Sheriffs," § 88. But, though the sheriff may defend if he obeys the court's command, he cannot build any adverse rights upon a void order or upon a writ issued under a void judgment. Wilson v. Sawyer, supra. If the court have jurisdiction of the subject-matter, the sheriff, if he obeys, will be protected; but if the judgment be void for any reason he is under no legal obligation to obey, even though jurisdiction of the subject-matter does exist, and he may disregard the court's fiat with impunity. In Ward v. Deadman, 124 Ala. 288, 26 South. 916, 82 Am. St. Rep. 172, the court said:

> "If the judgment was void, the constable could have availed himself of this, as a defense

for *not* obeying its mandate; but in such case, the execution will operate to protect him in its execution." (Italics ours.)

In Commonwealth v. Magee, 8 Pa. 240, 44 Am. Dec. 509, the court, without expressly deciding the question, bases its decision upon the assumption that if a stay order be made by a judge who is without authority of law to make it, the sheriff is under no obligation to obey it, and he may proceed to execute the writ notwithstanding the judge's order. There the court used this language:

> "The inquiry is thus reduced to the single question, whether his [the judge's] order to stay proceedings was obligatory on the sheriff, or a nullity, commanding neither respect nor obedience."

The court then proceeds to show that in that case the judge did have authority to make the order, and that because the order was authorized by law its effect was to hang up the execution until after the return day, the court saying:

> "The power of acting residing in the judge, it is no part of the sheriff's business to inquire whether it has been executed in an orderly manner, or to determine how far the steps properly precedent to the order have been taken. In this respect, the fiat at chambers is analogous to a writ, which the sheriff is bound to execute, though it be irregular; *the distinction being between process voidable for irregularity, and process void by lack of jurisdiction of the subject.*" (Italics ours.)

The cases relied upon by respondent are not in point. In the case upon which he seems to place the greatest reliance, Buffandeau v. Edmondson, 17 Cal. 438, 79 Am. Dec. 139, the order which directed the issuance of the injunction to restrain the sheriff from proceeding under the writ of execution was made by a court of competent jurisdiction; and though the order may have been erroneous, it certainly was not void.

[8, 9] We know of no case which questions the right of the sheriff to inquire into the jurisdiction of the court or judge to make the stay order. Indeed, many of the decisions expressly recognize such right. Thus, in Williams v. Stewart, 12 Smedes & M. (Miss.) 533, the court says:

> "The record shows the fiat of the circuit judge, directing the supersedeas to issue, and beyond this the sheriff need not look. It is not for him to inquire into the *propriety* of the grant of the fiat *but only as to the jurisdiction of the court to grant it.*" (Italics ours.)

In the present case the stay order was a nullity. The subject-matter of the order, i. e., the stay of proceedings under a writ of restitution in an unlawful detainer action was one which lay wholly outside the jurisdiction of the judge who signed the order. It is well-established that if the court or judge is without jurisdiction of the subject-matter the sheriff not only may refuse to obey a precept from such court or judge, but he will not be protected if he does obey it. In such cases the officer is without authority to act under the void precept. 24 R. C. L., title "Sheriffs," § 88.

There is no merit in respondent's point that "mandamus is not the proper remedy to use to attack an order staying execution." The writ of mandate is not sought for the purpose of attacking the stay order. Its direct purpose is to compel respondent to perform a duty enjoined upon him by law. And if between that duty and its performance respondent sees fit to interpose a void order, it cannot be said that the purpose of the mandamus is to attack that order merely because it is our duty to disregard it and to treat it as an unbegotten thing.

It is ordered that the peremptory writ of mandate issue commanding respondent to execute the writ in so far as it is a writ of possession directing the sheriff to make restitution of the premises.

We concur: WORKS, J.; CRAIG, J.

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PEOPLE v. HINSHAW. (Cr. 2544.)

(Supreme Court of California. June 10, 1924.)

1. Criminal law 🔑1134(10)—Denial of motions to set aside information and in arrest of judgment and disallowance of demurrer reviewable only on appeal from judgment.

Orders denying motion to set aside amended information, disallowing demurrer, and denying motion in arrest of judgment, are not appealable, but will be reviewed on appeal from judgment.

2. Criminal law 🔑211(1)—Complaint need not state elements of crime charged with technical nicety of indictment or information.

Complaint is practically deposition only, and should state essential elements of crime charged to common certainty, but not necessarily with all technical nicety of indictment or information.

3. Indictment and information 🔑140(1)—Facts in motion to set aside information not taken as true without proof.

Facts in motion to set aside information will not be taken as true without proof, in absence of which there is no error in denying motion on ground stated in Pen. Code, § 995, that defendant was not committed by magistrate.

4. Criminal law 🔑213—Imperfections of complaint cured if magistrate's examination warrants commitment.

When magistrate's examination of charge and evidence warrants order holding defendant to answer, imperfections of complaint are cured, and commitment is legal.

5. Indictment and information 🔑137(5)—Sufficiency of complaint not questioned before committing magistrate cannot be attacked on motion to set aside information.

If sufficiency of complaint to justify warrant of arrest is not questioned before committing magistrate, it cannot be attacked on motion to set aside information, which is based on commitment, into which complaint is merged; district attorney being authorized to file information for any offense shown by depositions.

6. Criminal law 🔑211(1)—Complaint stating offense in terms of statute sufficient to authorize commitment.

Complaint stating offense in terms of statute vests magistrate with jurisdiction to consider evidence in support of charge, and hence is sufficient to authorize commitment, which depends on evidence rather than pleading.

7. Criminal law 🔑241—Indictment and information 🔑122(1)—Commitment held for offense charged in complaint, and to warrant information therefor in greater detail; "deposition."

Commitment stating that offense in "within deposition mentioned," etc., was committed, committed defendant for trial for offense stated in "complaint," the words as so used being equivalent, and hence warranted information charging such offense, though in greater detail.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deposition.]

8. Criminal law 🔑1144(9)—Preliminary examination presumed regularly held, and evidence sufficient to justify commitment received in absence of transcript.

In absence of transcript of testimony and proceedings on preliminary examination, in support of motion to set aside information, it must be presumed that preliminary examination was regularly held, and evidence sufficient to justify commitment received, especially as remedy, if evidence is insufficient, is specially provided by writ of habeas corpus under Pen. Code, § 1487, subd. 7.

9. Indictment and information 🔑161(9)—District attorney may amend information by describing offense in greater detail than complaint and commitment.

District attorney may amend indictment or information for felonious assault under Pen. Code, § 245, by describing same offense with more detail as to means employed and force used than is alleged in complaint and commitment.

10. Indictment and information 🔑161(9)—Error in Christian name of complaining witness held cured by correction before jury was impaneled and sworn.

Error in Christian name of complaining witness in complaint, commitment, and original and amended informations *held* cured by correction of the amended information made by permission before jury was impaneled and sworn.

11. Criminal law 🔑1167(1)—Error in Christian name of complaining witness held not prejudicial.

Error in Christian name of complaining witness in complaint, commitment, and original and amended informations *held* not prejudicial; surname being correctly alleged.

12. Indictment and information 🔑81(1)—Sufficiency of identification of criminal act held not affected by error in Christian name of complaining witness.

Sufficiency of identification of criminal act charged *held* not affected by error in Christian name of complaining witness as stated in information, under Pen. Code, § 956.

13. Assault and battery 🔑77—Indictment and information 🔑63, 65, 71—Information for assault held to sufficiently allege means or force likely to produce great bodily injury, and sufficiently certain, and not to plead evidence on conclusions.

In prosecution under Pen. Code, § 245, for felonious assault, amended information alleging assault with fists and hands on head and face, resulting in fractured jaw and other grievous injuries, *held* sufficient, as against demurrer on grounds stated in sections 950-952, and against objections of stating conclusions and pleading evidence, to charge assault "by any means or force likely to produce great bodily injury," though "means" and "force" were charged conjunctively, and physical disparity between defendant and complaining witness or fact that latter was taken by surprise and struck from behind was not alleged.

14. Criminal law 🔑1159(1)—Evidence reviewed, on appeal from conviction of felonious assault, only to determine whether jury could have found that assault was felonious.

Supreme Court, on appeal from conviction of felonious assault (Pen. Code, § 245), will not determine facts, which are for jury and court below, but will review evidence only to determine whether, as matter of law, jury could have found that assault was felonious within statute.

15. Criminal law 🔑1186(4)—Insufficiency of amended information held not reversible error.

Insufficiency of amended information to allege felonious assault within Pen. Code, § 245, *held* not reversible error, in view of evidence; there being no miscarriage of justice, as required by Const. art. 6, § 4½, nor any prejudice to defendant within Pen. Code, §§ 960, 1258, 1404.

16. Criminal law 🔑165—When plea of once in jeopardy will lie stated.

Plea of once in jeopardy will not lie, in either felony or misdemeanor case, unless there has been former acquittal or conviction on valid indictment or information before competent court, and jury has been impaneled and sworn.

17. Criminal law 🔑178—Dismissal of complaint for simple assault before jury was impaneled and sworn not bar to conviction thereof in subsequent prosecution for felonious assault.

Dismissal of complaint charging simple assault (Pen. Code, §§ 240, 241) before jury was impaneled and sworn does not bar conviction thereof in subsequent prosecution, under section 245, for felonious assault.

18. Criminal law 🔑178—Further prosecution not barred by dismissal of misdemeanor complaint where felony complaint was filed before motion to dismiss.

Under Pen. Code, § 1387, declaring dismissal of misdemeanor complaint bar to further prosecution, unless order is explicitly made for purpose of amending pleading further prosecution is not barred where felony complaint was filed before motion to dismiss was made.

19. Criminal law 🔑406(6)—Defendant's admission of statement made held admissible to rebut presumption of innocence.

In prosecution for felonious assault, testimony as to defendant's admission that he stated in county jail that he had hit man and broken his jaw *held* properly admitted under Code Civ. Proc. § 1832, and section 1870, subd. 2, as tending to rebut presumption of innocence, though he did not deny assault.

20. Criminal law 🔑1168(2)—Admission of testimony as to defendant's admission of assault before establishment of corpus delicti held not prejudicial error.

In prosecution for felonious assault, admission of testimony as to defendant's admission of assault before establishment of corpus delicti *held* not prejudicial error, especially as assault was not denied.

21. Criminal law 🔑364(3), 368(3), 419, 420(1)—Statements of witness and defendant to officers after assault held hearsay, and not part of res gestæ.

In prosecution for felonious assault, testimony as to what complaining witness and defendant said to policeman and arresting officer, respectively, after defendant had left scene of assault, *held* properly excluded as hearsay, and not part of res gestæ.

22. Assault and battery 🔑84—Testimony as to defendant's hostile declarations concerning complaining witness held admissible.

In prosecution for felonious assault, testimony as to defendant's hostile declarations concerning complaining witness *held* admissible as tending to reflect defendant's state of mind at time of assault.

23. Criminal law 🔑1170½(5)—Refusal to permit cross-examination as to prior statement by witness held not error in view of his subsequent denial.

In prosecution for felonious assault, refusal to allow complaining witness to answer question, on cross-examination, as to whether he had not said to defendant before assault that he would make monkey out of him before he left, as testified to by defendant's witness, *held* not error, in view of his subsequent denial.

24. Criminal law 🔑742(1)—Acceptance of eyewitness' testimony solely for jury.

Whether eyewitness' testimony should be accepted is solely for jury.

25. Criminal law 🔑1035(3)—Error in court's remark to defendant while testifying not considered in absence of objection or request for admonitory instruction.

Error in court's remark to defendant, in effort to have him speak louder while testifying, need not be considered, in absence of objection or request for admonitory instruction at time.

26. Criminal law 🔑1171(1)—Objection to district attorney's remarks at time of application for probation not considered.

Objection to district attorney's remarks, at time of application for probation, after verdict and denial of motions for trial and in arrest of judgment, need not be considered.

27. Criminal law 🔑829(1)—Omission from instruction of portion substantially given elsewhere not error.

Omission from instruction of portion substantially given elsewhere is not error.

28. Criminal law 🔑811(6)—Instruction singling out defendant as witness and charging as to his testimony improper.

Instruction singling out defendant as witness and charging as to his testimony is improper.

29. Criminal law 🔑814(17)—Instruction on circumstantial evidence held not objectionable.

Instruction that, if evidence, direct or circumstantial, was sufficient to establish defendant's guilt, jury should so find, *held* not objectionable as leading jury to consider circumstances not connected with case.

30. Criminal law 🔑761(11)—Instruction held not erroneous as charging that defendant started fight premeditating felonious assault.

Abstract instruction that self-defense is not available to one seeking quarrel to force deadly issue, and thus create real or apparent necessity for making felonious assault, *held* not erroneous as practically charging that defendant started fight with premeditation to make felonious assault.

31. Assault and battery 🔑67—Self-defense not available to one seeking quarrel to force deadly issue.

Self-defense is not available to one seeking quarrel to force deadly issue, and thus create, through his fraud, contrivance, or fault, real or apparent necessity for making felonious assault.

32. Criminal law 🔑554—Whether defendant believed he was in danger at time of assault is for jury.

Jurors are final judges as to whether defendant believed he was in danger at time of alleged felonious assault, and may reject his testimony that he did so believe.

33. Criminal law 🔑770(3)—Hypothetical instruction on disputed question as to defendant's reason for flight held not error.

Hypothetical instruction on disputed question whether defendant left scene of assault because of consciousness of guilt or to avoid being struck by rocks thrown by complaining witness *held* not error.

34. Assault and battery 🔑55—Instruction to acquit if defendant did not use deadly weapon nor intend to commit murder held properly refused.

In prosecution for assault with intent to do great bodily harm, instruction to acquit if defendant did not use deadly weapon nor intend to commit murder was properly refused.

35. Assault and battery 🔑96(9)—Instruction that offense could be only misdemeanor unless means used was other than fists held misleading.

In prosecution for assault with intent to do great bodily harm, instruction that, unless means used was something other than defendant's fists, offense could be only misdemeanor, *held* properly refused as misleading, in view of evidence.

36. Criminal law 🔑814(1)—No issue as to deadly weapons being involved, instruction that fists and hands are not deadly weapons properly refused.

In prosecution for assault with intent to do great bodily harm, where it was not claimed that deadly weapon was used, instruction that fists and hands are not deadly weapons was properly refused.

37. Criminal law 🔑761(6)—Instruction held properly refused as invading jury's province on subject of self-defense.

In prosecution for assault with intent to do great bodily harm, instruction that breaking of jaw is not probable consequence of blow with bare fists, that defendant is not presumed to have intended such result, and that if he did not so intend crime could be no more than misdemeanor, *held* properly refused as invading jury's province on subject of self-defense.

38. Criminal law 🔑763, 764(6)—Instruction that disparity in size of parties had nothing to do with defendant's guilt held properly refused.

In prosecution for assault with intent to do great bodily harm, instruction that disparity in size of defendant and complaining witness had nothing to do with defendant's guilt or innocence *held* properly refused as violating Const. art. 6, § 19.

39. Assault and battery 🔑96(9)—Good reputation for honesty, truth, and integrity not involved in charge of assault to do great bodily harm.

Defendant's good reputation for honesty, truth, and integrity is not involved in charge of assault with intent to do great bodily harm.

40. Criminal law 🔑829(9)—Instruction on presumption of innocence held unnecessary.

Instruction on presumption of innocence *held* unnecessary in view of entire charge.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Mike Hinshaw was convicted of assault with intent to do great bodily harm, and appeals. Affirmed.

William M. Morse, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and Erwin W. Widney, Deputy Attys. Gen., for the People.

LAWLOR, J. [1] This is an appeal from a judgment of conviction under section 245 of the Penal Code, and from an order denying defendant's motion for a new trial. The inclusion in the notice of appeal of "all other orders * * * denying and overruling the various applications of the defendant * * *" probably refers to the orders denying the motion to set aside the amended information, disallowing the demurrer, and denying the motion in arrest of judgment, none of which is appealable. They will, however, be reviewed on the appeal from the judgment.

At the time of the trouble out of which the charge grew, the complaining witness, Robert Ritter, and the defendant were rival newsboys in the city of Los Angeles. Ritter was selling the Los Angeles Herald and the defendant the Los Angeles Express. At the time of the alleged assault they were selling papers at the corner of Fifth and Hill streets. One Isidore Gralla was also a newsboy. Before selling the Express in Los Angeles he attended a college in Berkeley and sold newspapers in Oakland. It was during this period that he met the defendant. While in Los Angeles he handled at Fifth and Hill streets three papers, including the Herald and the Express, and remained there until within two weeks of the alleged assault, when he established himself at Seventh and Alvarado streets, and employed the defendant to sell papers at Fifth and Hill streets for the purpose "of helping push the sales of the Express particularly." Gralla testified that "the Express sort of guaranteed me to make up for what I lost getting those Heralds for this reason, if I would give them a little special representation there on the Express; but they didn't really hire me." The people claimed that the defendant was under engagement with Gralla to get Ritter off of the corner of Fifth and Hill streets within a week, and that the week had not expired when Ritter was injured. A further statement of the facts of the case will later appear in a review of the evidence.

The defendant was arraigned upon the charge, and following the interposition and denial of a motion to set aside the amended information and the filing and disallowance of a demurrer he pleaded not guilty. Upon the trial the following verdict was rendered:

> "We, the jury in the above entitled action, find the defendant guilty of assault by means and force likely to produce great bodily injury, a felony, as charged in the information."

In due course the defendant was arraigned for judgment, and motions for a new trial and arrest of judgment were respectively interposed and denied; whereupon the defendant was sentenced to serve a term prescribed by law in the penitentiary at San Quentin.

1. The first point urged for reversal is that the court erred in denying the appellant's motion to set aside the amended information.

The grounds of the motion were:

> "(I) That before the filing of the amended information the defendant had not been legally committed by the magistrate; (II) that the transcript of the testimony taken before the committing magistrate [?] that no offense has been committed of which the court has jurisdiction; and (III) that the said transcript and testimony does not show that there was any evidence from which the committing magistrate could conclude that there was reasonable cause to believe the defendant guilty of any offense of which this court had jurisdiction."

When the case was called after the filing of the first information the district attorney moved for a continuance to file an amended information, which motion was granted, and subsequently the amended information was filed.

It is also urged in support of the motion that the amended information charged a different offense than that contained in the complaint and in the order of commitment. The complaint alleged that "the crime of assault, a felony, was committed by Mike Hinshaw, who, at the time and place aforesaid, did then and there, with force and violence, * * * in and upon the person of one William Ritter, make an assault, which said assault was likely to and did produce great bodily injury" upon the person of the complaining witness. In the order of commitment the language is:

> "The offense in the within deposition mentioned, to wit, assault, a felony, has been committed."

The allegations of the amended information appear in connection with the discussion of the demurrer. This contention is supplemented by the claim that "the crime charged in the complaint and the crime charged in the commitment are not crimes known and described in any sections of the penal laws of the state of California," and is apparently based on the theory—insisted upon by appellant throughout—that he was not charged with a felony in the complaint, nor in the amended information, nor was he held to answer for a felony, nor does the evidence show he was convicted of a felony. We shall consider under point 2 the sufficiency of the amended information as matter of pleading.

Two grounds are stated in section 995 for the setting aside of an information: (1) "That before the filing thereof the defendant had not been legally committed by a magistrate"; and (2) that it was not subscribed by the district attorney.

[2] "The complaint is practically a deposition only. It should state the essential elements of the crime charged to a common certainty, but it is not necessary that it should do so with all the technical nicety of an indictment or information." 7 Cal. Jur. 103.

[3] With respect to the sufficiency of the complaint under a motion to set aside, it has been held that it is intended only as a basis for a warrant of arrest, and that objections thereto must be availed of while the defendant is under the warrant of arrest. 7 Cal. Jur. 103, citing, among other authorities, People v. Warner, 147 Cal. 546, 82 Pac. 196; People v. Lee Look, 143 Cal. 216, 76 Pac. 1028; People v. Cole, 127 Cal. 545, 59 Pac.

984. See, also, People v. Beach, 122 Cal. 37, 54 Pac. 369. It is not claimed nor disclosed that the complaint was attacked before the committing magistrate on the ground it did not state a public offense. Facts in the motion to set aside an information will not be taken as true without any proof as to the matter, and without such proof there is no error in denying the motion on the ground the defendant had never been committed by a magistrate. People v. Williams, 84 Cal. 616, 24 Pac. 145.

[4] The general rule is well stated in People v. Warner, supra:

> "When a charge has been examined by a magistrate and the evidence taken, and the examination warrants an order holding the defendant to answer, the imperfections of the complaint are cured, and the commitment is legal. People v. Cole, 127 Cal. 545, 59 Pac. 894. In the late case of People v. Lee Look, 143 Cal. 216, 76 Pac. 1028, in considering the point made by appellant in support of his motion to set aside the information on various grounds antecedent to the commitment by the examining magistrate, this court said: 'The object of the statute in providing for the issuance of a warrant of arrest is that the defendant may appear before a committing magistrate, and when he is once there, and an examination of the case is had in pursuance of the terms of the statute, and the defendant is held to answer, a foundation is laid for the filing of an information by the district attorney. The regularity of the proceeding by information did not, therefore, depend in any manner upon the affidavit on which the warrant of arrest was issued, and had no connection with it,' referring to the case of People v. Velarde, 59 Cal. 457. And, continuing: 'If there be anything inconsistent with these views in the two Department cases of People v. Christian, 101 Cal. 471, 35 Pac. 1043, and People v. Howard, 111 Cal. 655, 44 Pac. 342, cited by appellant, they must be considered, so far as they are thus inconsistent, as overruled by the other cases above cited.' (Citing several cases.) The presumptions are that the proceedings leading up to the commitment of the defendant by the magistrate were regularly conducted, and it is necessary, therefore, for the appellant to produce some showing to the contrary, which has not been done in this case."

We quote from People v. Sacramento Butchers' Ass'n, 12 Cal. App. 471, 478:

> "The instrument upon which the warrant of arrest is authorized to be issued by a magistrate in the case of an indictable offense is not a 'complaint' in the sense that it is a pleading, but is practically a deposition only, setting forth the facts stated by the informant, sufficiently showing the commission of an offense and its perpetration by the defendant to justify the issuance of a warrant of arrest by the magistrate. Pen. Code, §§ 811, 812. The commitment is based upon all the depositions and not alone upon the so-called complaint, and the information is in turn founded upon the order of commitment."

[5, 6] It is plain from the authorities that if the sufficiency of the complaint to justify the issuance of a warrant of arrest is not questioned before the committing magistrate, it cannot be attacked on a motion to set aside; that the information is based on the commitment, and not on the complaint—that the latter is merged in the former—and that the district attorney may file an information for any offense shown by the depositions. It follows that, considered with reference to the meaning of "legally committed," the complaint is sufficient in any case if it states an offense in the terms of the statute, for such a complaint would vest the magistrate with jurisdiction to consider the evidence offered in support of the charge so far as the subject-matter is concerned, and the holding of the defendant for trial would depend on the evidence, and not the pleading.

[7, 8] The question is then presented whether the commitment was sufficient to warrant the filing of an information in this case. It has been held that the word "deposition" in a commitment is the equivalent of "complaint." The appellant was therefore committed for trial for the offense stated in the complaint, and whether the holding over was justified must rest upon two propositions: Was the offense charged in the amended information the same as that for which the appellant was held for trial? and Was a preliminary examination held at which evidence was received? As to the first proposition it has been shown that the complaint upon which the commitment is made to depend did purport to charge the conventional offense of assault with means and force likely to produce great bodily injury as prescribed by section 245, and the identical offense is charged, only with more detail, in the amended information. With reference to the second proposition, we have not found in the record that the transcript of the testimony and proceedings on the preliminary examination was offered in support of the motion to set aside the information. It must therefore be presumed that a preliminary examination was regularly held, and that evidence sufficient to justify the commitment was actually received. People v. Williams, supra. Without regard to this question, however, and dealing with the meaning of the term "legally committed by a magistrate," it was declared in People v. Beach, supra:

> "It is contended that the defendants had not been legally committed because the evidence before the magistrate did not show that a public offense had been committed. If the magistrate had no power or jurisdiction to hold the examination, if no complaint had been made charging the defendants with a public offense, and perhaps if no evidence at all was taken by the magistrate, and there was no waiver by the defendants, it might be held that the defendants had not been legally committed. People v. Howard, 111 Cal. 655. The phrase 'legally committed' refers to the examination

of the charge and holding the defendant to answer by the magistrate. Ex parte Baker, 88 Cal. 84. If a magistrate, upon a complaint duly made and charging a public offense, has heard the evidence and has committed the defendant, that ends the matter so far as concerns this motion.

"The question here is not, as upon habeas corpus, whether a person is illegally deprived of his liberty, but whether he can legally be tried upon a criminal charge. A preliminary examination and commitment by a magistrate is required before an information can be filed, and an examination by a grand jury before an indictment, not so much to protect the liberties of the citizen as to protect them from being prosecuted upon slight evidence or mere suspicion, or at the instigation of private malice. A trial before a jury must still be had before a final judgment can be made depriving an accused person of his liberty. * * * The right to have a charge dismissed is regulated by statute, and, as we have seen, the phrase 'legally committed' means only that the accused has been committed by a magistrate who has jurisdiction to hold the examination, and who has actually heard the evidence and determined that probable cause exists for holding the defendant. The point was decided in People v. More, 68 Cal. 500. Counsel attempt a distinction on the ground that the alleged defect there was that venue was not shown, but the difference is not obvious. If the point was founded in fact there as here the evidence failed to show an offense for which the magistrate could legally hold the accused person. The decision was a construction of section 995 of the Penal Code, and holds that, on the motion to set aside the information, the superior court cannot review and overrule the finding of the magistrate that the evidence taken before him was sufficient."

In connection with the question of the sufficiency of the evidence to justify the holding on preliminary examination it is proper to point out that a remedy is specially provided by the writ of habeas corpus under subdivision 7, § 1487, of the Penal Code.

[9] Referring again to the contention that the amended information charged a different offense than that covered by the complaint and the commitment we quote from appellant's brief:

"The district attorney in filing the amended information in this action has taken greater liberties with this complaint and commitment than is allowed under the law. [Here follows a statement of what is alleged in the complaint.] There is no suggestion that it was by means or force likely to produce great bodily injury in the language of section 245 of the Penal Code. The district attorney * * * has no authority to amend or modify the complaint and commitment on which the defendant was examined. * * * He cannot add anything thereto in describing the offense for which he would try the defendant. * * * In the case at bar he charged the defendant with a different assault than the one on which he was examined, and against a different person. * * * So the district attorney was entirely wanting in authority to add to the description of the offense as he attempted to do in the amended information. Neither could he under the law charge the alleged offense to have been committed against Robert Ritter when the complaint on which defendant was examined by the magistrate alleged it to be committed against William Ritter."

Appellant has cited a number of authorites to the effect that the district attorney has no authority to file an information for a different offense than the one shown by the commitment. People v. Parker, 91 Cal. 91, 27 Pac. 537; People v. Wallace, 94 Cal. 497, 29 Pac. 950; People v. Christian, 101 Cal. 471, 35 Pac. 1043; People v. Howard, 111 Cal. 655, 44 Pac. 342. These authorities involve section 809 of the Penal Code; but the distinction must be observed between charging a different offense and charging the same offense differently. The district attorney in drawing the information is not confined to the allegations of the complaint, provided he charges the same offense for which the defendant is held. This is the meaning of the authorities above cited, as well as People v. Rippe, 32 Cal. App. 514, 163 Pac. 506; People v. Miller, 34 Cal. App. 641, 168 Pac. 574; People v. Wilhite, 49 Cal. App. 246, 193 Pac. 151; People v. Liberty, 39 Cal. App. 360, 170 Pac. 868. It was said in Ex parte Chambers, 32 Cal. App. 476, 163 Pac. 223:

"The amendment of an indictment or information by the district attorney is permitted, subject to the limitation that the amendment shall be [made] as to matters of form only and not in matters of substance."

In that case the amendment made more certain the date of the instrument set out in the indictment, which date formed the basis of the charge of perjury involved. As already stated, the complaint and the amended information herein charged and the commitment held appellant for the same offense. An assault, a felony, under that branch of section 245, was the basis of the prosecution, but the amended information in describing the offense went more into details as to the means employed and the force used in the commission of the assault. This was clearly within the rule. Although the appellant claims the amended information charges a different offense than the complaint, he has not pointed out wherein it does.

[10-12] With respect to the error in the name of the complaining witness in the complaint, the commitment, and in both informations, it may be stated that, according to the reporter's transcript, permission was given to correct the name in the amended information and the correction was made before the jury was impaneled and sworn. In any event no prejudice could have resulted, as the surname was correctly alleged. Moreover, it cannot be maintained that the criminal act was not sufficiently identified without the correct Christian name. Section 956, Pen. Code. The motion to set aside the amended information was properly denied.

[13] 2. We will consider the demurrer under this head. It is insisted that the amended information fails to charge a felonious assault. The charging part of the first information reads:

> 'That the said Mike Hinshaw * * * did then and there, with force and violence, * * * feloniously in and upon the person of one William Ritter make an assault, which said assault was likely to and did produce great bodily injury to and upon the person of said William Ritter."

In amending the information the following allegations in brackets were added:

> "[In that he, the said Mike Hinshaw, did then and there * * * strike and beat the said Robert Ritter about the head and body and did then and there strike and beat the said Robert Ritter about and upon the head and face with his fists and hands with all the force and violence that he, the said defendant, Mike Hinshaw, was then and there able to exercise, and which said striking and beating did then and there cause the fracture of the jaw of the said Robert Ritter, together with other grievous bodily injuries, and which said striking and beating was by means likely to and which did produce great bodily injury to the said Robert Ritter.]"

Paragraphs (a) and (b) of specification I may be passed as not having any place in a demurrer. The remaining specifications—II, III, IV, V, and VI—are on the grounds mentioned in sections 950, 951, and 952 of the Penal Code, to which are added certain special grounds. Section 954 is also mentioned, but we do not perceive its applicability. Apart from the conventional grounds of demurrer it is alleged that the amended information does not state the means used by which it was intended to charge that the appellant employed means likely to produce great bodily injury; whether the appellant used some other instrument than his fists and hands in order to do the injuries complained of, or whether "it is simply intended to charge that the defendant committed a battery upon the prosecuting witness, and no more;" "whether and by what means the force and violence complained of that did the damage and injury to the prosecuting witness was applied other than with his fists and hands;" and that it states no cause of action coming within the jurisdiction of the superior court, and is in fact nothing but a complaint for the commission of a battery. We quote from appellant's answer to the petition for hearing in this court:

> "The amended information does not state facts sufficient to constitute a public offense under the laws of the state of California, in this: That there is no specification of the means used to produce great bodily harm other than the fist; * * * that the use of the fist is not the use and means likely to produce great bodily harm, and no other means are specified. The allegations of the pleader in the amended information that the said defendant 'did then and there strike and beat the said William Ritter about and upon the head and face with his fists and hands with all the force and violence that the said defendant Mike Hinshaw was then and there able to exercise' is not an allegation of fact, but simply a conclusion of the pleader, and the next portion of said amended information, which reads as follows: 'And which said striking and beating did then and there cause the fracture of the jaw of the said William Ritter, together with other grievous bodily injury'—is a pleading of evidence and not the statement of a public offense. The next assertion in said amended information, as follows: 'And which said striking and beating was by means likely to and which did produce great bodily injury to the said William Ritter'—is not an allegation of any of the elements of an assault, a felony, which says that the assault must be by means likely to and which did produce great bodily injury. The last quotation from the amended information is but a statement of a conclusion of the pleader, and not a statement of the fact."

Appellant has cited People v. Perales, 141 Cal. 581, 75 Pac. 170, which held that the phrase "with a heavy wooden stick" did not charge a felonious assault; People v. Brown, 42 Cal. App. 462, 183 Pac. 829, wherein "with a rawhide whip on the naked body" was declared sufficient to charge a felonious assault under that portion of section 245; People v. Emmons, 61 Cal. 487, holding the allegation that the defendant "with force and violence did then and there seize and throw out of the attic window * * * situate in the third story," referring to the complaining witness, sufficiently charged the offense; and People v. Pape, 66 Cal. 366, 5 Pac. 621, which declared sufficient an allegation of the means used in an assault with a deadly weapon—"by means of the explosion of gunpowder." Appellant also relies on the following language in People v. Munn, 65 Cal. 212, 3 Pac. 651, wherein murder was charged, and a verdict in the second degree rendered:

> "It may be conceded that an assault with the fist, or without the use of a deadly weapon, may be made in such a manner and under such circumstances as to make the killing murder, but the law draws a broad distinction in cases generally between an assault committed with a deadly weapon, and a simple assault and battery. The former amounts to a felony, whereas the other is merely a misdemeanor."

People v. Murat, 45 Cal. 281, is cited to the proposition that—

> "An assault made without the use of a deadly weapon with intent to do mere bodily harm and not to do murder, is a misdemeanor, nothing more."

This language is quoted:

> "But an assault made with intent not to commit murder, but only to do a lesser bodily harm,

is not constituted a felony, unless such an assault were made with a deadly weapon, or by resort to means of a deadly nature. The character of the particular agency employed by the prisoner in making such an assault is of the substance of the offense, as constituting it a felony, for an assault made without the use of a deadly weapon, with intent to do mere bodily harm, and not to do murder, is a misdemeanor, nothing more."

The point to the contention is that, if there was any physical disparity between appellant and the complaining witness, or that the latter had been taken off his guard at the time he was struck, and either or both of these elements constituted the force behind the impact which rendered the assault felonious, such fact or facts should have been alleged. The statute uses "means" and "force" in the disjunctive, and the amended information charged in the conjunctive. It would be sufficient, however, if either "means" or "force" was alone alleged. In the course of the oral argument, in reply to a question put to him by the court, counsel for appellant answered that, if the physical disparity had been alleged, the pleading would have been sufficient. It is alleged that appellant, with all the force and violence he was able to exercise, did strike and beat the complaining witness about and upon the head and face with his fists and hands, and that such striking and beating fractured his jaw and caused other grievous bodily injuries.

Concerning section 245, it was said in People v. Perales, supra, as to the allegation that the means used was "a heavy wooden stick":

> "While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification that, where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. * * * The term, however, 'or by any means of [or] force' likely to produce great bodily injury, immediately following in the section, is a general and comprehensive term designed to embrace many and various means or forces, which, aside from a deadly weapon or instrument, may be used in making an assault. What these means or forces may be, other than that they must be such as are likely to produce great bodily injury, the statute does not declare or define. As an example of such means it specifies a deadly weapon; as to any other means its language is general and indefinite. * * * A 'heavy wooden stick' is not ex vi termini a deadly weapon, or a deadly instrument. Nor does this description suffice to show that it is either. Neither, as described, is it necessarily a means likely to produce great bodily injury. In fact, it is not described at all, except by the indefinite statement that it was 'heavy.' Describing a stick as 'heavy' imparts no certain information; the term is relative; a stick which in the hands of a boy, or a feeble person, would be considered heavy, in the hands of a robust person would be deemed light. Again, it might be heavy, and yet so large and unwieldy as to be useless, in the hands of a powerful man, towards the commission of an assault. It might, too, be heavy, and yet so small, or short, that no danger of bodily harm could reasonably be apprehended from its use.
>
> Aside from the use of the term 'heavy,' there is no description in the information as to the definite weight, strength, or size of the stick, or other qualities, properties, or characteristics, showing that it was a means likely to produce great bodily injury."

The allegation in the case at bar differs from that involved in People v. Perales, supra. In the latter case there is no description as to how the stick was used, upon what part of the body the assault was made, and no indication of the degree of force used by alleging the result of the assault or otherwise. In short, the facts were not alleged from which danger of bodily harm might be reasonably apprehended. The pleading here, by way of describing the means employed and the force used and where the force was directed, alleges that the assault was made with the fists and hands upon the head and face and that the result was a fractured jaw and other grievous injuries. Such allegations, under the circumstances of this case, describe both the means employed and the force used, which we think meet the language of the statute, "by any means or force likely to produce great bodily injury," and are "not the details of probative matter or particulars of evidence by which these material elements are to be established." Pomeroy's Code Remedies (4th Ed.) p. 555. The suggested allegation of physical disparity would not necessarily indicate the force used, for it would be the force of the impact and the circumstances under which the force was applied rather than the relative size of the men which would constitute the assault, for a small man might deliver a blow with more force than a larger one. The evidence is in conflict as to the events immediately preceding the blow, and as to the position of the principals; but, in view of some of the evidence of the prosecution that at the precise moment the assault was made the complaining witness was taken by surprise and struck from behind, it would be proper to so allege by way of describing the force with which the blow was delivered and the gravity of the assault. People v. Perales, supra, in our opinion, is clearly distinguishable.

It was said in People v. Brown, supra, with reference to the allegation of an assault with a rawhide whip upon the naked body, that it came within the rule followed in People v. Perales, supra. Where a rawhide whip is applied to a naked body, less force would be necessary to constitute a felonious assault than if the body were protected by clothing, just as a blow on the jaw when the assaulted party is not prepared for it or is not moving away from it may have graver consequences. The statement in the case of People v. Munn, supra, that death resulting from a blow of a fist without aggravating circumstances does not constitute murder is undoubtedly correct. The defendant in People v. Murat, supra, was indicted for an assault to kill and murder, and convicted of an assault with a deadly weapon, but it was not alleged that the assault was made with a deadly weapon, and, as there was no allegation to support the crime of which the defendant was convicted, the judgment was properly reversed.

[14, 15] 3. But, even if the demurrer and motion in arrest of judgment should, in strictness, have been granted, we do not think the error constituted a miscarriage of justice. The constitutional rule of decision on appeal (article 6, § 4½) includes error in any matter of pleading, and we will examine the evidence in the light of this provision.

According to the evidence, the complaining witness was 29 years old, weighed between 132 and 135 pounds at the time of the injury and 128 at the time of the trial. He was not athletic, and had never boxed; he complained of a weak heart, but the doctor who gave him a physical examination after the injury stated the patient appeared undernourished, but not diseased. Ritter gave up a job as a driver of a delivery wagon because the work was too heavy for him. He testified that he had commenced selling the Los Angeles Evening Herald on this particular corner about April 1, some 14 days prior to the alleged assault, and that about April 7 the defendant started selling the Los Angeles Express on the same corner; previous to April 7 he had seen him on that corner several times, "but he wasn't working—standing around there." Appellant's version was that he commenced selling the Express on that corner about April 1, and that Ritter was selling the Herald at the same time. The difference in the testimony as to when appellant started work on the corner probably is due to the fact that he counted himself working when Ritter assumed he was only being broken in on the job. At all events, it is clear that appellant was engaged on the corner from April 1, but he probably did not start selling papers right away. Isidore Gralla, in testifying for the defense, said he saw Ritter run in front of defendant to sell papers; that "Mike wasn't fast enough to get up to any customers as fast as Ritter was"; and overheard Ritter say what he was going to do to Hinshaw several days before the accident:

> "Ritter says, why he could make sort of a monkey out of him—make him act around like a monkey. In other words, Ritter was supposed to be the boy on the corner that was selling the papers and getting around fast, and made him stand there like a dumbbell."

Ritter also testified there was no trouble between them before appellant started to work, "only he kept shoving me around a lot, but that's what he done all the time; I never paid any attention to it." According to Ritter, on the occasion in question he had made a sale to a lady who gave him a quarter, and just as he put his hand and arm out to give her the change appellant, who was behind him, delivered the blow that fractured his jaw; the blow dazed him, and he sank to his knees on the box "that had two rocks on it that held the newspapers from the wind blowing them away, and as I fell on these, and as I fell I picked them up, and as I got up Hinshaw run. * * * I threw one rock at him, and the next one I couldn't throw at all—just dropped on the sidewalk. * * * I staggered over to an officer there, and all the people started hollering." He testified:

> That appellant had said to him when no one else was present: "You ain't going to last here a week."
>
> "Q. By Mr. Hill: Just before you started to sell this paper to the lady, had you had any encounter with the defendant at all? A. None whatsoever.
>
> "Q. Had you had any trouble there between you? A. No hard feelings between me, but he always had hard feelings toward me.
>
> "Q. What I am getting at is this, Mr. Ritter: I believe you stated that there had been some shoving around there. A. Yes.
>
> "Q. I want you to state what had happened in that regard. A. Why, I seen a woman come up for a paper, and I dashed over to give it to her, and I just sold one to a man, and I turned around to sell it to a lady, and just then he kicked me in the shins; I never paid no attention; and she gave me 25 cents, and I was making change, and just as I was about to make change I got struck."

Ritter denied saying he would make a monkey out of appellant. His wife and his brother, George P. Ritter, testified as to the shoving and pushing. For instance, upon one occasion when the wife approached her husband the appellant shoved her, and stepped on her foot in trying to sell her a paper. She testified that the day before the injury she overheard the following conversation between Abe Gralla, the brother of Isidore Gralla, who had employed appellant, and appellant:

> "He said to Mike Hinshaw, 'What did we put you here for?' * * * and he says, 'I told you I would have him gone in a week, so give me the week—the week ain't up; give me a week, will you? So shut up.' Q. Who said that? A. Michael Hinshaw."

George P. Ritter, the complaining witness' brother, testified that when he walked up to his brother, Robert, appellant stepped in and shoved him away and shoved a paper into his face. When he said he didn't want a paper the appellant turned and said to the complaining witness, "I'll get you yet." He further testified that his brother "was kind of scared of him," referring to appellant.

Dr. C. E. Early testified that he attended the complaining witness at Golden Gate Hospital; that "he had a swollen jaw, and the lower jaw was fractured on both the left and right sides, and both fractures were compound—that is, broken through the soft structures into the mouth; and he was bleeding from the mouth. * * * The fracture on the left jaw * * * broke through the socket to the last jaw tooth, allowing the fractured bone on the inside to be partially exposed on the inside of the mouth. The fracture on the right side was a little forward, also transversely to the long angle of the jaw, and broke between the sockets of two teeth"; that the patient could not readily open and shut his mouth, his teeth were loosened, and that the left third molar had to be extracted in order to get the fracture in alignment.

Dr. G. F. Boehme testified that he made a complete physical examination of the complaining witness: "He had a contusion of the side of his jaw * * * and a fractured mandible."

Les Roches, a witness on behalf of the people, testified that in the presence of a number of persons in the county jail some time between the middle of April and the middle of May he heard the defendant say he hit a man and broke his jaw.

> "Q. Just state what you heard Hinshaw say that time. A. I heard him say that they asked when they brought him in what they brought him in for, and he said he hit a man down the street and broke his jaw."

Reuben Barr, a witness for the defense, who was an eyewitness of the affair, testified that appellant "slipped a little bit and rubbed up against" the complaining witness, who "fell off the curb"; that the complaining witness saw appellant coming, and kicked back, and then appellant kicked frontwards twice, and the complaining witness "stood up like he was going to strike."

The appellant testified:

> "I stepped up to get a sale, and he stepped on my toes, and he kicked back like that (indicating), and I kicked that way (indicating), and that way (indicating), and I turned around to see."

On cross-examination he said his fist was doubled up when the blow was struck; that there was not much force; that Ritter had his arm raised; that appellant was behind Ritter when the sale was made—that is, Ritter was between appellant and the customer; that Ritter stepped on his toes and kicked back twice; that he kicked forward twice, walked around facing Ritter, and then struck the blow.

In the opening address to the jury the attorney for the people said that the evidence would show certain facts, among others, that appellant was trained in the art of boxing, and that he weighed considerably more than the complaining witness, his weight being about 152 pounds. In replying, the attorney for appellant stated the evidence would show that he took part in only one prize fight, and that was when he was 16 years old. We have not found any testimony in the record showing appellant's weight or whether he had engaged in prize fighting. The weight of the complaining witness was given, however. But, apart from the testimony, the jury could have determined the question of the relative size of the men from their appearance in the courtroom.

In thus reviewing the evidence we have not attempted to determine the facts, for that is a matter committed to the jury and to the court below. We have surveyed it only as to its legal import, with the view of determining whether the jury could have found that the assault was the result of a conspiracy between Isidore Gralla and appellant to drive the complaining witness away from the corner; whether when the assault was made the complaining witness was taken unawares; whether the blow was intended to and did incapacitate him; and whether the assault was by means and force likely to produce great bodily injury. In other words, viewing the evidence as matter of law, could the jury have found that the assault was felonious within the meaning of section 245?

It follows that, even if the amended information did not allege the offense sufficiently, the omission was supplied by the evidence received on the trial. We have therefore found there was no miscarriage of justice. 8 Cal. Jur. 605. Among the cases cited in the note to Cal. Jur. is People v. Bonfanti, 40 Cal. App. 614, 181 Pac. 80, which held, under article 6, § 4½, of the Constitution, the failure to allege in a case of rape that the complaining witness was not the wife of the defendant—a distinct element in the crime—did not constitute a miscarriage of justice where the proof showed the relationship did not exist. This court denied a petition for hearing herein. The following authorities are also cited in the note: People v. Brown, 37 Cal. App. 101, 173 Pac. 621; People v. Ruiz, 39 Cal. App. 593, 179 Pac. 691; People v. Griesheimer, 176 Cal. 44, 167 Pac. 521; People v. Lauman, 187 Cal. 214, 201 Pac. 459; People v. Evanoff, 45 Cal. App. 108, 187 Pac. 54. Nor was appellant prejudiced within the meaning of sections 960, 1258, and 1404 of the Penal Code.

[16, 17] 4. We will next consider appellant's assignments of error occurring during the trial. The first is that the court erred in denying his application to enter a plea of once in jeopardy for a "misdemeanor growing out of the said act so that the same would estop any further proceedings in the event that the jury found the defendant guilty of a simple assault or a battery." It was stipulated that a complaint charging a misdemeanor was filed in the police court, the docket reading thus:

> "The prosecuting attorney, felony charge pending, charge dismissed and defendant discharged."

Therefore, while the complaint was pending the felony complaint was filed. The point first made was that appellant was once in jeopardy as to the felony charge. When People v. Brown, 42 Cal. App. 462, 183 Pac. 829, was cited, counsel for appellant conceded that point was not well taken. The record shows that appellant sought by the plea of once in jeopardy in the misdemeanor case to be in a position to urge it in the event the jury returned a verdict for simple assault. The court refused to entertain the plea and said:

> "Before the conclusion of the case I will entertain any further motions you may make and rule upon them without prejudice by any former rulings."

As the verdict was for a felony, it would seem there was no occasion for a further ruling on the point. However, a plea of once in jeopardy will not lie in either a felony or misdemeanor case unless there has been a former acquittal or conviction upon a valid indictment or information before a competent court and a jury has been impaneled and sworn to try the charge. Ex parte Harron (Cal. Sup.) 217 Pac. 728.

[18] Here there was no trial of the assault and battery charge. Counsel for appellant at one point in the proceedings, however, spoke of a plea in bar, and referred to section 1387 of the Penal Code. But the provision of that section that a dismissal of a misdemeanor complaint is a bar to a further prosecution unless the order is explicitly made for the purpose of amending the pleading was met in this instance, for, as has been stated, before the motion to dismiss the first complaint was made the complaint charging the felony was on file.

[19, 20] It is next claimed that the court erred in allowing, over appellant's objection, testimony of an admission by appellant that he had said in the county jail that he hit a man down the street and broke his jaw. The ruling was clearly proper, for the admission (subdivision 2, § 1870, and section 1832, Code Civ. Proc.) tended to rebut the presumption of innocence, and the fact that appellant had not denied the assault rendered the admission no less provable. The prosecution was entitled to make out its case in chief without regard to whether appellant denied the assault. It is true that the corpus delicti should first have been established, but we cannot say, and especially in view of the fact the assault was not denied, that the action of the court in yielding to the prosecution as to the order of proof was prejudicial.

[21] The ruling excluding testimony as to what the complaining witness said to the policeman after the assault had been committed, upon the ground it was hearsay, was proper. It was claimed by appellant to be a part of the res gestæ. The statement itself does not appear in the record, and it is shown that the conversation was not sought from the complaining witness during his direct examination by the people. When he spoke to the policeman appellant had left the scene of the assault, and what was said may have been merely the narration of a past event. This is also true of the point as to what the appellant said to the arresting officer after the assault.

[22] There is no merit in the objection to the testimony of Mrs. Ritter and George P. Ritter as to the hostile declarations of appellant concerning the complaining witness on the two occasions already referred to. It is argued the testimony was no part of the res gestæ. But the declarations were admissible as tending to reflect the state of mind of appellant at the time he committed the assault.

[23] Error is assigned to the refusal of the court to allow the complaining witness to answer on cross-examination whether prior to the assault he had not said to appellant "that you would make a monkey out of him before you left there?" It is claimed that if the witness had been allowed to answer the question he would have corroborated the testimony of Isidore Gralla on the point. This claim seems to be without foundation, in view of the fact that later the witness denied he made the statement.

[24] It is sufficient to say with regard to the claim that the testimony of Reuben Barr, referred to in appellant's brief as the only other eyewitness of the assault, should have been accepted by the jury, that it was solely for the jury to pass on that question.

[25] Error is predicated on a remark made by the court to appellant in an apparent effort to have him speak louder when he was testifying. As it does not appear that any objection was made or admonitory instruction to the jury requested at the time, the incident calls for no further comment.

[26] 5. An objection, apparently made for the first time in appellant's opening brief, is addressed to the remarks of the district attorney "at the time of passing on the application for probation in pronouncing sentence," and it is assigned as misconduct. As the jury had rendered its verdict 15 or 16 days before, and it was after the motions for a new trial and in arrest of judgment had been denied, it will not be necessary to pursue the point.

6. Appellant also complains of errors in six instructions which were given to the

jury. We shall, for convenience of reference, discuss them in the order of their presentation in appellant's opening brief in the District Court of Appeal, and designate them as (a), (b), (c), (d), (e), and (f), respectively.

We find no error in instruction (a). There is no basis for the claim that an attempt was made by the court to intimate to the jury that it had an opinion as to the guilt or innocence of appellant. The instruction follows the introduction to subdivision 1 of section 2061, Code of Civil Procedure, and correctly declares the respective functions of the court and the jury in matters of evidence.

[27, 28] The portion omitted in instruction (b) was substantially given elsewhere. One omitted portion had the vice of singling out the appellant as a witness and charging as to his testimony.

[29] Instruction (c) is not open to the objection that it led the jury "to consider circumstances which had no connection with the case." It correctly declared the rule of circumstantial evidence, and stated that, if the evidence was sufficient to establish appellant's guilt, the jury should so find, whether the evidence be direct or circumstantial.

[30, 31] There is no foundation for the assertion that by instruction (d) the jury was practically charged that appellant "started this fight with the premeditation beforehand to make a felonious assault." The instruction is given in the abstract, and correctly states the recognized principle of law "that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for making a felonious assault."

[32] The objection to instruction (e) is that it "practically makes the jurors judges of whether the defendant believed that he was in danger, or not. The question was: How did it appear to the defendant at the time and not how it appeared to the jury at the time of the trial." The jurors are the final judges as to whether a defendant believed he was in danger at the time he takes the law into his own hands, and they may or may not reject his testimony that he did so believe.

[33] Instruction (f) covered the subject of flight, and was given in approved form. The question whether appellant left the scene because of a consciousness of guilt, as claimed by the prosecution, or whether, as testified by him, he left to avoid being struck by two rocks thrown at him by Ritter, was involved in conflict, and the instruction was framed in hypothetical form. Here was no error.

[34-37] Appellant also complains of the rejection by the court of several instructions proposed by him. Taking such instructions in the order they appear in the clerk's transcript, it may be said of the first that it was erroneous in stating that, if appellant did not use a deadly weapon and did not intend to commit murder, the verdict must be for him; the second declared that unless the means used was something other than his fists the offense would be only a misdemeanor. This was misleading in view of the evidence, and it was open to the additional objection that it charged that, if the jury found appellant was arrested and taken before the justice's court, and the charge dismissed by the prosecution, such dismissal is a bar, the court is without jurisdiction, and they must acquit him. This statement referred to the charge of assault and battery, and for the reasons already given was erroneous. The third declared that the use of fists and hands is not regarded as a deadly weapon. It was not claimed that a deadly weapon was used. The balance of the instruction covered a part of the preceding one. By the next instruction the jury is charged, among other things, that the breaking of the jaw is not a probable consequence of a blow with the bare fists, *and he is not presumed to have intended that result, "and if he did not so intend the crime committed could be nothing more than a misdemeanor."* We have added the italics. The rest of the instruction invades the province of fact on the subject of self-defense.

[38] Appellant's next proposed instruction violates section 19, art. 6, of the Constitution, for it tells the jury "that the fact of the disparity in size has nothing to do with the guilt or innocence of the defendant."

"Given elsewhere" was the proper endorsement to the next instruction.

[39] The next instruction may be disposed of by the statement that appellant's "good reputation for honesty, truth, and integrity" was not involved by the charge.

[40] In view of the entire charge, it was not necessary that this instruction on the ject of the presumption of innocence should have been given.

We find the final proposed instruction was objectionable on the ground that it again charged the jury that, if they found appellant was only guilty of the offense provided by section 240, and punishable by section 241 of the Penal Code, the dismissal of the first complaint is a bar, and the jury must therefore acquit him.

The points call for no further discussion.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: MYERS, C. J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; WASTE, J.

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STATE COMPENSATION INSURANCE FUND v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 10830.)

(Supreme Court of California. June 11, 1924. Rehearing Denied July 10, 1924.)

Master and servant 🔑375(1)—Injury to hotel maid while leaving premises on day off held compensable, as "arising out of and in course of employment."

Injury to a hotel maid from slipping on adjoining sidewalk, while leaving hotel on a personal errand on her day off, *held* compensable, as "arising out of and in course of employment," where her contract of employment required her to live at hotel in part payment of wages and to use the exit she did, and contemplated that she enjoy her day off.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings for compensation before the Industrial Accident Commission of California by Florence R. Glennan, claimant, opposed by Fairmont Hotel, employer, and State Compensation Insurance Fund, insurance carrier. The Commission awarded compensation, and the insurance carrier petitions for certiorari. Award affirmed.

F. J. Creede, T. W. Slaven, and B. E. Pemberton, all of San Francisco, for petitioner.

Annette Abbott Adams and Warren H. Pillsbury, both of San Francisco, for respondents.

LANGDON, Justice pro tem. The petitioner, State Compensation Insurance Fund, is the insurance carrier for the Fairmont Hotel. It is here seeking annulment of an award made by the respondent Industrial Accident Commission to the other respondent, Florence R. Glennan, a maid employed in and living at the hotel, who was injured by a fall while leaving the premises by the servants' entrance. The accident was caused by unsafe conditions of the entrance and adjacent runway across the sidewalk, created by employees of the hotel in the discharge of their duties. The maid was not on duty at the time, but was leaving the building for a personal errand on her "day off." It is the contention of the petitioner that at the time the employee sustained the injury on which the award was based she was not performing any service, either growing out of or incidental to her employment, and was not at the time acting within the scope of her employment.

Maids employed at the Fairmont were not compelled, as is the case in some hotels, to live in the building. When respondent Glennan applied to the hotel management for employment, she was offered two forms of contract, either of which she was at liberty to accept. Under the terms of one she could enter the employment, be paid a flat wage of $50 monthly and lodge where she pleased. Under the other she would be given what is referred to in her testimony as "the protection of the building," lodgings in the hotel, and be paid $40 monthly. For the reason that it was more expensive for the maids to rent a room outside than to make an allowance of $10 monthly for one at the hotel, the respondent signed the form of contract which permitted her to live on the premises. Her wages were therein fixed at $40 a month, in addition to board and lodging, stipulated before the commission to be of the value of $30. The maids were not allowed to be in parts of the hotel where they were not employed, and in going to and from the building were required to use an entrance on the Sacramento street side of the hotel, where the time clock was located. Other than the requirement about the use of this entrance maids were free to "come and go and do" as they pleased, provided they did their work and ate their meals within the hours provided.

At the time of the injury in question the entrance referred to was also used as a passageway for trucks. As it opened on to a sloping street, the cement walk between the building and the outer edge of the sidewalk was made rough, forming a sort of runway. On the day of the accident Miss Glennan started to leave the hotel at the required entrance, which she stated was used to take out ashes. She found other employees of the hotel "sweeping out the slush" and "washing out the entrance with soapy water." As she walked through the passageway her shoes became wet, and, in stepping off the runway on the sidewalk, outside the entrance, in an attempt to avoid walking in the water thereon, her feet slipped, and she fell, striking against a projection of the building, and received a severe injury to the base of the spine. For this injury compensation was allowed her, and the award was affirmed on rehearing before the respondent Commission.

Some contention is made by petitioner that the injury did not arise out of the employment, as required by the statute, and this position is based upon the reasoning that as the injury to the applicant was sustained on the sidewalk on a public street, entirely outside the premises of the employer, it resulted from a hazard to which all the public was exposed and not from any peculiar or particular hazard to which the applicant was subjected by reason of her employment. Respondents in reply to this contention point out that the contract of employment in this case contemplated the use of the entrance and passageway where the injury occurred, as a necessary incident to the employment. Where the employment itself involves peculiar and abnormal exposure to a common peril, which peculiar exposure is annexed as a risk incidental to the employment, it has been repeatedly held that the risk is incidental to the employment within the meaning of compensation statutes. Judson Mfg. Co. v. Ind. Acc. Comm., 181 Cal. 300, 184 Pac. 1 and cases therein cited. The fact that the accident happens upon a public road or at a railroad crossing, and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree. Cudahy Packing Co. v. Parramore, 44 Sup. Ct. 153, 68 L. Ed. ——.

In the instant case there is a direct causal connection between the injury received by the employee and her employment by the hotel. The injury directly resulted from the condition of the entrance to the premises of the employer, which, under the regulations governing her employment, Miss Glennan was compelled to use, which caused her to get her feet wet, combined with her natural effort to avoid the water and slush upon the runway immediately adjacent to said entrance, which water and slush had been placed there by employees of the hotel.

It seems clear, therefore, that the injury arose out of the employment. But a more serious problem is encountered in the next contention of petitioner, which is that the injury did not occur in the course of the employment or while the employee was performing service incidental thereto. Upon this essential element of the case respondents rely upon a recent decision of this court in which it was held that a number of ranch hands, who, by reason of the situation of the ranch and the nature of their employment, were compelled to sleep in the bunkhouse provided by the employer for their use, were in the course of their employment and performing a service incidental to the employment in which they engaged at a time when they had completed their work and were in the bunkhouse waiting for supper. Larson v. I. A. C. (Cal. Sup.) 224 Pac. 744. Petitioner relies with equal confidence on another decision of this court. Associated Oil Co. v. I. A. C. (Cal. Sup.) 217 Pac. 744. It is contended that this case is determinative against respondents, because it is said therein that the test to be applied to situations where an employee is injured while upon the premises of the employer after working hours, and because of the fact that he is living upon said premises, is "whether or not the workman is given a choice in the matter and is free as possible to come or go as he pleases." However, it was pointed out in said case, citing Schneider on Workmen's Compensation Law, that—

> "The general rule appears to be that, when the contract of employment contemplates that the employees shall [not must] sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer."

And again, in said case it was emphasized by the court that:

> "The men were not required to stay there, and it was no part of the contract of employment that they should do so."

And we think this is a vital distinguishing feature between this case and the instant case. In the instant case Miss Glennan, it is true, had a choice, when she applied for employment, of making a contract by which she would be paid $50 a month and furnish her own room, or a contract by which she would receive $40 a month and accept a room in the hotel in lieu of the other $10 a month in wages. At the time she had this choice she had not entered upon her status as an employee. It was a preliminary choice which she was given before entering upon the employment. When she had made her choice and signed the contract of employment by which she accepted a room in the hotel as part compensation for her labor, she then, and then only, sustained to the hotel the relationship of employee to employer; then her rights were fixed by contract, as were those of the hotel. It cannot be said, then, that she had any further choice. Her contract for employment was a monthly one, and she was bound during that month, at least, to accept a room in the hotel in lieu of $10 additional wages. She was under the compulsion of a contract obligation. It was a distinctive part of her contract of employment that she should occupy a room in the hotel. It was contemplated by the contract of employment that she should sleep in this room, and that she should enter and leave the building by the servants' entrance. It was also contemplated by the contract that she was to have one "day off" each week, and, assuredly, it was implied in said contract that she should leave and enter the building by the servants' entrance upon that "day off." An employee is in the "course of his employment" "when he does those reasonable things which his contact with his employment expressly or impliedly permits him to do." Novack v. Montgomery Ward & Co. (Minn.) 198 N. W. 290, 292.

Miss Glennan was to be furnished all of her meals at the hotel as a part of her compensation for her labor. It was a part of the express written contract creating her status as an employee that she should live at the hotel and receive her meals there. That was her residence solely because of her employment, and she was upon the premises to sleep and eat her meals, because room and meals were the exchange in which she was paid in part for her labor. She was in the course of her employment when she was collecting this remuneration just as much as when she was performing the labor that earned the remuneration. The contract between the parties was reciprocal.

In the case of Hackley, etc., Co. v. I. A. C., 165 Wis. 586, 162 N. W. 921, an employee of a lumber company had been working at one of its camps for some months, when he decided to give up his employment for a time and take a vacation. He so stated to his foreman, and was given a statement of his time of service, to be used in collecting the money due him. It was necessary for him to go to the office of the company to collect his "pay," and this was some distance from the camp, and was reached by train. The employee was injured while riding on this train which was furnished by the company as a conveyance for its employees. It was contended that the injury was not in the course of the employment, as the employee had definitely terminated his employment before leaving the camp. The court said:

> "The essential elements of the contract of employment were that the employee should render services for the employer, and in return therefor the employer should pay him an agreed compensation. The duty to pay and the right to receive the compensation were integral parts of the contract of employment. * * * So in going to get his pay he was but fulfilling a duty imposed upon him by the employer and using the means of conveyance which the employer furnished his employees for such purpose. * * * If we turn to the text-books and decided cases on this subject, we find that they sustain the view that an employee going in the usual manner for his pay to a place designated by the employer is performing a service within his employment. 1 Bradbury, W. C. 438; 1 Honnold, W. C. 356; Lowery v. Sheffield Coal Co., 1 B. W. C. C. 1; Nelson v. Belfast Corp., 1 B. W. C. C. 158; Riley v. Holland & Sons, 4 B. W. C. C. 155; Re R. V. Phillips, 1 Bull. Ind. Com. of Ohio, 49. In Lowery v. Sheffield Coal Co., supra, the facts were these: A collier left his work at 5 o'clock on a Saturday morning. At noon of the same day he went for his wages for a fortnight past. He went along a footpath which had been made by the employer for its workmen, and was going along the Great Central Railway Line, which ran through the employer's premises, when he was knocked down by an engine and injured. He was not going to resume work till the following Sunday night. The court held that the employee was entitled to compensation."

The other cases cited and discussed in the opinion in the case of Hackley, etc., Co., v. I. A. C., supra, are directly in point here, because an analysis of the facts in the instant case discloses that the respondent Glennan, in sleeping in the room at the hotel, was but collecting a portion of her wages. The medium of exchange in which wages happen to be paid is a mere accidental circumstance, and should not be permitted to cloud the issue. Here the respondent Glennan was to be paid, by the written express contract between the parties, $40 in money and $30 in room and meals. She was collecting her wages when she came for her meals and when she occupied her room, just as much as when she called for the balance of her wages to be paid in cash. In occupying her room (collecting a portion of her wages) she incidentally used the entrance provided by the employer for that purpose. It would seem, upon principle, that her legal situation was precisely the same as if upon a day when she was not actually working for her employer—when she had a "day off," or for some other reason was not working—she had gone to his premises by the entrance designated by the employer to collect the portion of her wages to be paid in cash, and had been injured in the same place and manner as she was injured. In either instance, in the language of the decision in Hackley, etc., Co. v. I. A. C., supra:

> "The employee * * * was still performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract of employment were mutually satisfied."

We think the foregoing discussion distinguishes this case from the "Jones Case" (Associated Oil Co. v. I. A. C., supra) upon principle, and that the instant case falls within the rule announced by this court that "when the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such such employment during the time he is on the premises of the employer" (Associated Oil Co. v. I. A. C., supra). There is involved here the same legal principle as in the case of Larson v. I. A. C., supra. In the Larson Case the employees were held to be in the course of their employment and performing a service incidental thereto when sleeping in a bunkhouse, because the situation of the ranch and the nature of their employment practically precluded them from living elsewhere. In the instant case neither the situation of the hotel nor the nature of the employment demanded residence at the hotel, but the written contract under which the employee was working provided for such residence as a partial payment for services. In the one case, there was the compulsion of circumstances, and in the other, as we have stated, the compulsion of a written contract.

Applying the language of the Associated Oil Company Case, supra, i. e., "When the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer," and applying, by analogy, the case of Larson v. I. A. C., supra, to the facts of the instant case, we think the employee was in course of her employment and performing services growing out of and incidental to such employment when she was leaving her place of employment (her residence, also, by reason of her contract of employment, and furnished to her as part compensation for her labor under such contract) by the exit designated by the employer, to enjoy her "day off"—an intermission in her labor contemplated by said contract of employment.

The award of the Industrial Accident Commission is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; SHENK, J.

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193 Cal. 755

MILLER & LUX, Inc., v. SECARA et al.
(S. F. 9944.)

(Supreme Court of California. June 10, 1924.)

1. Waters and water courses 🔑226—Irrigation district not invalid by reason of uncertain description of boundary.

An irrigation district was not invalid for uncertainty of description of boundary as the right bank of a stream, in view of Civ. Code, § 830, regarding boundaries of lands on tide water.

2. Boundaries 🔑8—Question of location always question of intention.

Question of location of boundary line is always question of intention of parties framing description or making agreement or conveyance containing description.

3. Waters and water courses 🔑216—Finding of board of supervisors of irrigation district as to validity of assessment conclusive to what extent.

As against any attempt to question validity of organization of irrigation district in any proceeding to contest the validity of an assessment other than direct attack in certiorari, the conclusive evidence provision of Irrigation District Act, § 72, as amended by St. 1915, p. 1370, should be given its full effect.

4. Waters and water courses 🔑216—Statute of limitations as to assessments held invalid.

Thirty-day statute of limitations prescribed in Irrigation District Act, § 69, regarding actions to determine validity of assessments, when regarded merely as a statute of limitations, is void as not allowing a reasonable period of time to property owner who has not received legal notice of hearing before board of equalization within which to commence an action.

5. Constitutional law 🔑55—Legislature empowered to prescribe rules of evidence.

Legislature is empowered to prescribe rules of evidence subject to limitations placed upon it by Constitution.

6. Waters and water courses 🔑231—Action to quiet title held collateral attack on assessment.

Action to quiet title by landowner as against lien of irrigation district was a collateral attack upon validity of assessment as distinguished from direct attack.

7. Waters and water courses 🔑225—Conclusiveness of resolution declaring irrigation district duly organized in suit to quiet title.

Conclusiveness of resolution of board of supervisors of irrigation district declaring that district was duly organized is in no way qualified or lessened in a suit to quiet title as against lien of district by fact that question of validity of district is still open to be determined in a certiorari proceeding; suit to quiet title not having been brought within 6 months after resolution as required by Irrigation District Act, § 72, as amended by St. 1915, p. 1370.

8. Waters and water courses 🔑231—Assessment held shown to have been made for proper purposes.

Board of irrigation district levying an assessment *held* to sufficiently state purposes for which levy was made under Irrigation District Act, §§ 39, 61.

9. Evidence 🔑584(1)—Effect of prima facie evidence is not destroyed by introduction of contradictory evidence.

In view of Code Civ. Proc. §§ 1824, 1833, effect of prima facie evidence is not destroyed by introduction of contradictory evidence, but it stands as proof of that particular fact unless and until it is both contradicted and overcome by such other evidence.

10. Waters and water courses 🔑231—Assessment book prima facie evidence of assessment requiring contradiction.

An assessment book showing unpaid assessments is prima facie evidence of validity of assessments, notice, etc., under Irrigation District Act, § 49, and compels finding of validity in absence of contradicting evidence which overcomes it, in view of Code Civ. Proc. §§ 1824, 1833.

In Bank.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Miller & Lux, Inc., against J. A. Secara and others. From an adverse judgment, plaintiff appeals. Affirmed.

Edward F. Treadwell, of San Francisco (Gail C. Larkin, of Los Angeles, and Joseph C. Sharp, of San Francisco, of counsel), for appellant.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondents.

MYERS, C. J. This is an action to quiet plaintiff's title against the lien of an irrigation district assessment upon the ground of the invalidity of the organization of the defendant Madera irrigation district, and the invalidity of an assessment of $35,859.96 levied by the board of directors of such irrigation district. Judgment was rendered in favor of the defendants.

The defendants claim that the defendant district was properly organized, and that the plaintiff, by suing the Madera irrigation district as such, and alleging that it is claiming to be and acting as an irrigation district, has admitted at least that the defendant was a de facto district, and therefore that plaintiff cannot attack the validity of its organization in his action, which is in the nature of a collateral attack thereon.

The first objection to the validity of the district is that the description of the district in the proceedings for organization is uncertain, and therefore that the whole proceedings are void because of the fact that the lines of the district cannot be ascertained. This contention is based upon the alleged impossibility of locating the right bank of the Fresno river, which is made one of the boundary lines of the district. The portion of the description attacked by the plaintiff is as follows:

> "Thence east along section lines one and three-fourths miles more or less to the intersection of the south line of section 14, said township, with the left bank of Ash slough; thence southwesterly along the left bank of said slough to the right bank of the Chowchilla canal in block 25 of subdivision No. 1 of the Chowchilla ranch, *according to the official map of said subdivision on file in the office of the county recorder of said county of Madera;* thence southeasterly along the right bank of said Chowchilla canal to the *right* bank of the Fresno river, *which said river runs through blocks 15, 16, 17, 18, 19, 20, and 21 of subdivision No. 2 of the Chowchilla ranch according to the official map of said subdivision on file in the office of the county recorder of said county of Madera,* thence easterly along the right bank of said Fresno river 7½ miles more or less to its intersection with the west line of sections 16 and 21, township 11 south, range 16 east." (Italics ours.)

[1] The plaintiff's point is that the river divides in several branches; that each of these branches is shallow and that the banks are not well defined; that the river "bank" is the bank at high water, and that this is never the same, for the reason that the river spreads out into a great sheet of water several miles wide, and that the edge of this sheet cannot be located because it is never at the same place during the flood season of different years.

It appears from the evidence that the government maps of this locality of 1853 show a single line passing through blocks 15, 16, 17, 18, 19, 20, and 21 of subdivision 2 of the Chowchilla ranch, which the field notes show indicates the right bank of the Fresno river. The surveyors employed by the defendants testified that they had no difficulty in locating the right bank of the Fresno river where it passed through the blocks in question, and it also appears from the testimony that there is only one branch of the river which flows through the particular blocks referred to in the description. In one place for about 600 feet only was it difficult to ascertain the location of the bank. At this point there is no very well-defined bank. The surveying level, however, showed where the edge of the water would be in passing from the defined bank to the next defined point in the bank 600 feet down stream, and the surveyors accepted such line on the high land across this space as the bank of the river. The method of locating the line of high tide by ascertaining the intersecting line of the plane of water at mean high tide with the surface of the land, and using this line of intersection as the boundary line between the tide lands of the city and the adjoining lands of the defendants, was used in the case of City of Los Angeles v. San Pedro, etc., R. Co., 182 Cal. 652, 189 Pac. 449, although a slight change in elevation resulted in a variation of a mile or more in the line of high tide. Indeed, this is the only possible method of locating the boundary line fixed by statute (section 830, Civ. Code) as the boundary of lands bordering on tide water. The plane of ordinary high tide is an imaginary plane fixed by observation and calculation as to the average high tide, and its location is fixed by running of this level on the shore. No reason is suggested why a similar process should not be used to locate the line of the bank for the hiatus of 600 feet between the well-defined points of the bank shown upon the ground, as was done by the engineers who testified in this case.

It should perhaps be stated that the map referred to in the above description of the Chowchilla ranch does not show the east bank of the Fresno river, but the reference to this map serves to determine which of the numerous channels of the Fresno river it was intended to adopt in the description; that is, the branch flowing through the blocks referred to as shown on this map. This being ascertained, the exact location upon the ground could be made in any way adapted to ascertain the location of that bank. The fact that the map does not definitely locate the right bank of the river merely requires it to be otherwise ascertained. It might be said also that, where the stream spreads out indefinitely, and becomes a great sheet of water extending over a wide expanse of the territory, the location of the edge of which changes many miles from year to year, the reference in the description to the "right bank" of the river could not be intended to mean the extreme edge of this sheet of water, which would vary so greatly with every storm and every flood, but should be taken to be the bank of the stream as indicated on the ground.

[2] The question of the location of a boundary line is always a question of the intention of the parties framing the description, or making the agreement or the conveyance containing the description.

> "Intention, whether express or shown by surrounding circumstances, is all controlling; and that which is most certain and definite will prevail over the less certain and indefinite." 9 Corpus Juris, p. 152, § 2, page 193, § 78.

We think the line located by the defendants' engineers, with the help of the surface indications on the ground, and the field notes of the government survey of 1853, and adopted by the court in its findings, was evidence of the sufficiency and certainty of the boundaries described in the proceedings for the establishment of the district.

[3] Appellant contends that the defendants failed to establish that the alleged district had either a de jure or de facto existence. The allegations of the complaint itself, which were not denied by the answer, were sufficient to establish the de facto existence of the district at the time this action was commenced. We are of the opinion that the evidence introduced was sufficient to warrant a finding that the district had been at least a de facto district since January 12, 1920, the date or the resolution of the board of supervisors finding and declaring it to be duly organized as an irrigation district. Indeed, the appellant does not seriously oppose this conclusion, but urges rather that, in the absence of sufficient proof of the valid organization of the district, appellant was entitled to prove herein that its lands were not benefited thereby, and therefore should have been excluded therefrom, and could not be lawfully assessed for the expense thereof. Appellant offered to prove these things at the trial of this action, to which defendants' objection was sustained by the trial court, and appellant specifies this as prejudicial error requiring a reversal. Appellant concedes that, if the district had in fact been lawfully organized, pursuant to sufficient petitions therefor, and after a hearing before the supervisors pursuant to notice to the property owners whose lands were proposed to be included in the district, giving to such property owners a reasonable opportunity to appear and litigate before the supervisors the questions of benefit and the inclusion or exclusion of their lands, and if the supervisors, acting at such hearing upon competent evidence, had decided these questions adversely to appellant, it would then have been precluded from litigating them in the present action. But it argues that, in the absence of proof herein of such hearing and action by the supervisors and of the facts necessary to confer jurisdiction upon them to determine those questions, appellant had a constitutional right to litigate them in this action. This brings us to a consideration of the validity and effect of the provisions contained in sections 68, 69, 72, and 4 of the Irrigation District Act (St. 1897, p. 254). Section 68 provides for the bringing of an action in rem in the superior court by the directors of the district to determine the validity of such an assessment. Section 69 provides that at any time within 30 days after the levy of an assessment any district assessment payer may bring an action in the superior court to determine the validity thereof. Section 72, as amended by St. 1915, p. 1370, provides:

> "No contest of any thing or matter herein provided shall be made other than within the time and manner herein specified, and in any such action all findings of facts or conclusions of said board of directors, or of the board of supervisors upon all matters shall be conclusive, unless such action was instituted within six months after such finding or conclusion, was made."

Section 4 of the act as amended by St. Extra Sess. 1911, p. 139, provides that—

> "A finding of the board of supervisors in favor of the genuineness and sufficiency of the petition and notice shall be final and conclusive against all persons except the state of California upon suit commenced by the attorney general. * * *"

This court decided in Miller & Lux v. Board of Supervisors, 189 Cal. 254, 208 Pac. 304, that said section 4, "in so far as it would give conclusive validity to the order of the board of supervisors in the absence of notice and hearing and would deprive the property owner at every subsequent stage of the proceedings of any right to contest the question as to whether or not his lands would be benefited, would be violative of the due process of law clauses of the federal and state Constitutions." It was said therein that said section 69 provides "for proceedings by the property owner to contest the validity of the assessment, but it is evidently not intended that this contest should include an inquiry into the validity of the proceedings for the organization of the district. * * *" This court there concluded that the jurisdiction vested in the courts by the Constitution to issue writs of certiorari for the purpose of reviewing proceedings of an inferior tribunal or board exercising judicial functions in order to ascertain whether or not such inferior tribunal or board was acting within its jurisdiction cannot be taken away by the Legislature, and that the sections above referred to, in so far as they purport to deprive the courts of their jurisdiction to review the proceedings of the board of supervisors, or to make the findings of the board of supervisors conclusive, "if construed to prohibit the inquiry upon direct attack in certiorari into the question of whether or not the supervisors conformed to the constitutional requirements of due process of law in exercising their jurisdiction, * * *" are to that extent void. The opinion in that case did not expressly hold, but strongly implied, that the provisions here in question are valid as against any other attack than the direct attack in certiorari.

[4] In the former opinion in this case it was held that the 30-day statute of limitations prescribed in section 69 of the act, when regarded merely as a statute of limitations, is void as not allowing a reasonable period of time to the property owner who has not received legal notice of the hearing before the board of equalization within which to commence an action to contest the assessment. To that conclusion we adhere. Hayes v. Douglas County, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213, 53 Am. St. Rep. 926; Lamb v. Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558, and cases cited therein. The result of the invalidity of that statute of limitations is to permit the assessment payer to bring such an action within a reasonable time (Rossi v. Caire, 186 Cal. 544, 548, 199 Pac. 1042), and this action, which was commenced within three months, must be held to have been commenced in time. We think there is no room to doubt that the six months' limitation prescribed in section 72 of the act is not unreasonable, particularly in the light of the fact that the assessment payer would know from the provisions of the law that the date of the levy would in all likelihood be some time within the month of September.

[5, 6] A six months' statute of limitations was impliedly held valid in Capuccio v. Caire, 189 Cal. 514, 209 Pac. 367. We see no reason, therefore, why the provision of section 72 that "in any such action all findings of facts or conclusions * * * of the board of supervisors upon all matters shall be conclusive, unless such action was instituted within six months after such finding or conclusion was made," should not be given full effect as a rule of evidence in this action. We agree with counsel for appellant that a total lack of jurisdiction due to absence of notice sufficient to constitute due process of law cannot be cured by a curative act or by a curative provision in the statute, but we see no reason why such a defect may not be cured, in effect, by a statute of limitations, provided the latter is not unreasonable, and is therefore valid. We also agree that a conclusive evidence clause such as that contained in section 72 in so far as it purports to debar all inquiry into the question of jurisdiction of the supervisors in forming the district "must be held unavailing to prevent such inquiry where that board has proceeded without jurisdiction." We so held in Miller & Lux v. Board of Supervisors, supra, but this conclusive evidence provision was there held to be unavailing only to the extent that it purported to "prohibit the inquiry upon direct attack in certiorari into the question of whether or not the supervisors conformed to the constitutional requirements of due process of law in exercising their jurisdiction." It was strongly, if not necessarily, implied in that decision, that, as against any attempt to question the validity of the organization of the district in any proceeding to contest the validity of an assessment other than the direct attack in certiorari, the conclusive evidence provision of section 72 should be given its full effect. This is the interpretation which we place upon that opinion, and we think that it should be adhered to. The Legislature is empowered to prescribe the rules of evidence, subject to the limitations placed upon it by our state and federal Constitutions. Nothing therein has been called to our attention which would prohibit the Legislature from making the record of a proceeding of a judicial or quasi judicial character conclusive as against a collateral attack or from limiting the scope of the inquiry upon such collateral attack, the opportunity being open to test all jurisdictional questions by means of a direct attack, as was held in Miller & Lux v. Board of Supervisors, supra. It is clear that this action is a collateral attack upon the validity of the assessment as distinguished from the direct attack under consideration in that case.

Plaintiff argues that the words "such action" in section 72 refer back to section 69, and that the provisions of section 72 are therefore applicable only to the action provided for in section 69, to wit, an action by an assessment payer to contest the validity of the assessment. Plaintiff asserts that this is not such an action, but is a suit to quiet title, and that therefore the provisions of section 72 are not applicable herein. There is no merit in this contention. This is plainly an action to contest the validity of this assessment—nothing more and nothing less. Plaintiff in its complaint herein alleged title to the premises in itself, and that the defendants claimed some interest therein, which claim was without right, and called upon them to set forth in their answer the nature of their claim. Defendants in their answer admitted plaintiff's ownership of the premises, claimed in behalf of the defendant irrigation district a lien thereon to the amount of this assessment, and disclaimed any other interest therein. If this action had been for any other purpose than to contest the validity of this assessment plaintiff thereupon would have dismissed its action or would have taken judgment upon the pleadings quieting its title subject to the lien. If this is not an action to determine the validity of this assessment it must follow that plaintiff is entitled to no relief herein other than that which defendants freely concede to it.

[7] Plaintiff next contends that the conclusive evidence provision of section 72 is inap-

plicable herein for the reason that this action was commenced within six months after the session of the board of directors as a board of equalization and after the levy of the assessment in question. It is true that this action was commenced within six months after the levy of the assessment, and it follows therefrom that the finding and conclusions of the board of directors in levying the assessment are not conclusive herein, and the plaintiff is therefore at liberty to litigate herein the question of the validity of the assessment. But, on the other hand, the resolution of the board of supervisors, wherein it found, concluded, and declared that the district was duly organized as an irrigation district under the provisions of the California Irrigation District Act, was adopted much more than six months prior to the commencement of this action, and it follows that, when that resolution was introduced in evidence herein, the validity of the organization of the district was conclusively established so far as this action is concerned. The conclusiveness of this proof for the purpose of this action is in no way qualified or lessened by the fact that the question of the validity of the organization of this district is still open to be determined in the pending certiorari proceeding. Plaintiff introduced evidence at the trial hereof to prove the pendency of that certiorari proceeding. We are unable to conceive of the relevancy of this evidence except to a plea in abatement. It would be an unusual thing for a plaintiff to plead in abatement of its own action that there was another action pending, instituted by it, which involved the same question. No such plea was filed herein, but it is not improbable that the trial court herein, if it had been requested so to do by the plaintiff, might have granted a continuance of this action pending the determination of the proceeding in certiorari. It is sufficient to say that the plaintiff made no such request, but, on the contrary, elected to pursue the present action to a conclusion. The pursuit of the present action carried with it the consequence that under the provisions of section 72 the trial court was compelled to find that the district was duly and lawfully organized. In this state of the evidence the trial court committed no error in refusing to permit the plaintiff to offer evidence for the purpose of showing that its lands were already irrigated, that they would not be benefited, and that plaintiff had unsuccessfully endeavored to have its lands excluded from the district. Those questions were for the determination of the board of supervisors, and its determination thereof is not subject to review by the court in the absence of fraud, actual or constructive, at least not in a collateral attack such as the present one. The provision of section 78, excepting from certain assessments lands irrigated by water pumped from an underground source or sources, is clearly inapplicable to plaintiff's land, none of which was so irrigated.

[8] There is no merit in the contention that the assessment was void because not shown to have been made for a purpose for which the board can make an assessment. We find no provision in the act which requires the board in levying an assessment to state expressly and in detail the specific purposes for which the money is to be raised; but, assuming that the law does so require, we think the requirement is complied with in the resolution levying the assessment herein. It recites that the sum of $78,620.70 is required to meet outstanding warrants which have been issued in accordance with the provisions of the act. This is one of the purposes specified in section 39 for which such assessment shall be levied. It further recites that—

> "Before the 1st day of January, 1921, there will be required by the district for the purpose of organization and for other purposes of said act the further sum of $63,993."

This is expressly authorized by section 61 of the act. It recites that the further sum of $46,790.91 will be needed to meet the obligations of the district that will be incurred before the time for levying the next annual assessment. This also is expressly authorized by section 39 of the act. These three items added together make up the amount of the assessment which was levied in the sum of $189,404.51.

Appellant most earnestly contends that the assessment was void because no sufficient notice thereof and of the meeting of the board as a board of equalization thereon was given as required by the statute. The requirements of the statute herein are found in section 37, which provides:

> "On or before the first Monday in August in each year, the assessor must complete his assessment book, and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than twenty nor more than thirty days from the first publication of the notice; and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested."

The meeting of the board of equalization was set for September 2, 1920. At the trial affidavits of publication were introduced, showing that notice thereof was published in three newspapers in Madera county on August 5th, 12th, and 19th, respectively, in each of those papers, together with an affidavit showing that such notice was published in a paper in Merced county on August 23, 1920, which was but 10 days prior to the date of the meeting. In the former opinion filed herein it was assumed as a fact established beyond controversy that no other publication was made. This assumption was a natural one in the light of the circumstance that in all of the briefs filed herein up to that time all of the arguments on both sides of the case were predicated upon this assumed fact, with the exception of a single short paragraph in respondents' brief. Proceeding upon that assumed fact, this court interpreted the statute as requiring but a single publication in each county, but as requiring further that such publication should be made in each of the counties not less than twenty nor more than 30 days prior to the date of the hearing, and concluded that the publication thus assumed to have been made was insufficient to meet the requirement of the statute. It further concluded that the requirement of publication in more than one of the counties was not essential to due process of law, and therefore might have been dispensed with by the Legislature, and that when the Legislature had provided for publication in each of the counties it might have added thereto a provision to the effect that, if such publication should be made in one of the counties, the failure to so publish in the other county would not invalidate the assessment unless an action was brought to contest the same within 30 days thereafter, and that the Legislature did so provide in effect in sections 69 and 72 of the act, and that the omission was cured thereby. 5 Cal. Jur. 872-875, citing Chase v. Trout, 146 Cal. 350, 80 Pac. 81; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; Board of Education v. Hyatt, 152 Cal. 515, 93 Pac. 117; Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750; Schaffer v. Smith, 169 Cal. 764, 147 Pac. 976; Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 660, 161 Pac. 113; Watkinson v. Vaughn, 182 Cal. 55, 186 Pac. 753.

[9, 10] The petition for rehearing was granted herein in order that we might give further consideration to the validity of these conclusions. Upon such consideration we have arrived at the conclusion that these questions are not involved in a determination of this appeal. Section 49 of the act provides as follows:

> "The assessment book or delinquent list, or a copy thereof, certified by the collector, showing unpaid assessments against any person, or property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of assessments due and unpaid, and that all the forms of the law in relation to the assessment and levy of such assessments have been complied with."

> "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." Code Civ. Proc. § 1833.

It is to be noted that the Code does not say "until contradicted or overcome by other evidence," but "until contradicted and overcome by other evidence." Therefore, when prima facie evidence of a given fact has been introduced, its effect is not destroyed by the introduction of contradictory evidence. It stands as proof of that particular fact unless and until it is both contradicted and overcome by such other evidence. "Proof" is something more than merely "evidence." It is "the establishment of a fact by evidence." Code Civ. Proc. § 1824. The defendants introduced the assessment book in evidence at the trial, and no question was made then or since as to the genuineness thereof or the correctness of the entries therein or the manner of making and keeping the same. By so doing the defendants established a prima facie case of the validity of the assessment and of the fact that all the forms of law in relation to the assessment and levy had been complied with. This showing would not only justify but would compel a finding to this effect unless it was both contradicted and overcome by other evidence in the case. The plaintiff introduced no evidence which even tended to contradict it. The defendant, however, introduced affidavits of publication showing the publication of the notice three times in each of three papers in Madera county and one time in one paper in Merced county. This was all the evidence introduced or offered upon this subject. It may be doubted that this evidence can justly be said to contradict the prima facie case thus made. It presented no irreconcilable conflict therewith, for the reason that other publications of the notice may have been made in other newspapers in both counties or in the same newspapers. If at this stage of the trial the burden had still rested upon the defendants to prove the validity of their assessment, then the trial court might justly have inferred that no other publications were made than those they proved; but, the introduction of the assessment books having established a prima facie case of the validity of the assessment, the burden then rested upon the plaintiff to produce evidence to contradict and overcome that showing. As the plaintiff did not offer any evidence to show that no other publications were made, it was the reasonable and natural inference that such other publications were in fact made, and that they were sufficient. See Corson v. Crocker, 31 Cal. App. 626, 632, 161 Pac. 287; Sacramento Bank v. Montgomery, 146 Cal. 745, 751, 81 Pac. 138, and cases there cited. If the trial court had found that the publication of notice was insufficient, a nice question would have been presented as to whether or not in this state of the evidence such finding would be legally justified. But the trial court did not so find. If found, by necessary implication, that the publication was sufficient. We must hold that this finding was justified, if, indeed, it was not compelled, by the state of the evidence. This finding is conclusive upon this appeal.

"Where the facts established may reasonably authorize either one of two opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon the appellate court. * * *" 10 Cal. Jur. p. 741; Mah See v. North American Acc. Ins. Co. (Cal. Sup.) 213 Pac. 42, 26 A. L. R. 123.

This conclusion renders it unnecessary to consider appellant's contention that the notice as published did not conform to the requirements of section 1705 of the Code of Civil Procedure and section 4459 of the Political Code. Nevertheless we adhere to our former conclusions upon these points that section 1705, Code of Civil Procedure, is inapplicable to this situation, and that the notice set forth in the affidavits of publication was substantially in compliance with section 4459 of the Political Code. The finding of the trial court that plaintiff's cause of action is barred by the provisions of sections 68, 69, and 72 of the act was predicated upon an erroneous conclusion of law; but, as this finding is in no way essential to support the judgment, the error is immaterial.

(Unless otherwise stated the sections herein referred to are those in the California Irrigation District Act, No. 1726, General Laws 1915, p. 661 et seq., and amendments thereto in Codes and General Laws 1921, p. 1436 et seq., being the act of 1897 [Stats. 1897, p. 254], and amendments thereto.)

The judgment is affirmed.

We concur: LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; SHENK, J.; WASTE, J.

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193 Cal. 730

PEOPLE v. TORRES. (Cr. 2640.)

(Supreme Court of California. June 6, 1924.)

1. Prostitution ⇨1—One dealing with third person to procure inmate guilty of "pandering."

One negotiating with third person to procure a female to be inmate of house of prostitution is guilty of pandering, under St. 1911, p. 9.

2. Prostitution ⇨4—Evidence held sufficient to sustain conviction for pandering.

Evidence *held* sufficient to sustain a conviction for pandering, under St. 1911, p. 9.

3. Criminal law ⇨863(2)—Jury held not misled by re-reading of instruction and statute.

In prosecution for inducing, persuading, or encouraging complaining witness to become an inmate of a house of prostitution, *held*, that jurors were not misled by re-reading of statute to jury, including part concerning inducing, persuading, or encouraging one to remain in house of prostitution, and that there was no prejudice.

In Bank.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Marina Torres was convicted of pandering, and appeals. Affirmed.

H. M. Dalton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

LAWLOR, J. The defendant, Marina Torres, was charged by information in three counts: (1) With the crime of pandering in procuring, persuading, and encouraging a female to become an inmate of a house of prostitution; (2) with feloniously aiding, abetting, encouraging, and assisting one John Doe in the commission of the crime of rape upon the complaining witness, a female under 18 years of age; and (3) with the crime of rape in having aided, abetted, encouraged, and assisted one Richard Roe to accomplish an act of sexual intercourse with the said complaining witness. It may be assumed on appeal that one Miguel Mayo, alias "Mike Flores," in the city of Los Angeles, brought the complaining witness to a house of prostitution kept by the defendant, and that she allowed the minor to become an inmate thereof. The defendant was prosecuted on counts 2 and 3 on the theory that she was a party to the crime of rape as alleged to have been committed respectively by the procurer, and the crime of rape alleged to have been committed by a visitor at the house of prostitution.

The defendant went to trial on the three counts, and a verdict of guilty was rendered on count 1. She was acquitted on counts 2 and 3. Upon the denial of defendant's motion for a new trial she was sentenced to serve a term in the penitentiary. An appeal was taken by the defendant to the District Court of Appeal for the Second Appellate District, and we adopt and make a part hereof the following portions of the opinion of that court in deciding the appeal:

"The defendant was charged with the crime of pandering as defined in the statutes of this state. Stats. 1911, p. 9. The particular charge against the defendant was that she did procure, persuade, and encourage a female person to become an inmate of a house of prostitution. On the trial she was found guilty of the offense charged. This appeal is from the judgment of conviction and an order denying a motion for new trial.

"Appellant assigns as grounds for reversal that the evidence was insufficient to justify the verdict, and that the court erred in instructing the jury.

"The evidence shows that Dorothy Hall, a girl 16 years of age, left her home in the city of Los Angeles in February, 1923, with one Miguel Mayo, and that the two lived together as man and wife in various hotels and lodging houses in said city up to April 23, 1923. During this time the said Dorothy Hall in these various hotels and lodging houses practiced prostitution under the direction of the said Mayo, the two sharing in the profits of her prostitution. On April 23, 1923, she entered defendant's house with Mayo, where they lived until the house was raided by the police of said city on April 28, 1923. In the house of the defendant, and during her stay there, she and Mayo continued to cohabit as man and wife, and she continued to practice prostitution as she had done prior to taking up her residence there. The evidence is beyond question sufficient to establish the fact that the house of the defendant at the time said Dorothy Hall became an inmate thereof, and during all the time she resided there, was a house of prostitution. The arrangements for Dorothy Hall to enter defendant's house were made with defendant by Mayo, and the terms agreed upon were that defendant was to receive $4 per week for the rent of the room and 50 cents for each act of sexual intercourse indulged in by the said Dorothy Hall while an inmate of defendant's house. These terms were complied with by the parties thereto during the time that Mayo and Dorothy Hall occupied a room in defendant's house. The evidence further shows that Dorothy Hall speaks the English language, but neither speaks nor understands the Spanish language; that the defendant speaks the Spanish language but neither speaks nor understands the English language; and that Mayo speaks and understands both the English and the Spanish language.

[1, 2] "The claim of appellant is that there is no evidence that she either procured, persuaded, or encouraged Dorothy Hall to become an inmate of her house. Appellant argues that as Dorothy Hall was unable to speak the Spanish language and the defendant was without any knowledge of the English language, it was impossible for them to have any communication one with the other, and therefore it would be impossible for defendant to procure, persuade, or encourage the girl to enter the house of the former. It is true that this state of facts might preclude the two persons named from having any direct communication with each other. In this proceeding, however, it appears from the testimony that Miguel Mayo, acting for Dorothy Hall, arranged for the latter to enter the house of the defendant. Had the defendant dealt directly with the Hall girl and agreed with her that she was to enter defendant's house with the understanding that defendant was to receive the compensation agreed upon, there is no doubt that the defendant would be guilty as charged. Is she any the less guilty of the offense when she carries on these negotiations with a third person? In her dealings with Mayo she had but one object in view, and that was to procure the Hall girl to become an inmate of her own house. Her efforts in this direction were successful, and in so doing she violated the plain provisions of the statute. We are therefore of the opinion that the evidence justifies the verdict of guilty as rendered against the defendant in this action.

"The next objection to the judgment interposed by the appellant is that the court erred in its instructions to the jury. The court, at the request of the prosecution, gave the following instruction:

" 'You are instructed that Act 865, General Laws, provides as follows: "Any person who shall procure a female inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as inmate in a house of prostitution, or as an inmate of any place in which prostitution is encouraged or allowed within this state, or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade or encourage an inmate of a house of prostitution or any other place in which prostitution is encouraged or allowed, to remain therein as such inmate, or any person who shall, by fraud or artifice, or by duress of person or goods or by abuse of any position of confidence or authority, procure any female person to become an inmate of a house of ill-fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution, or who shall receive or give, or agree to receive or give, any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill-fame within this state, or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, to wit, pandering." '

"During one of the occasions when the court had the jury returned to the courtroom for the purpose of ascertaining whether they had agreed upon a verdict, a juror asked the court the following question: 'Would it be all right for me to ask you the meaning of the word "pandering"? Does it mean allowing to remain in the house, or does it mean going out and getting the girl to come?' The court replied to this question as follows: 'Now, the statute itself describes what pandering is, and one instruction has that section of the statute copied.' The court then read to the jury the foregoing instruction, and followed such reading by the following remark: 'So, a person who does any of these things, who, by promises, threats, and so on, shall cause or induce or persuade or encourage a female person to become an inmate or who shall procure for a female person a place as an inmate, or any person who shall by promises, threats, and so forth, cause or induce an inmate of a house of prostitution to remain there in a house of prostitution, or shall, by fraud or artifice procure any female person to become an inmate of a house of ill fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state, and so on, is guilty of pandering.' It is now claimed by appellant that the court erred to her serious prejudice, both by the giving of the instruction originally and by afterwards reading it to the jury and commenting upon it in the manner as shown by the above remarks of the court. The charge against appellant, as we have already noted, was that she did procure, persuade, and encourage the said Dorothy Hall to become an inmate of a house of prostitution. She was not charged with causing, inducing, persuading, or encouraging said Dorothy Hall to remain therein as an inmate. Appellant therefore contends that by the giving of said instruction and by the re-reading thereof, and by commenting on, that portion of the statute which provided that any person who shall cause, induce, persuade, or encourage an inmate of a house of prostitution to remain therein is guilty of pandering, the court misled the jury into the belief that they could find the defendant guilty of pandering in this action, if the evidence showed that she had caused, induced, persuaded, or encouraged the girl to remain an inmate of her house."

It is shown by the record that, after the jury had been deliberating some four hours and thirty-five minutes, they were returned into court. The exchange between the court and several of the jurors elicited the fact that the jury stood eleven to one for conviction. It further developed that the divergence of opinion between the eleven jurors on the one hand and the unconvinced juror on the other was as to the state of the testimony upon two questions of fact. One of these questions was as to the complaining witness' age, "as to the birth certificate or evidence of her age at the time," and the other was whether Mayo, when he first went to the house of prostitution, "was accompanied by the girl, or whether the girl did not come until the second visit; or whether he was accompanied on his first visit by this man, and then went back and brought the girl in the evening?" Later the court declined to answer the following question: "A Juror: May I ask would the girl be in the juvenile court if over eighteen years old?" It was finally decided by the jurors that the reading of the testimony would make no difference "in the disagreement." One of them said that reading the testimony as to whether Mayo was accompanied by the complaining witness on the first visit would not help the situation—that "it is on a different point altogether, and depends upon the age of the girl." The dissenting juror was then asked whether reading the testimony as to her age "would clarify things," and he answered, "not for me." One of the jurors remarked:

> "May I say a word? I am sorry to say it, but I think I am voicing the sentiment of all of us here; there is an impossible situation; we cannot meet."

The court, however, refused to discharge the jury and they retired for further deliberation without any of the testimony being read.

An hour and a half later, upon again being brought into court, the foreman of the jury, in answer to the question of the court as to whether an agreement had been reached, replied:

> "We have not, your honor; but the one voting for acquittal has voted the same on every ballot since entering the jury room, and says if we vote from now till doomsday their opinion will never be changed; so it doesn't seem necessary to the rest of the jurors to remain longer."

Whereupon the court indicated it would not discharge the jury, and remarked, referring to what developed on the previous occasion concerning the age of the complaining witness, that it was immaterial under count 1 of the information whether "she was under age or over age, or how old she was." Then the following occurred:

> "A Juror: I am the person who has voted not guilty—
>
> "The Court: I don't know that I care—
>
> "The Juror: I do this as the jury felt I ought to have done it before; I thought that it was right to do it and I want to do it. It is over the discussion of the instructions and not the evidence; the instructions as to whether this girl came there or was brought there, or came of her own volition, that is what the discussion is. I have read time and again your instructions on the last page, and it is a matter of procuring or encouraging, and I have read over every word to see to what extent the defendant is responsible for this individual's coming. I don't think—
>
> "The Court: That is a question turning upon the facts. I think the instructions are clear on that as on most other points. I don't believe there is anything I can add to the instructions to clarify them, and, if there should be any particular instruction that any juror does not understand, I would be very glad to make— * * *"

The court next read the instruction in question as already set forth.

The situation presented to the trial court was this: One of the jurors had been voting throughout for acquittal—the other eleven for conviction. It is evident that the former was confused in stating that his perplexity was over "the instructions and not the evidence," for he said that the point was "whether this girl came there or was brought there, or came of her own volition, that is what the discussion is." That the juror was concerned with the evidence rather than the instructions is further shown by the contentions over the evidence; the principal point being whether the complaining witness accompanied Mayo the first time she went to the house of prostitution. Moreover, the court, in answering the juror, said, "That is a question turning upon the facts." It would seem then that the juror was not induced to change his vote by the circumstance that in re-reading the instruction the court repeated the clause—"to remain there as such inmate." The juror who acknowledged he voted for acquittal appeared to be in doubt on two points—the age of the complaining witness, and whether she went to the house of her own volition. The court cleared up the first point when it stated that her age was immaterial under count 1, and it must be assumed that the juror, in joining in the verdict on count 1, finally concluded she was induced, persuaded, and encouraged by the defendant "to enter the house," and that she did not become an inmate of her own volition. In other words, his point of perplexity was not whether the mistress of the house allowed the girl to remain there within the meaning of the clause in question, but whether she induced the girl to become an inmate in the first instance.

In giving the charge originally the court read the entire statute to the jury, and that it was merely intended to repeat it is evidenced by the remark, of the judge: "I think I can put my hand on the particular instruction covering the matter;" that is to say, the part objected to was not given to the jury as an element in count 1. The meaning of the word "pandering" was the point of the inquiry, and the juror who propounded the question evidently was thinking of the defendant with reference to the arrival of the minor at the house in the first instance, for the inquiry is, "Does it mean allowing to remain in the house, or does it mean going out and getting the girl to come?" It is not claimed that the defendant brought the complaining witness to the house, and, this being so, it is as consistent with the evidence that by the words "allowing to remain in the house" the juror meant allowing the girl to remain when Mayo first brought her to the house as it is that he had reference to the period after she had been installed as an inmate.

It is made abundantly clear that the action of the court in merely re-reading the statute is not susceptible of the construction sought to be put upon it, namely, that by repeating the phrase "or to remain as such inmate" it was meant to convey to the jury that the defendant could, under the evidence, be convicted of that element of the statute. But, apart from this, it is not apparent to us how any prejudicial effect could attach to the action of the court in failing to omit the phrase objected to. After re-reading the statute, the court finally said:

> "And then the last three pages of the instructions specifically define if you find certain things set forth in those instructions, then your verdict should be so and so. Read those last three pages. I think that will cover the matter also. I am desirous of making the law as clear as possible, but I think they are clear."

The other instructions thus referred to included the following, given at the request of the defendant:

> "The court instructs you that the crime of pandering consists in the procuring of a place in a house of prostitution for one who becomes an inmate thereof. In order to complete this offense it must be proved to your satisfaction beyond every reasonable doubt:
>
> "First. That a place was procured in a house of prostitution for a female person; and,
>
> "Second. That, following such procuring of such place in such house, the female person for whom such place was so procured actually occupied such place or room in such house.
>
> "If either the first or the second of these elements is lacking, then the crime of pandering cannot be said to have been committed.
>
> "In this case I instruct you, therefore, that before you can find the defendant guilty of the crime of pandering you must find:
>
> "(1) That the home of the defendant at 1217 Temple street in the city of Los Angeles, was a house of prostitution, or house where prostitution was allowed or permitted by the defendant.
>
> "(2) That a place or room in such house was procured by the defendant for Dorothy Hall, and that the defendant induced or persuaded Dorothy Hall to enter said house and become an inmate thereof and occupy a room therein for the purpose of practicing prostitution.
>
> "(3) That following such inducement or encouragement of said Dorothy Hall by the defendant and in response to such inducement or encouragement on defendant's part Dorothy Hall did so enter defendant's home, become such inmate, and occupy a room for such purpose.
>
> "And unless you so find it is your duty to acquit the defendant of the crime of pandering.
>
> "The court instructs the jury that, if you find and believe from the evidence in this case that Miguel Mayo, otherwise known as Mike Flores, procured or persuaded or encouraged Dorothy Hall to enter the home of the defendant at 1217 Temple street in this city of Los Angeles, and that this defendant did not aid, abet, assist, or participate in procuring, or persuading or encouraging said Dorothy Hall to enter her home at said location, then your duty is to acquit the defendant."

[3] It is plain beyond dispute that the jury could not have understood and did not understand the court to charge that the defendant might be convicted of inducing, persuading, or encouraging the complaining witness to remain in the house of prostitution as such inmate. That branch of the statute was not included in count 1 of the information, and, although it was read to the jury both originally and on the second occasion when they were returned to court, their consideration was expressly limited throughout the charge, and, when the jury was again before the court, to the acts charged in count 1 of the information.

We are satisfied the evidence was sufficient to support the verdict under count 1, and that no prejudicial error is shown by the record.

Judgment and order affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; LENNON, J.; SEAWELL, J.; SHENK, J.; LANGDON, Justice pro tem.

(193 Cal. 609)

WORES v. IMPERIAL IRR. DIST. et al.
(L. A. 8011.)

(Supreme Court of California. May 29, 1924.
Rehearing Denied June 27, 1924.)

1. Statutes 🔑74(1), 76(1)—Act for government of irrigation districts of more than 500,000 acres not invalid as special legislation.

St. 1915, p. 1, providing for government of irrigation districts having an area of more than 500,000 acres, is not obnoxious to Const. art. 1, § 11, requiring general laws to have uniform operation, or article 4, § 25, subd. 33, prohibiting special laws where general one can be made applicable, especially in view of amendment of article 11, § 13, in 1914.

2. Constitutional law 🔑48, 70(1) — Question of classification primarily one for legislative power.

Question of classification of irrigation districts for governmental purposes is primarily one for legislative power, to be determined in light of its knowledge, and presumption is in favor of fairness and correctness of determination by legislative department, and that determination will not be overturned unless plainly without warrant in facts.

3. Waters and water courses 🔑231—Board of equalization of irrigation district may equalize assessments without formal petitions.

Under General Irrigation Act, § 38, board of equalization of the Imperial irrigation district could assume and exercise power to equalize assessments without presentation before it of formal petitions or requests by interested property owners.

4. Waters and water courses 🔑231—Court held not authorized to override conclusions of directors of irrigation district acting as board of equalization.

Reduction of 50 per cent. in valuation of properties within incorporated cities and towns and unincorporated subdivisions within the Imperial irrigation district, by the board of directors acting as a board of equalization, *held* not subject to review by the court under General Irrigation Act, §§ 37, 38, where complaints were made to the board and discussed, and no fraud was shown.

5. Waters and water courses 🔑231—Board of directors of irrigation district held empowered to provide income by tolls.

Under General Irrigation Act, § 55, board of directors of Imperial irrigation district *held* authorized, in addition to levying assessments, to provide income by tolls and charges for irrigation.

6. Waters and water courses 🔑231—Board of directors invested with large discretion in fixing tolls.

In fixation of tolls and charges for use of water, board of directors of Imperial irrigation district is invested with a very large discretion, and remedy of landowner for imposition of undue burden by assessments or tolls or both is that of effecting a change in directory.

7. Waters and water courses 🔑231—Board of directors of irrigation district not limited to 2 per cent. of aggregate value of lands.

Board of directors of Imperial irrigation district, in raising moneys required for uses and needs of district, actual or potential, is not confined to 2 per cent. of aggregate value of lands within district, under General Irrigation Act, § 39, as amended in 1915.

In Bank.

Appeal from Superior Court, Imperial County; George R. Freeman, Judge.

Action by Charles R. Wores against the Imperial Irrigation District and others. Judgment for plaintiff, and defendants appeal. Reversed.

Rehearing denied, MYERS, C. J., dissenting.

W. B. Mathews, of Los Angeles, and Phil D. Swing and Chas. L. Childers, both of El Centro, for appellants.

Harry W. Horton and Hickcox, Crenshaw & Trude, all of El Centro, for respondent.

RICHARDS, J. This is an appeal from a judgment of the superior court of Imperial county in favor of the plaintiff, in an action instituted by him against the defendant Imperial irrigation district and the members of the board of directors of said district, to have it adjudged and decreed that certain assessments, tolls, and charges levied, assessed, and imposed against the property owners and tax and assessment payers of said district are null and void, and that they be canceled, annulled, and set aside and that an injunction issue restraining said defendants and each of them from enforcing or collecting said assessments, tolls, and charges against the said plaintiff and the other property owners and tax and assessment payers of said district. The amended complaint of the plaintiff herein, in brief, alleges that on the 18th day of September, 1923, the then existing board of directors of the said Imperial irrigation district undertook to levy an assessment upon the lands within said district, through the passage and adoption of a certain resolution, wherein it was recited that the assessed valuation of the real property within said district, according to the equalized assessment rolls of said district, is the sum of $43,010,893, and that, after deducting from said valuation 15 per cent. thereof for anticipated delinquencies, there would remain a net valuation of said property in the sum of $36,559,259.05. It was therefore resolved by said board of directors of said irrigation district that it was necessary that the sum of $1,005,452.95 be raised by assessment for the general current expenses of the district during the ensuing calendar year and that it was necessary that the sum of $812,500 be raised by assessment to meet the interest due or that will become due on the outstanding bonds of the district on the 1st day of January and the 1st day of July of the next ensuing year; and to that end that there be and was thereby levied an assessment of 27.5 mills upon the dollar of said assessment valuation of said property for the general expenses of said district, and an assessment of 22.5 mills upon the dollar thereof to meet the interest due and to become due upon said bonds. The said complaint further alleged that the said board of directors of said district did also, by resolution duly adopted, elect, in lieu of levying all amounts required for 1924 by assessment, to in part fix rates of tolls and charges for the ensuing calendar year for the supply for irrigation and other public uses of the water furnished by said district; and, in arriving at the amount and rates of said tolls and charges, did estimate and fix such rates as would raise the sum of $1,489,500 by the sale of said water; and that the said board of directors of said district did accordingly, by resolution duly entered, adopt and fix a schedule of water rates to become effective on January 1, 1924, and wherein it was provided that the tolls and charges for water furnished for general irrigation throughout said district should be $1 per acre foot, except as otherwise in said resolution provided; that the charges for water furnished and used exclusively for washing, silting, and sluicing sand dunes or high land should be $1 for each delivery when water was available and not required for irrigation; that the charges for water service to school districts should be $1 per month; that the charge for service pipes not to exceed two inches in diameter for domestic and stock use should be $12 per year, payable semiannually in advance; that the minimum charge for water furnished to regular delivery gates for stock and domestic uses should be $1 per day. This resolution further provided that when the 1923–24 assessment on any particular tract of land assessed on the acreage basis was paid the owner of said tract should be entitled, upon presentation of his assessment receipt therefor, to receive thereon 2½ acre feet of water per acre upon his land and order without additional charge on or before December 31, 1924, provided said land is valued for assessment purposes at $100 per acre; but, if said land is valued at more or less than $100 per acre, then the amount of free water to which the owner thereof should thus become entitled should be increased or decreased in the ratio which the assessed valuation bears to $100. The amended complaint then proceeds to allege that the real property within the corporate limits of the cities of Calexico, El Centro, Holtville, Brawley, and Calipatria are not being assessed on an acreage basis within the meaning of the above resolution, although the said cities are within the lands comprising the Imperial irrigation district; and that is true, or the reason that on the 14th day of September, 1923, the said board of directors, acting as a board of equalization for said Imperial irrigation district, passed and adopted the following resolutions, viz.:

> "Resolved that the assessed valuation paid on all real estate within incorporated cities in the district is higher than its actual value and for the purpose of equalization the same ought to be and is hereby reduced 50 per cent. on each respective parcel."
>
> "Resolved that the valuations on the following subdivisions be and they are hereby reduced 50 per cent. from present assessed valuation as placed by the assessor of the district, Dixie, Heber, Niland, Seeley, Westmoreland."

The amended complaint alleges that these resolutions—

> "were adopted for the fraudulent purpose of throwing additional burden on plaintiff and all other district assessment payers owning land within said Imperial irrigation district and lying without the boundaries of said incorporated cities and unincorporated subdivisions, and that said reduction in said valuation was not made on any basis of actual cash or other value of said property, but made solely for the purpose of fraudulently relieving said real property within said incorporated cities and subdivisions from their just and fair proportion of the assessment thereafter to be levied for the year 1924 by said irrigation district, and also for the fraudulent purpose of throwing an illegal and unequal burden of taxes on the lands lying within said irrigation district and without said cities and subdivisions, and that unless said assessments hereinbefore purported to be made and levied by said board of directors and irrigation district is annulled and set aside this plaintiff and all other assessment payers in said district and owning property without said cities and subdivisions will be irreparably damaged and without any adequate recourse at law."

The amended complaint further and finally alleged that the estimated revenue of said irrigation district exceeds in substantial and gross amounts the legal estimated expenditures of said district as determined by said board of directors for the calendar year of 1924, and that said assessments are for that reason also illegal and void. Wherefore the plaintiff prays that the said assessments be adjudged null and void, and that the said defendants be restrained from the enforcement or collection thereof and of the tolls and charges imposed in aid thereof.

The amended answer of the defendants contains numerous denials of the averments of the plaintiff's amended complaint, but those which appear to be essential to the determination of the questions presented upon this appeal consist in their denials that in the adoption of the resolutions set forth in the plaintiff's amended complaint, or any of them, and particularly of those purporting to equalize the assessment of lands lying within said incorporated cities and unincorporated subdivisions, the said board of directors acted in any degree fraudulently or for the fraudulent purposes, or any of them, asserted in the plaintiff's amended complaint; and they deny that the reductions in valuations of the lands lying within said incorporated cities and unincorporated subdivisions were not made upon any basis of actual cash or other value of said properties, or that the same were made for the purpose of fraudulently relieving the owners of such properties of their just and fair proportion of the assessments to be levied for the year 1924. They admit that said reductions in the valuations of said properties were made solely upon the direction of the board of directors of said district, but deny that they were made solely upon the instigation of said board, or without any request therefor by interested persons, or that the same were made without valid reason or justification therefor, based upon the actual cash or other valuation of the property affected thereby. The defendants also deny that the estimated revenue of said irrigation district exceeds in substantial or any amounts the legal estimated expenditures of said district, or that the assessments levied by the board of directors of said irrigation district are illegal or void for that or any other reason. For a further and separate defense the defendants aver that the Imperial irrigation district is an irrigation district organized and existing under and by virtue of the California Irrigation District Act, approved March 31, 1897 (St. 1897, p. 254), and of the acts amendatory thereof and supplementary thereto, and that it is and ever since the organization has been a district having an area of more than 500,000 acres of land within its boundaries, all located within the county of Imperial, state of California. Wherefore the defendants pray that the plaintiff take nothing by his amended complaint.

The trial of the cause came on for hearing upon the issues as thus framed, and at its conclusion and submission the trial court made its findings of fact and conclusions of law wherein the court found that the board of directors of the irrigation district had duly and regularly adopted the several resolutions set forth in the plaintiff's amended complaint and admitted by the defendants' answer. The court then proceeded to find that the assessor of the Imperial assessment district had duly assessed all real estate located within the incorporated cities and the unincorporated subdivisions specified in the pleadings herein at the actual cash value thereof, and that the reductions in said valuations, as attempted by the two resolutions of the board of directors of said district were not made or based upon any basis of actual cash or other value of said properties, but were made and passed for the purpose of relieving the real property within said incorporated cities and unincorporated subdivisions from their just and fair portion of the assessment thereafter to be levied for the year 1924, and also for the purpose of throwing an additional burden of taxes upon the lands lying within said Imperial irrigation district, but without said incorported cities and unincorporated subdivisions, and that said reductions were made solely at the instigation or direction of said board of directors, and without any petition or request therefor being filed by any interested person and without any evidence or testimony being taken under oath, and without any evidence being presented in support of the change of valuations and without any valid reason or justification therefor based upon the actual or other valuation of any of said property. The trial court therefore concluded and found that said reductions were void. The court further found and concluded that the assessment as purported to have been levied by the board of directors of said irrigation district was illegal and void in any and all amounts that the same exceeded the amounts and purposes authorized by any of the provisions of Act 1726 of the General Laws of the state of California. The court further found that as to the rates of tolls and charges adopted by the aforesaid resolutions of said board these were also illegal and void to the extent that such tolls and charges exceed, together with the amount of the assessment levied by said board of directors, the amount that is provided and permitted to be raised by section 39 of the California Irrigation Act, and that the amounts to be raised by said tolls and charges are illegal and void as in addition thereto. As conclusions of law from its foregoing findings of fact, the trial court found that the assessment levied by the board of directors—

"is void as to any sum or amount in excess of the sum of $812,500, as and for the payment of interest due or to become due in the year 1924 upon the outstanding bonds of the Imperial irrigation district and a sum not exceeding 2 per centum of the aggregate value of the lands within said Imperial irrigation district according to the last duly equalized assessment roll thereof, and that plaintiff is entitled to an injunction against the collection or enforcement of any portion of the assessment or tax levied by the board of directors of the Imperial irrigation district in excess of, first, the sum of $812,500 found by said directors to be sufficient to raise the interest due or that will become due on all outstanding bonds of the said Imperial irrigation district on the 1st day of next ensuing January and on the 1st day of the next ensuing July; second, plus an amount not exceeding 2 per centum of the aggregate value of the lands within said Imperial irrigation district according to the latest duly equalized assessment roll thereof. Further that the collection or enforcement of rates of tolls or charges for the sale of water to any amount in excess of the sum of $812,500, plus an amount not exceeding 2 per cent. of the aggregate value of the lands within said Imperial irrigation district, according the latest duly equalized assessment roll thereof, is illegal and void, and that the plaintiff is entitled to an injunction against the enforcement or collection of tolls and charges for water by the said Imperial irrigation district for water ordered or to be delivered to lands within the Imperial irrigation district during the calendar year of 1924. Further, that the orders and resolutions of said board of directors reducing the values of the real property within the incorporated cities and unincorporated subdivisions within said Imperial irrigation district 50 per cent. are illegal and void, and the plaintiff is entitled to an injunction against the collection or enforcement of the assessment or taxes or the enforcement or collection of tolls or charges by said Imperial irrigation district, based upon such reduction or other than upon the assessed valuation of the property within said incorporated cities and unincorporated subdivisions as fixed and assessed by the assessor of said Imperial irrigation district."

It is to be noted that the court nowhere expressly finds or concludes that the board of directors of the Imperial irrigation district, or any of the members thereof, acted fraudulently in connection with the passage and adoption of any of the resolutions or other acts of the said board of directors of said district, having relation to the adoption or equalization of the assessments assailed by the plaintiff herein, or to the adoption of the resolution relating to the collection of tolls and charges for the use of the water of said district by the inhabitants thereof. The conclusion arrived at by the trial court as to the validity of the action of the board of directors of said district in the levy of the assessment in question, and the equalization thereof as to certain of the lands to be affected thereby, and as to the tolls and charges imposed upon the users of the water of said district, whether in connection with or addition to the amounts properly raisable by assessment, is apparently based upon its conclusion that the act of the Legislature, approved January 21, 1915, and entitled "An act to provide for the government irrigation districts having an area of more than 500,000 acres, etc." (Stats. 1915, p. 1), is void as special legislation, and hence that the Imperial irrigation district and its board of directors, which purported to act under the authority of said statute in their attempted levies of the assessments, tolls, and charges assailed in this action, were acting without authority of law and in violation of the provisions of the general irrigation acts which the act of 1915 was intended to supplement and alter with regard to irrigation districts having areas in excess of 500,000 acres in extent. The briefs of counsel herein are almost exclusively devoted to the discussion of this question, and to it we shall primarily direct our inquiry.

[1, 2] The main objection which the respondent urges to the validity of the act of 1915 is, first, that it is not a general law; and, second, that as special legislation it is invalid because it deals with a subject to which a general law could be made applicable. The act of 1915, as its title states, was an act to provide for the government of irrigation districts having areas in excess of 500,000 acres, and to provide additional powers for boards of directors of such districts. The act is both by its title and its terms supplementary of the General Irrigation Act approved March 31, 1897, and the subsequent acts amendatory thereof. It is the contention of the respondent herein that the act of 1915 is not a general law, for the reason that it is confined in its operation to the government of irrigation districts having an area of more than 500,000 acres, which, as the respondent contends, furnishes no proper basis for a classification. We are unable to agree with this contention. It may be stated as a general rule that the question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements. The presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination unless they can plainly see that the same was without warrant in the facts. "This," as was said by this court in the case of In re Cardinal, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850, "is but a statement of well-settled doctrines applicable in considering such questions as the one before us." See, also, Ex parte King, 157 Cal. 161, 106 Pac. 578; In re Martin, 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.) 242; Grumbach v. Lelande, 154 Cal. 679, 98 Pac. 1059; Gridley v. Fellows, 166 Cal. 765, 138 Pac. 365; Reclamation Dist. v. Riley (Cal. Sup.) 218 Pac. 762; Matter of Burke, 160 Cal. 300, 116 Pac. 755; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499.

Applying the principle enunciated and applied in the foregoing cases to the act before us, we are unable to say that a proper basis for classification does not exist in the case of irrigation districts embracing more than 500,000 acres of land. In the recent case of Tarpey v. McClure (Cal. Sup.) 213 Pac. 983, this court held, in construing the California Water Storage District Act of 1921 (Stats. 1921, p. 1727), that said act could not be said to be local or special, in that it provided for the initiation of proceedings under it either by a petition signed by the holders of a majority in value of the lands within the proposed district, or by not less than 500 landowners representing not less than 10 per-cent. in value of the land. Here was a classification based in some degree, at least, upon acreage of the larger water districts, but the act was held to be not the less a general law for that reason. It requires no labored reasoning nor undue stretch of imagination to arrive at the conclusion that irrigation districts having areas in excess of 500,000 acres may require the application of different rules and regulations for their government and for the raising of the necessary moneys for their successful operation than would be required for irrigation districts of smaller areas and of less diversified situations. The Imperial irrigation district seems to us to furnish an apt illustration of this. It lies along the west bank of the Colorado river, with its lands lower than the bed of that stream, and hence under the constant menace of disastrous overflow through breaches in the levees which restrain it. It embraces an area of more than 600,000 acres in California and of an additional several hundred thousand acres in Mexico. It owns and operates about 3,000 miles of main and lateral ditches fed from the waters of said river. It contains within its boundaries 5 incorporated towns and cities, and supports a population of about 50,000 people who are, in the main, either directly or indirectly employed in connection with the intensive production of the region made possible by the existence and activities of the irrigation district itself. It has in the past presented, and may at any moment in the future be confronted with, problems of water control requiring immediate and inestimable outlays of effort and money to restore safety and avert widespread, if not permanent, disaster. There would seem, therefore, to be obvious reasons why irrigation districts having the areas and subject to the conditions and possible emergencies of this one should have applied to them different methods of administration and finance than those applicable to districts of smaller areas and of a lesser diversity of conditions and eventualities. We are therefore of the opinion that the act of 1915 under consideration is a general law, for the passage of which a sufficient basis of classification existed. Looking to the title and terms of the act itself, we are also of the opinion that it is a general law having uniform operation upon all irrigation districts coming within its classification, and is not, therefore, obnoxious to section 11 of article 1 of the state Constitution. This conclusion disposes also of the respondent's contention that the act in question is in violation of subdivision 33 of section 25 of article 4 of the Constitution, which declares that the Legislature shall not pass local or special laws where a general law may be made applicable. It may be noted in this connection that the state Constitution, as to article 11, section 13 thereof, was amended in the year 1914 by adding to the former inhibition thereof against the passage by the Legislature of any law delegating to special commissions, private corporations, associations, or individuals power to deal with municipal affairs or to perform any municipal functions, the following exception, viz.:

> "Except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

While it is true that this court held in the case of Mordecai v. Board of Supervisors, 183 Cal. 434, 441, 192 Pac. 40, that in the exercise of these granted powers the Legislature is still subject to the general requirements of the Constitution governing the manner in which the power of legislation when conferred or possessed shall be exercised, and hence that the Legislature could not, under this grant of added powers, violate the provision of the Constitution requiring uniformity in the operation of general laws, still it must be conceded that, when this requirement of the Constitution is satisfied by finding a sufficient basis of classification in the attempted legislation, the Legislature, in all matters touching the regulation and conduct of the affairs of these classes of governmental agencies, has been given an enlarged discretion by the terms of the aforesaid amendments to the Constitution, and hence that very clear reasons must appear for whatever objections are urged against the particular provisions of a statute enacted subsequent to the adoption of said amendment to the Constitution before the courts would be justified in declaring them void.

These observations bring us to a consideration of the particular terms of the statute under review for the purpose of determining whether the changes wrought by it in the General Irrigation Act of 1897 and the amendments thereto, which it was designed to supplement, are to be deemed valid as within the discretion thus conferred upon the Legislature. The act of 1915, by section 1 thereof, provides:

> "The board of directors of irrigation districts having an area of more than five hundred thousand acres may expend such sums as may to them seem necessary for the protection of the canal system of such district or of lands within such districts from damage by flood and from the overflow of rivers and may contribute funds for that purpose to be expended by or jointly with the government of the United States of America, or other governments or persons benefited by the same protective work or works. The board of directors of any such irrigation district may also do all things necessary to insure such irrigation system and the lands within such district from any such damage by flood or overflow without first receiving a petition of landowners or freeholders for

holding an election to authorize such expenditure."

Section 4 of said act provides:

> "The board of directors of any such irrigation district shall within fifteen days after the close of its session as a board of equalization, levy an assessment sufficient to raise the annual interest on any outstanding bonds of such district and for any year in which any bonds shall fall due, must increase such assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature, also, sufficient to pay in full all sums due or that shall become due from the district before the time for levying the next annual assessment, also, sufficient to pay in full, the amount of any other contract or obligation of the district due or to become due within the succeeding twelve months and such further sum as, with the other revenue of the district, will meet the estimated current expenses of the district including cost of flood prevention for the succeeding twelve months."

The important change which the foregoing provisions of the act of 1915 makes in the powers and duties of boards of directors of irrigation districts, as defined by the General Irrigation Act of 1897 and the amendments thereto, is that the act of 1915 empowers boards of directors of the districts to which it applies to levy assessments for the purposes set forth in section 4 of said act, but without the limitation which was imposed by the General Irrigation Act through the amendment of section 39 thereof, adopted in 1911 (Stats. 1911, p. 514), and continued in force in the amendments of 1917 and 1919, restricting the amount of the annual assessments to a sum—

> "not exceeding two per centum of the aggregate value of the lands within the district according to the latest duly equalized assessment roll thereof, as the board of directors shall determine to be needed to be raised by assessment for any of the purposes of this act." Stats. 1917, pp. 751–765.

Neither the amendment to the General Irrigation Act made in 1917, nor that enacted in 1919 (St. 1919, p. 472) purported expressly or by implication to annul or affect the supplementary act of 1915 in the foregoing or any other respect, and hence cannot be given the effect of limiting the powers of boards of directors of districts affected by and operating under the act of 1915, relieved by it from such former limitation.

The conclusion that the act of 1915 under review is a general law and is valid as such answers every constitutional objection which the respondent urged against it, and leads to the inevitable deduction that the trial court was in error in that portion of its decision wherein the assessment levied by the board of directors of Imperial irrigation district is held to be void in so far as it exceeds the 2 per cent. limitation imposed by the terms of the General Irrigation Act as amended in 1911, 1917 and 1919.

[3, 4] The other questions involved in this appeal relate, first, to the regularity of the action of the board of directors of Imperial irrigation district sitting as a board of equalization with special reference to the reduction of the assessed valuation of those properties which lie within the limits of the incorporated towns and cities and of certain unincorporated subdivisions of lands within said district; and, second, as to the validity of the action of the said board of directors in fixing tolls and charges for the use of water by the users thereof within said district. As to the first of these questions the undisputed facts, as shown by the evidence in the case, are these: On or about September 1, 1923, the board of directors of Imperial irrigation district met as a board of equalization for the purpose of equalizing the assessment of the properties of said district which had theretofore been made by the assessor thereof for the current year. The said board met upon said date pursuant to the notice required to be given of such session by the provisions of section 37 of the General Irrigation Act, and which notice it is conceded was duly and regularly given. When thus assembled the board proceeded to act as such board of equalization under the powers conferred upon it as such by the terms of section 38 of said General Irrigation Act, which reads as follows:

> "Upon the day specified in the notice required by the preceeding section for the meeting, the board of directors, which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from time to time, as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections to the valuation and assessments as may come before them; and the board may change the valuation as may be just. The secretary of the board shall be present during its session, and note all changes made in the valuation of property, and in the names of the persons whose property is assessed; and within ten days after the close of the session he shall have the total value, as finally equalized by the board, extended into columns and added."

Acting in pursuance of the powers thus conferred, the said board of directors proceeded and continued to sit as a board of equalization during a period of about 10 days. The testimony as to what the board acting in that capacity did during that period is wholly contained in the testimony of Mr. Ira Aten, president of said board, Mr. F. H. McIvor, the secretary thereof, and Mr. Mark Rose, one of the members of said board. There was before the said board, during its session and proceedings as a board of equalization, a copy of the assessment roll which had theretofore been prepared by the assessor of said irrigation district. The trial court made certain findings with respect to the action and the regularity thereof of said board while sitting as a board of equalization, which, if supportable and if sufficient to support its judgment, must find such support in the testimony of the foregoing witnesses, and the action of the board thereof viewed in the light of the law applicable to the powers and duties of such boards of equalization. For example, the trial court found, with reference to the reductions in those valuations of the properties lying within incorporated towns and cities and also of those lying within certain unincorporated subdivisions:

> "That said reduction of valuations of said real property within said incorporated cities and unincorporated subdivisions was made solely from the instigation and direction of said board of directors and without any petition or request therefor being filed by any interested person, and without any evidence or testimony being taken under oath, and without any evidence being presented in support of the change of valuations, and without any valid reason or justification therefor based upon the actual or other valuation of any of said properties. That said reduction is void."

In so far as said finding purports to find that whatever reductions in said valuations were made by said board of equalization, were made solely from the instigation of said board, its findings in that regard are wholly unsupported by the evidence of these witnesses upon that point, which shows indisputably that during the 10 days' sessions of said board numerous complaints were made to the board and to the several members of the board, and which were by them conveyed to it that the valuations of city properties, as shown by said assessment roll, were too high, and that said board as a board, and also the individual members thereof, investigated these complaints, and that the members of said board discussed almost daily during the said sessions thereof as a board of equalization these complaints and the individual investigations made by its members as to the merits thereof.

In so far as the trial court, by its said findings, purports to find that whatever changes were made by said board in the valuations of the aforesaid properties were "without any valid reason or justification therefor based upon the actual or other valuation of any of said properties," the said evidence fails to support it, since the testimony of said witnesses upon that matter is to the contrary. The above-quoted finding of the trial court was apparently in its entirety based upon a misconception of said court as to the powers and duties of boards of equalization under the broad and general terms of section 30 of the General Irrigation Act above set forth. It is nowhere required therein that the board of equalization shall have filed with it or presented before it formal petitions or requests by interested property owners, or that evidence or testimony be taken under oath as a prerequisite to the assumption and exercise of power to equalize assessments. We are cited to no authority by the respondents herein which goes to the extent of holding that boards of equalization which are vested with the general power conferred by the said provision of the General Irrigation Act shall be required to have formal complaints in writing presented or filed before them or to have the testimony of sworn witnesses presented in order to the exercise of their equalizing powers and functions under said act. On the contrary, it is the general rule, supported by ample authority, that such formalities of procedure are not required. Rickard v. Council of Santa Barbara, 49 Cal. App. 58, 192 Pac. 726; Pierce v. Santa Barbara Co., 40 Cal. App. 302, 180 Pac. 641; Kansas Pac. Ry. Co. v. Comm'rs, etc., 20 Kan. 141; Fields v. Russell, etc., 38 Kan. 720, 17 Pac. 476; St. Louis, etc., R. R. Co. v. Surrell, 88 Ill. 535; Case v. Dean, 16 Mich. 12. The discussion of this subject brings us naturally to a question which is vital to the determination of the branch of this case under immediate consideration. That question is as to what power, under the facts of this case as disclosed by the undisputed evidence therein, the trial court or this court possesses to override the action and conclusions of the board of directors of said irrigation district acting as a board of equalization thereof in equalizing the property values within said district, in the absence of fraud or of a manifest abuse of its powers. In the case of La Grange, etc., Co. v. Carter, 142 Cal. 560, 565, 76 Pac. 241, this court declared the general rule applicable to the powers and duties of boards of equalization to be that—

> "A board of equalization of a county possesses great powers under our Constitution and statutes as to raising or lowering assessments. It seems, in the absence of fraud or malicious abuse of its powers, to be the sole judge of questions of fact and of the values of property. Such powers should be used with caution, after investigation, and with the sole purpose of doing equal and exact justice to each and every taxpayer, whether rich or poor, corporation or private citizen. To it the taxpayer can go for relief when assessed for more than his property is worth. To it the taxpayer may go when through fraud, favoritism, or ignorance of values some taxpayer is about to escape his just burden of taxation. We must presume in all cases that as a public official body it has performed his duty."

In the case of Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277, this court approved the foregoing rule and amplified it by the statement that—

> "It is not disputed that the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at and when not made in pursuance of some fixed rule or general system the result of which is

necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be. The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. (San Jose Gas Co. v. January, 57 Cal. 614; Henne v. Los Angeles Co., 129 Cal. 297 [61 Pac. 1081]. See, also, Gray on Limitations of Taxing Power, § 1460 [31 C. C. A. 537].)"

The court in that case, however, proceeded to say:

> "But it is likewise universally held that a taxpayer may so assail an assessment in the courts where it was 'fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes,' and it has that effect, or where there is something equivalent to fraud in the making of the assessment, producing such effect."

In the case of Southern Pacific Co. v. San Diego County, 183 Cal. 543, 191 Pac. 931, this court approved both the general rule and the exception to it as enunciated in the case last above cited but held that where it was shown to a board of equalization by evidence, without substantial contradiction or conflict, that certain property was assessed at nearly twice its real value, while other property similarly situated was assessed in pursuance of a "systematic, willful, and intentional scheme to so do, at not to exceed twenty-five per cent. of its real value," and that the board of equalization, with full knowledge of the existence of these facts, refused to take any other action than to deny the injured taxpayers' application for relief, such a situation would present a case showing "something equivalent to fraud" which would entitle the taxpayer to relief in the courts, regardless of the denial of his application by the board of equalization, and this entirely regardless of the motives of the members of the board. In the still more recent case of Birch v. Orange County, 186 Cal. 736, 200 Pac. 647, this court gave application to the same doctrine both in its general rule and in the exception, holding that "a grossly inequitable and palpably excessive overvaluation of property for taxation may be held constructively fraudulent," and cited a long line of cases in support of this conclusion. In both of the cases last above cited, and in all of the authorities upon which the aforesaid conclusion rests, it was made to affirmatively appear that there was no basis in reason or in the facts educed before the board of equalization in each case or before the court for any differentiation between the property subjected to the alleged unjust assessment and other properties of the same class similarly situated for purposes of taxation, and that no reasonable justification could be found or offered for the inequality of the assessment. In the case before us, however, no such situation exists. The properties with respect to which the board of directors of Imperial irrigation district undertook to exercise their discretion in making a horizontal reduction in their assessment were the lots and properties lying within the several incorporated towns and cities, and also those lying within certain specified subdivisions, all within the exterior boundaries of said district. It is obvious that as to such properties, when the same are being subjected to assessment for any purpose, a different principle and basis of valuation is to be applied than that applicable to acreage properties or agricultural lands lying outside of such towns, cities, or subdivisions, and that no proper comparison can be made as to such valuations upon the basis of acreage or of valuation for agricultural or like productive purposes. It is obvious that the assessor of this district must have recognized this differentiation between the bases of valuation of these two classes of the properties within said district in making up his assessment roll, and that if such assessment roll had been spread before us in this record it would disclose that he had done so. The question which was thus presented to this board of equalization was not as to whether the properties located within said incorporated towns and cities and said unincorporated subdivisions were as a whole assessed too high in comparison with the acreage areas of the district, but whether the assessment of these properties, considered as a whole, and in their own particular class for purposes of taxation, was too high as compared with the actual values of that class of assessable property. In the case of Los Angeles, etc., Co. v. County of Los Angeles, supra, this court pointed out that under the provisions of section 3673 of the Political Code county boards of equalization were invested with the power "to increase or lower the entire assessment roll, or any assessment contained therein," and we can see no reason why like power should not reside in the board of equalization of an irrigation district. The question thus resolves itself into the inquiry as to whether, upon the record before the trial court or before us on appeal, there is anything to show that in making the reduction of 50 per cent. in the valuation of properties within that particular class of property lying within those incorporated cities and towns or the particular unincorporated subdivisions enumerated in its order the said board acted either arbitrarily or in such grossly inequitable and palpable disregard of the actual valuation of said properties for purposes of assessment as to lead to the conclusion that their action in so doing was either actually or constructively fraudulent. We are entirely satisfied that there is no such showing upon the face of this record. As to any actual fraud, while it is true the plaintiff's amended complaint does charge in general terms that the said board acted fraudulently in the premises, not only was there no effort made to prove such averment, but the trial court entirely refrained from deciding that the said board acted fraudulently; while as to either constructive fraud or as to any arbitrary action on the part of said board the undisputed evidence shows that the subject of the excessive valuation of the properties in question was brought to the attention of said board by numerous complaints made both to the board and to the individual members thereof, and that it was the main topic of investigation and discussion during the ten days or more consumed in the sessions of said board sitting as a board of equalization. The only evidence upon which the respondent relies as a foundation for his averments or for the finding of the trial court as to the actual value of the properties thus subjected to a reduction in their assessed valuations is the assessor's rolls and the presumption arising therefrom that he has properly performed his official duty. But a similar presumption arises as to the performance on the part of the board of equalization of its official duty in the matter of equalizing said assessment, in addition to which the record shows not only a prolonged investigation as to the facts, but also an express finding on their part that the assessed valuation of said properties as shown by the assessor's figures was too high. In such a state of the record we are constrained to give application to the general rule above stated to the effect that the finding and conclusions of the board of equalization in the instant case and its order based thereon were not the proper subject of review by the court.

[5-7] The remaining subject for discussion and determination in this case refers to the regularity and validity of the action of the board of directors of the Imperial irrigation district, sitting as such, in adopting the schedule of tolls and charges which it did adopt and sought to impose upon the various classes of water users within said district. While the respondent herein makes a general assault upon the validity of the resolution of said board imposing tolls and charges for the use of the water of the district upon the users thereof, upon the ground that the said board, having already provided by the method of assessment for the raising of all funds required by the district during the ensuing year, had exhausted its power, and hence could not provide for the raising of additional sums of money beyond the needs of the district as thus fully provided for by means of tolls and charges, it is to be observed that the trial court does not follow the respondent thus far, but confines itself in its findings of fact, conclusions of law and judgment to holding that the resolution of said board fixing and imposing such tolls and charges is illegal and void "to the extent and amount that such tolls and charges exceed, together with the amount of the assessment levied by said board of directors, the amount that is provided and permitted to be raised by the California Irrigation District Act." In making this finding of fact and in the conclusion of law which follows it, and also in its judgment which adopts and embodies said conclusion, the trial court was evidently proceeding upon the misapprehension that the board of directors of said district in the matter of raising the moneys required for the uses and needs, actual or potential, of the district for the ensuing year were confined to the limitation of 2 per cent. of the aggregate value of the lands within said district as provided in the General Irrigation Act of 1897 and the several amendments thereto; but, since we have heretofore held herein that the said board of directors of said district under their enlarged powers under the act of 1915 applicable to said district are no longer subject to such limitation, it follows that the trial court was in error in that regard. As to the general strictures of the respondent upon the validity as a whole of such imposed tolls and charges and of the resolution of the said board imposing the same, we are of the opinion that they are unwarranted by the facts of this case. In the first place it nowhere appears, either from the evidence in the case or from the resolutions of said board of directors or from the findings of the court, what the actual or potential expenditures required to be made by or on behalf of said district during the current year would be, or what it was estimated they would be by said board in making said assessment. It has therefore been neither proven nor found that the sum or sums to be provided by said board of directors through the method of assessment do more than pay in part the necessary or potential outlays of the district for the current year. This being so, the power of the board of directors to provide for the raising of such additional money for the needs of said district, over and above that provided by the means of an assessment, is to be found within the terms of section 55 of the General Irrigation Act, which provides that—

> "The board may in lieu (either in part or in whole) of levying assessments as herein provided for, fix rates of toll and charges, for irrigation and other public uses declared by this act, and collect the same," etc.

The phrase in parentheses in the above quotation from said act plainly means that the board of directors may employ both methods of raising money for the purposes of the district as defined by law. In the fixation of tolls and charges for the use of its water by the various classes of users to whom it is to be supplied, the board of directors of the district is invested with a very large discretion by the general terms of the law giving that power, and which the courts ought not to interfere with in the absence of a clear showing of an abuse of that discretion. The remedy of the landowner or water user for the imposition of an undue burden by assessments or tolls or both is that of effecting a change in the directory of the district by the means provided in the acts relative to the selection of those who are from time to time intrusted with the conduct of the affairs of the district.

The judgment is reversed.

We concur: LENNON, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

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67 Cal. App. 103

PEOPLE'S STATE BANK v. PENELLO.

SAME v. BERTAINA.

(Civ. 2695, 2696.)

(District Court of Appeal, Third District, California. April 30, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Bills and notes 🔑497(5)—Indorsee of notes procured by fraud had burden of proving itself an innocent holder.

Indorsee suing on notes shown to have been procured by fraud had burden of proving that it was an innocent holder.

2. Bills and notes 🔑357, 497(2)—Proof that notes were assigned before maturity as collateral security held to sustain burden of proving that plaintiff was an innocent holder.

Proof that notes were assigned to plaintiff before maturity as collateral security for payment of debt *held* to sustain plaintiff's burden of showing that it was an innocent holder, shifting on makers the burden of showing circumstances creating presumption that plaintiff knew the facts impeaching their validity.

3. Bills and notes 🔑525—Evidence held insufficient to warrant inference that indorsee had knowledge of fraudulent inception.

In action by indorsee on notes given for purchase price of corporate stock, evidence *held* insufficient to warrant reasonable inference that indorsee had knowledge of fraud by which notes were procured at time of indorsement.

4. Bills and notes 🔑525—Evidence held insufficient to warrant inference that bank was holding notes for collection only.

In bank's action on notes procured by fraud and transferred to bank as collateral security, evidence that bank agreed to reduce notes to judgment and to apply proceeds to payment of payee's note to bank, and that it was not defraying expenses of litigation, *held* not to warrant inference that bank was holding notes for collection only.

5. Novation 🔑1—Corporation's execution of renewal note indorsed by stockholders held not to constitute "novation."

Corporation's execution of renewal note indorsed by stockholders *held* not to constitute novation under Civ. Code, §§ 1530, 1531, though original note to secure which the notes sued on were pledged as collateral security, was signed by the corporation only.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

6. Novation 🔑5—Rule as to establishment of novation by implication stated.

The release of original debtor by a novation cannot be established by implication, unless there is evidence showing facts and circumstances from which it might be reasonably inferred that the creditor intended to release the old debtor or to extinguish the old obligation.

7. Trial 🔑112—Limitation of argument to issue of attorney's fees held proper.

Where court directed verdict for plaintiff and submitted to jury merely the question as to attorney's fees, it was proper to limit the argument to such issue.

Appeals from Superior Court, Merced County; Stanley Murray, Judge.

Consolidated actions by the People's State Bank against B. Penello and against George Bertaina. Judgments for plaintiff, and defendants appeal. Affirmed.

F. W. Henderson and Henry W. Longsdorf, both of Merced, for appellants.

W. N. Graybiel, of Turlock, and Andrew R. Schottky, of Merced, for respondent.

YOUNG, Justice pro tem. These two actions were consolidated and tried together before the same jury. Judgments were rendered in favor of plaintiff on directed verdicts, and from these judgments the defendants appeal. The actions have been twice tried, and this is the second time that they are before this court. The first trial resulted in verdicts and judgments in favor of defendants, and upon appeals prosecuted by plaintiff, the judgments were reversed. See People's State Bank v. Penello, 59 Cal. App. 174, 210 Pac. 432. The actions were commenced on April 22, 1921, and they were first tried in October of that year. The trial resulting in these appeals was had in November, 1923. In each action the plaintiff, hereinafter referred to as the bank, sues on three promissory notes for the aggregate sum of $1,000, made by the defendant in favor of Hunt-Jewett-Bontz Company, a California corporation, and by it transferred to the bank. The notes were given for subscriptions for stock of the said company, and the defendants claim they were induced to sign them by fraudulent representations made by the stock salesmen. They admit the execution of the notes, but resist payment on three grounds, predicated on their fraudulent inception: First, that the bank took the notes with notice of the fraud; second, that the bank is a holder for collection only; and, third, that with notice of the fraud the bank entered into a new arrangement with the company, and with the assignee of the company, which said new arrangement constituted a novation and released defendants from liability. Practically the same defenses were made by the defendants in the first trial and it was held by this court on the former appeal in these causes that the evidence was insufficient to establish such defenses. On the second trial the trial court directed the verdicts for plaintiff upon the ground that the evidence was not sufficient to support these defenses, nor any of them.

The principal ground urged by defendants for the reversal of the judgments is that the court erred in directing the verdicts for plaintiff because there was substantial evidence showing, first, that the bank had notice of fraud, and, second, that the bank was a holder of the notes for collection only, and, third, novation.

[1] There was substantial evidence of the fraudulent nature of the representations made to induce the execution of the notes in suit. Indeed, the evidence on this phase of the cases was strong and convincing, and stands uncontradicted in the record. Proof of the fraud having been thus shown, the burden was cast upon the bank to show that it was an innocent holder of the notes. The rule governing courts in the determination of the sufficiency of the evidence in cases of this kind is set forth in Eames v. Crosier, 101 Cal. 260, 35 Pac. 873, as follows:

> "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities."

The rule is quoted with approval in Commercial Bank v. Moretti, 177 Cal. 256, 170 Pac. 419, and also in the opinion of this court in the former appeal of this action.

[2] The bank has shown in these cases that the notes in dispute were assigned to it before maturity as collateral security for the payment of a debt owing by the Hunt-Jewett-Bontz Company, assignor, to it as assignee. This being the case, the bank has sustained the burden cast upon it by the indorsement of the notes. It therefore follows that the burden rested upon the defendants to show that the bank took the notes under circumstances creating the presumption that it knew the facts impeaching their validity.

It is argued by the defendants that under the rule of law as above quoted they have sustained the burden of showing that the bank took the notes under circumstances which show that it had knowledge of the fraud, and they rely principally upon the evidence of J. E. Weaver, the president of the bank, called as their witness, to establish their contention. By the testimony of this witness it is shown that for months prior to the transfer of the notes in suit the company had been indebted to the bank in the sum of $10,300, evidenced by notes for $1,500, $5,600, and $5,000, respectively, the amounts due on the two former notes being $1,300 and $4,000, respectively. The loans were only partially secured, and payments were not being made. The bank knew of heavy losses by the company, and was dissatisfied with the condition of the loans, and urgently insisted upon a rearrangement. On July 16, 1920, in compliance with the demand of J. E. Weaver for payment of part of the loan and additional security for the balance, the company, acting through Bontz, paid the $1,300 note, and transferred the notes in suit and other notes to the bank. The principal part of Weaver's testimony relied on by defendants to show circumstances from which it can be inferred that the bank knew of the facts impeaching the validity of the notes, is, in substance, as follows:

> "At the time the bank took the notes I surmised in a general way that Hunt-Jewett-Bontz Company was heavily involved. I knew that the first year of their storing sweet potatoes there that they could not help but to have made a loss, because they stored a good many potatoes and they rotted to a great extent. I knew in a general way they were heavily involved. I suspected that they had not made any money, that was sure, but as to their actual condition I don't know to this day. I would not say what Mr. Bontz said to me as to what the company had taken the notes for. My understanding was that some of them had been for stock of Hunt-Jewett-Bontz Company, and others for seed potatoes. I knew the company was trying to sell stock. This note (one of the notes in suit) was the first note that the Hunt-Jewett-Bontz Company ever gave the bank indorsed by the principal stockholders. Since that time every note made by the company to the bank has been indorsed by the stockholders."

Weaver further testified in reference to a transaction had on May 17, 1921, when a new note was demanded of the company by the bank:

> "To make that clear, they (Mr. Hunt, Mr. Jewett, and Mr. Bontz) called upon us at the bank and in a conversation about the notes we entered into this agreement. The substance of it was that we would renew this note and give them six months in which to pay the balance on it if they would pay all except $5,000,

which they proceeded to do. And the question of these other notes came up that suit is being brought on. The suit had already been started before that, and we agreed with them that we would press the suit and give them credit on these notes for whatever funds came from them at any time that we made any collections on them. That is on any other notes we had, and they was to be given credit on this note regardless of its having been a time note, and for the remainder of this note they were to have six months in which to pay it off."

[3] We are satisfied that from the facts and circumstances shown by the evidence no reasonable inference can be drawn to the effect that the bank had knowledge of the fraudulent inception of the notes in suit at the time they were indorsed, and therefore the evidence would not furnish a sufficient basis upon which to rest verdicts in favor of the defendants, and it is our conclusion that the trial court did not err in directing verdicts on this issue.

[4] The contention of defendants that the bank is a holder of the notes in suit for collection only is based principally upon the fact that on May 21, 1921, the company's note for $5,000, held by the bank, for which these notes were held as collateral security, was renewed, and that at the time of the renewal the bank entered into an agreement with the principal stockholders of the company to press these suits and to apply the proceeds of its recovery against defendants to the credit of the company. We think that the bank's agreement to reduce these notes to judgment, and to apply the proceeds of any collection made by it to the payment of the company's note furnishes no evidence from which it might be inferred that it was holding the notes for collection only. If the credit of the company was impaired, as the evidence shows, it was to the interest of the bank to realize on its security and to reduce the company's indebtedness to it, if possible. Nor do we think that the further fact, shown by the evidence, that the bank is not defraying the expenses of this litigation, furnishes any evidence that the bank is a holder for collection only. It was to the interest of the bank to collect the notes without expense on its part, and for it to arrange with the company to pay expenses of the litigation was only a matter of business expediency. We think the evidence furnishes no issue on this point that should have been submitted to the jury.

[5] Defendants contend that the following transaction shows novation: The original note of the company for which the notes in suit were given as security was signed only by the company. The renewal note given in May, 1921, was indorsed by the stockholders of the company. We see nothing in this transaction that would not be reasonably expected as a matter of business prudence on the part of the bank. The company was involved, and the effort of the bank to obtain further security for the indebtedness is only evidence of business expediency on its part, and we think this transaction furnished no evidence upon which to submit the issue of novation to the jury, and the trial court was justified in directing the verdicts as to the same.

In October, 1921, the company made and delivered to the bank a note for $15,000, and at the same time executed a trust deed on real estate to secure the same. It is not shown that the indebtedness evidenced by the $5,000 note was included in this larger note.

Novation is the substitution of a new obligation for an existing one. Civ. Code, § 1530 It is made either by the substitution of a new obligation between the same parties with intent to extinguish the old obligation, or by the substitution of a new debtor in place of the old one, with intent to release the latter. Civ. Code, § 1531.

> "A renewal note does not extinquish the debt represented * * * for which it is given in lieu, unless there is a distinct and unqualified agreement that it shall so operate." Andrews v. First National Bank of Los Angeles, 55 Cal. App. 138, 203 Pac. 156; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273; Sather Banking Co. v. Briggs Co., 138 Cal. 724. 72 Pac. 352.

[6] Defendants argue that the release of the original debtor by a novation of a contract may be established by implication. It is conceded that such is the law. Such implication cannot arise, however, until there is evidence showing facts and circumstances from which it might be reasonably inferred that the creditor intended to release the old debtor or to extinguish the old obligation. We perceive that no such facts and circumstances have been shown.

It appears that the Hunt-Jewett-Bontz Company, in April, 1922, conveyed all its business and assets, both real and personal, to California Sweet Potato Corporation, subject to its liabilities, and that the grantee assumed to pay such liabilities; and it further appears that the Hunt-Jewett-Bontz Company thereafter became inactive in business, and that the California Sweet Potato Corporation has been paying the interest on the note held by the bank. It also appears that the bank knew that the interest was being paid by the California Sweet Potato Corporation. Defendant urges that this also shows novation. We think there is no substantial evidence of novation, and therefore that the court did not err in directing the verdicts.

Defendants complain of rulings of the trial court in sustaining objections to questions propounded by their counsel. There are many of these questions, and we can see no good purpose to be served in setting them out. An examination of these questions convinces us that no prejudicial error was committed by the trial court in the exclusion of evidence. Some of these questions were proper in form, and elicited evidence pertinent to the inquiry. An examination of the record shows, however, that as to each of them the evidence called for was produced in response to other questions. As to other questions, to which answers were not permitted, we are satisfied that the rulings of the trial court thereon were proper.

[7] The trial court limited the argument of counsel to the issue of attorney's fees, and defendants complain of this as error. Since the court properly directed the jury to return verdicts in favor of plaintiff on the main issue involved, and submitted to them the question as to attorney's fees alone, it was proper for it to limit the argument to the issue as to the attorney's fees.

Defendants complain of the ruling of the trial court in denying their motion for a new trial. No points are made as to this ruling not above discussed, and we think the court did not err in this ruling.

We think the judgments should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

(66 Cal. App. 584)

PYE v. EAGLE LAKE LUMBER CO. et al.

(Civ. 2686.)

(District Court of Appeal, Third District, California. April 16, 1924. Rehearing Denied May 15, 1924. Hearing Denied by Supreme Court June 12, 1924.)

1. Evidence 🔑113(1), 525—How value of "mill run" of a mill may be proved stated.

To prove value of "mill run" of any mill, a witness who, after showing knowledge of lumber market, of mill, and of forest from which it was cutting, could have been asked direct question as to what was market value as of specified date of such "mill run" as such mill and such forest would have produced, or such value could have been proved by the different grades in which "mill run" of that particular mill would sort, and the different percentages of each of these grades, and then by proof of the market value of these grades in their several quantities; "mill run" meaning the lumber that comes from the mill in the ordinary process of its operation.

[Ed. Note.—For other definitions, see Words and Phrases, Mill Run.]

2. Damages 🔑96—Sum to be awarded is for jury, where substantial damages are shown and their amount is difficult to ascertain.

In cases where substantial damages are shown, and their amount is entirely uncertain or extremely difficult of ascertainment, the sum to be awarded is a question for the jury, in the exercise of a sound discretion.

3. Damages 🔑6—That full amount of damages is speculative not ground for refusing damages.

That the full extent of damages must be a matter even of speculation is not ground for refusing all damages.

4. Evidence 🔑114—Proof of what "mill run" had been tended to prove what subsequent "mill run" would be.

What the "mill run" of a mill had been while delivering over 1,500,000 feet of lumber is some evidence of what it would be while sawing the next 1,400,000 feet.

5. Sales 🔑417—Evidence on question of damages for breach of contract to supply lumber held to support judgment.

In action for breach of contract to deliver first 3,000,000 feet board measure of mill run white pine lumber to be cut in defendant's mill, defendant having delivered only about one-half designated amount, testimony offered by plaintiff upon question of damages within rule announced in Civ. Code, § 3354, to show what would have been character of mill run of defendant's mill for period it would have been cutting lumber to supply the contract, in absence of its breach, *held* sufficient to support judgment for plaintiff.

6. Appeal and error 🔑1011(1)—Findings of trial court resting on conflicting evidence not disturbed.

Where evidence conflicted as to market value of lumber contracted to be delivered, at time of breach of contract, findings of trial court having support in the evidence will not be disturbed on appeal.

7. Sales 🔑409½, New, vol. 21A Key-No. Series—In action for failure to deliver to third person to whom plaintiff had agreed to resell such person held not necessary party.

Where contract between plaintiff and third person, which purported to assign to third person plaintiff's rights in upper grades of lumber to be delivered to plaintiff by defendant, amounted merely to resale to third person, and did not establish any privity between third person and defendant, third person was not necessary party in action by plaintiff for defendant's breach of contract.

8. Parties 🔑80(3)—Defendants' failure to plead nonjoinder in answer held waiver of right to object.

Defendants' failure to plead, in their answer, a nonjoinder *held* a waiver of their right to object to such nonjoinder.

9. Parties 🔑80(4)—General denial held not to raise issue of nonjoinder.

General denial in the answer *held* not to raise the issue of nonjoinder.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by B. J. Pye, doing business under the name of the California-Oregon Lumber & Box Company, against the Eagle Lake Lumber Company, and others. From a judgment against them, defendants Thomas Coulter and Frank L. Spencer appeal. Affirmed.

Butler & Van Dyke, of Sacramento, and Arthur C. Huston, of Woodland, for appellants.

J. J. Lermen and Oliver Ellsworth, both of San Francisco, for respondent.

SHIELDS, Justice pro tem. The Eagle Lake Lumber Company was a corporation maintaining and operating a sawmill at Termo, in Lassen county, California. It owned or had under contract 1,600 acres of timber land which it held in connection with its mill.

On June 25, 1919, the defendant Eagle Lake Lumber Company entered into a contract with the plaintiff whereby the company was to sell to plaintiff, the respondent herein, "the first 3,000,000 feet board measure of mill run white pine lumber" to be cut in the company's mill. The cutting was to begin immediately, and the plaintiff was to have all of the cut continuously until the entire 3,000,000 feet had been delivered, excepting that the company reserved the right to sell locally 200,000 feet board measure and 800,000 feet board measure to make into railroad ties. This contract left the rapidity with which the lumber was to be supplied, and the time in which its delivery should be completed, indefinite, and by a later supplemental contract it was provided that not less than ¾ of all of the cut of the mill during the period from June 25 to December 15, 1919, should be delivered to plaintiff, the respondent herein, and that during that time the entire 3,000,000 feet contracted for should be delivered. The contract made no provision as to what the quality of the lumber should be, other than that it should be "three million feet board measure of mill run white pine lumber," except that it was provided that the company agreed that unless the percentage of "No. 2 shop and better" white pine lumber sold under this agreement should equal 35 per cent. of the total, then that a readjustment of the contract price should be made on the basis of agreed prices for the different grades into which the lumber might be divided, of which the contract specified eight grades, designated as box lumber, numbers one and two shop, numbers one, two and three clear, and numbers one and two common board.

Under this contract the parties are in agreement that 1,526,210 feet of lumber were delivered, and that 1,473,790 feet remained undelivered. It is likewise undisputed that the conditions under which the defendant company failed to make delivery amounted to a definite breach of the contract. The defendants Coulter and Spencer were sued as stockholders of the defendant Eagle Lake Lumber Company. Judgment went against them in sums proportionate to their shares, and, from this judgment, these two defendants have taken this appeal.

[1] At the trial the parties were in substantial agreement that the measure of the plaintiff's damage, if any, was the difference between the contract price of the lumber, $22 per thousand, plus a slight cost for reloading, and the price at which similar lumber to that contracted for could have been purchased in the market nearest the place of delivery, as provided for in section 3354 of the Civil Code.

Out of the efforts of plaintiff to show what the market value of the undelivered portion of the lumber was arose the differences resulting in this appeal.

It will be noted that the lumber agreed to be delivered, and which defendant admittedly failed to deliver, was to have been "mill run white pine lumber" board measure. Appellants contend that the way in which to prove the market value of lumber thus described was to produce a qualified witness who knew the forest from which the lumber was to have been cut, and to ask him, in terms, what was the market value of such lumber as the "mill run" would have been from defendant's mill cutting logs from this forest. Respondent insists that there is no such grade of lumber as "mill run," and that the value of the lumber contracted for should be shown, and could only be shown, by finding out what grades the mill run from defendant's mill would sort into, and the percentages of the different grades, and then by proving the market values of the lumber in the different grades. It would seem that either method would be correct, provided it were properly done. There is no such grade of lumber as "mill run" known to the trade in the sense in which "box lumber" or "No. 1 clear," for example, are known. But the term, as a description, has a very definite meaning, and that is the lumber that comes from the mill in the ordinary process of its operation. "Mill run" of any one mill might differ from the "run" of any other mill, or a number of mills might so nearly approach each other in the character of the timber which they were sawing that their "runs" might be practically identical. The value of the "mill run" of any mill would, of course, depend upon the timber it was sawing, and whether or not this timber was of a kind which would produce a large or a small percentage of the higher quality and more valuable grades of commercial lumber.

To prove the value of the "mill run" of any mill, a witness could have been put on the stand, as contended for by appellants, and after showing knowledge of the lumber market, of the mill, and of the forest from which it was cutting, he could have been asked the direct question as to what was the market value as of a specified date of such "mill run" as such mill and such forest would have produced, and his answer would have been competent evidence. But that answer would have necessarily been based upon the quality of the "mill run" and the different amounts of the different commercial grades of lumber of which it was made up. On cross-examination, such a witness would have to develop this knowledge in great detail, or his testimony would be of no value. Respondent approached the matter from the other end. He sought to prove the different grades into which the "mill run" of this mill would sort, and the different percentages of each of these grades, and then to prove the market value of these grades in their several quantities. He contends that to prove the value of the different parts of the whole is, where the mere variety is not an element of value in itself, to prove the value of the whole. In this we think he is correct.

[2-5] Appellants insist that the evidence offered by respondent under this latter contention to show what the character of the "mill run" of the mill for the period it would have been cutting the lumber to supply the contract would have been, was insufficient. They contend that the defendant company had 1,600 acres of standing timber from which to cut; that, under the contract, it was not required to cut from any particular part of this timber, or, for that matter, that it was not even required to cut the lumber to fill the contract from their own holdings, and that no witness who did not know at least all parts of the company's 1,600 acres, and what the mill run from any part of it would have been, was qualified to testify as to the kind or quality of the lumber due to plaintiff under his contract. This contention cannot be followed; it leads too far. Sixteen hundred acres is a large tract. How much of it should a witness have known before being qualified to testify in this action? It can be readily seen that much of it might not have been available as a source from which to fill this contract. If it was all in one body, some of it might have been very distant and inaccessible. If it was not all in one body, some parcels of it might have been wholly beyond the bounds of practicable use. Some portions of the forest might have been of inferior timber which, in the exercise of good faith, the defendant could not have resorted to for the purposes of this contract. It must be recalled that defendant had but a limited time within which to cut the lumber due to plaintiff. The pressure of time might have confined defendant to the near and convenient "forties" which were examined by the witness White.

It may be contended that, if any of these conditions existed, the plaintiff should have shown them as part of his case. But this is not so, with reference to the other contention of appellants, that, under the contract, the defendant company was not even restricted in its freedom to select timber from which to supply the contract to that grown on its own land. If it was at liberty to go anywhere it saw fit for timber to saw while delivering its product to plaintiff, under its contract, then no witness would be qualified to tell what the "mill run" of that mill would have been during the time when it should have been filling plaintiff's contract. This would leave plaintiff in a condition where defendants would admit the breach of their contract and say that, because it was difficult for plaintiff to prove with exactness the amount of his admitted loss, he could recover nothing. This, of course, is not the law. In cases where substantial damage is shown, where the amount is entirely uncertain or extremely difficult of ascertainment, the sum to be awarded is a question for the jury, in the exercise of a sound discretion. The fact that the full extent of the damages must be a matter even of speculation is not ground for refusing all damages. 17 Corpus Juris, 756. "While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account. * * *" The law requires "only that the best evidence be adduced of which the nature of the case is capable." Kennett v. Katz Const. Co., 273 Mo. 279, 202 S. W. 558.

To the degree to which the damage in this case falls short of definiteness, it comes within the operation of this rule. It appears that the lumber which had been delivered, more than half of the amount contracted for, was of the grade claimed by the plaintiff to be due him in the undelivered portion. He contends that proof of what the "mill run" had been tended to prove what a later "mill run" would be. This claim seems reasonable. Clearly, what the "mill run" of a mill had been, while delivering over 1,500,000 feet of lumber, is some evidence of what it would be, while sawing the next 1,400,000 feet. In addition to this, the lumber piled in the yards, and which was seen by plaintiff and the witness White, was of the grade upon the basis of which plaintiff was given judgment. Logs were in the millyard which the testimony shows would give a "mill run" as high as plaintiff claimed he was entitled to. The witness White looked over "three or four forties," being from 120 to 160 acres of the defendant's standing timber. This was close to the mill, and immediately adjoining the land upon which the mill had operated while cutting the lumber already delivered. That the company had been cutting there, and that the timber seen by the witness White was adjoining it, and close to the mill, affords some evidence that that was the timber which would have been cut if the defendant had continued to cut and deliver the lumber contracted for. Particularly is this true where the company had but a limited time within which to deliver the lumber, with the probability that within that time it would not have been able, while continuing to cut and deliver the lumber, to have moved its logging operations, opened up roads, and done other things necessary to draw upon different or distant timber areas.

This same evidence disposes as well of the objection that the different grades of lumber within the "mill run" had not been shown. The evidence on this point was not strong; it fell far short of positive certainty and involved some element of presumption and estimate. But its weakness grew out of the nature of the breach in which defendants involved themselves. The thing to be determined was the quality of the "mill run" which a mill would have cut when it had, theoretically, 1,600 acres of timber to select from, or might have gone out and purchased stumpage over an indeterminate area. The manifest impossibility of doing this definitely necessitated resort to the less complete, but practically sufficient, evidence given in this case. That evidence was that the lumber already delivered had sorted into the grades and the percentages of these grades claimed by the plaintiff; that the cut lumber in the piles would run true to these percentages, and that fallen logs, ready for sawing, would do the same This was followed by the testimony of the plaintiff that the standing timber near the mill, and adjoining the area already cut over, was of this standard. It would seem that such testimony should support the judgment.

[6] Some question arose in the case as to the market value of the lumber contracted to be delivered at the time of the breach, and as to what was the time of the breach. Upon these questions the evidence conflicts. Under such circumstances the findings of the trial court, finding support in the evidence, will not be disturbed.

[7] A further contention of appellants, urgently insisted upon, is that plaintiff had parted with all interest in the contract sued upon, in so far as it related to that portion of the "mill run" contracted for, which was of the grade of number 2 shop, or better. It is claimed that this was effected through the contract of December 2, 1919, made by plaintiff and Swayne & Hoyt. The matter has been argued upon the assumption that this contract amounted to a complete assignment of all of plaintiff's interest in the contract, with respect to all of the "upper" grades due under it. But the instrument is not of this character. While it purports to "sell and assign," to Swayne & Hoyt, all of plaintiff's rights, under the contract, in so far as the upper grades of lumber are concerned, it really amounts to no more than a resale of such lumber to these parties. The lumber, as shipped, is to be paid for by Swayne & Hoyt to plaintiff. The plaintiff is to keep the lumber covered by the contract insured. When Swayne & Hoyt wanted lumber shipped to them under this contract, they were to give shipping instructions to plaintiff, and not to defendants, and plaintiff was to forward such instructions to the defendant Eagle Lake Lumber Company. Notwithstanding defendants' knowledge of this contract, no privity was ever established between them and Swayne & Hoyt. Under these conditions, Swayne & Hoyt were not necessary parties to this action.

[8, 9] It would seem, further, that if this agreement between Swayne & Hoyt and plaintiff was an assignment, as claimed by defendants, and that thus they should have been made parties to the action, defendants waived their right to object on this ground by failing to plead this nonjoinder in their answer. Defendants insist that their general denial amounted to such a plea. But in Russ v. Tuttle, 158 Cal. 226, 110 Pac. 813, where the answer, among other defenses, contained a general denial, it was held that the issue of nonjoinder was not properly raised.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

66 Cal. App. 732

WHITE v. COVELL. (Civ. 2654; Sac. 3462.)

(District Court of Appeal, Third District, California. April 25, 1924. Hearing Denied by Supreme Court June 23, 1924.)

1. Negligence ⟹111(1)—Complaint for negligence as to infant leading horses held sufficient.

A complaint alleging negligence on the part of defendant in having plaintiff infant lead horses while sitting in automobile *held* to state cause of action.

2. Judgment ⟹18(2)—In testing sufficiency of complaint as basis for judgment, averments not supported by evidence should be eliminated.

In testing sufficiency of complaint as basis upon which to rest verdict and judgment, averments not supported by proof should be eliminated.

3. Negligence ⟹108(2) — Pleader need not use term "negligence."

In stating cause of action based upon negligence, general rule is that it is not necessary for pleader to use term "negligence," if conclusion of negligence can be drawn from facts stated.

4. Negligence ⟹108(2)—Complaint held to support verdict, though word "negligence" not used.

Complaint alleging that defendant had plaintiff twelve year old boy lead horses while sitting in automobile, when he knew it was dangerous for plaintiff to lead horses, and that they were likely to pull back, *held* sufficient to support verdict and judgment, though there was no averment that defendant was "negligent."

5. Negligence ⚿134(1) — Finding of negligence in causing boy to lead horses held not against evidence.

Finding of negligence in causing boy twelve years old to lead horses while sitting in automobile *held* not against the evidence.

6. Master and servant ⚿405(2)—Finding boy was not employé sustained.

In action for injuries to boy when leading horses while sitting in automobile, evidence *held* sufficient to sustain finding that the boy was not an employé of defendant, and therefore that Workmen's Compensation Act (St. 1917, p. 831) did not apply, and court had jurisdiction of his action for personal injury.

7. Negligence ⚿138(1)—Instruction held not objectionable as not stating acts complained of were negligently done.

An instruction that, if jury believed that defendant did acts therein specified which resulted in injury to plaintiff, and if they further believed that in doing such acts he did not act with care and forethought, plaintiff was entitled to recover *held* not objectionable as not founded on hypothesis that acts were negligently done.

8. Master and servant ⚿332(4)—Instruction as to liability for acts of servant held proper under evidence.

In action for injuries to twelve year old boy, received when leading horses while sitting in automobile, instruction that defendant was liable for acts of his servant was proper, though plaintiff and his witnesses testified that defendant himself directed plaintiff to lead the horses from the automobile, where defendant and his witnesses testified that he did not instruct plaintiff with regard to leading horses, but that his servant did.

On Hearing in Supreme Court.

9. Trial ⚿296(12)—Definition of negligence held not error or misleading in view of other instructions.

An instruction defining negligence as a failure "to act with care and forethought," *held* not incorrect or misleading, where other instructions were given in which negligence was accurately defined.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Henry Gordon White by his guardian ad litem, H. L. White, against George F. Covell. Judgment for plaintiff, and defendant appeals. Affirmed in District Court of Appeals, and hearing denied in Supreme Court.

L. J. Maddux, of Modesto, for appellant.

Hawkins & Hawkins, and J. W. Hawkins, all of Modesto, for respondent.

YOUNG, Justice pro tem. [1] In this action instituted by plaintiff to recover damages for personal injuries a verdict was returned in his favor against defendant for $5,000. Judgment followed, and defendant appeals.

The first point urged by defendant for a reversal of the judgment is "that the complaint does not allege any negligence on the part of the defendant."

It is averred in the complaint that plaintiff—

"was, by reason of his tender years, susceptible to the influence of the said George F. Covell, and easily dominated by him, and was by reason of his tender years not able to comprehend the danger hereinafter specified and set out.

"That on the said 27th day of August, 1920, in the county of San Joaquin, state of California, the defendant directed said Henry Gordon White to get into an automobile and to lead six horses of defendant. That said horses of defendant had, up to that moment, been in pasture, and one of said horses was four years old and had been broken in the spring of 1920, and was wild; that another of said horses was a spirited horse, wild, and what is commonly known as a 'kicker.' That all of said horses by reason of having been out on pasture were frisky and full of spirits. That by reason of said horses being frisky and full of spirits they were likely to object to being led and were likely to pull back; and defendant knew that said horses were frisky and full of spirits, and that one of said horses was wild and commonly known to be a kicker, and that one of said horses was only four years old and had been broken in the spring of 1920, and knew that, by reason of these facts that said horses were likely to pull back and would pull back, and would object to being led, and knew it to be a fact that if said horses would pull back, if a person was leading them, the lead rope would be jerked in the hands of the person leading said horses, and would injure and harm the person leading said horses. That preparatory to leading the horses defendant caused one of said horses to be harnessed, and the other five horses to have halter chains placed in their halters, and had halter chains attached to the harness of the harnessed horse. That defendant caused a rope to be attached to the halter of the harnessed horse for the purpose of leading said harnessed horse, and on said date, defendant, well knowing said horses were likely to pull back upon being led, and well knowing that it was dangerous to lead said horses, and if they would pull back the leader of said horses would in all probability be injured, directed the said Henry Gordon White to get into said automobile and to lead said horses. That the servant of said defendant was in said automobile, and he was directed to run and operate said automobile, and said automobile was under the sole charge and control of defendant. That, when said defendant directed said Henry Gordon White to get into said automobile and lead said horses, said Henry Gordon White did get into said automobile and took hold of said lead rope attached to the halter of said harnessed horse and wrapped it around a projection of said automobile, but the defendant commanded and directed that said Henry Gordon White unwrap said rope from said projection and to lead said horses directly by said rope. That the said Henry Gordon White complied with said demand of defendant, and the servant of defendant, under the direction of defendant, started said automobile, and defendant caused said horses to follow behind said automobile. That while said horses were being so led by the said Henry Gordon White behind said automobile, and while he had the said rope in his hand as demanded and requested by the defendant aforesaid, said horses pulled back and jerked the rope by which the said Henry Gordon White was leading said harnessed horse and by reason of said jerk the rope was pulled in the hand of Henry Gordon White and his hand was pulled against the side of said automobile, and the fingers of plaintiff's left hand were cut off by said rope, and by reason thereof plaintiff's left hand has been permanently injured to his damage in the sum of $50,000.

"That at the time the said defendant directed the said Henry Gordon White to get into his said automobile the said Henry Gordon White was a minor, and was of the age of twelve years, and was by reason of his tender age unfamiliar with leading horses or the habits of said horses, and was ignorant of the fact that said horses might pull back and might jerk the rope in his hands and might injure him, and the said defendant well knew that the said Henry Gordon White was of the age of twelve years, and was inexperienced, and did not know that he was likely to be injured and hurt if said horses did pull back."

A general demurrer to the complaint was overruled by the trial court. Defendant does not complain of this ruling, but his contention is that the only allegations in the complaint which state facts sufficient to constitute a cause of action are those in reference to the nature and character of the horses, and that those allegations are not supported by any evidence, and should therefore be eliminated from the complaint in considering its sufficiency to support the verdict and judgment, and that, if they are eliminated, the remaining allegations, if supported by the evidence, do not state sufficient facts to constitute a cause of action, for the reason that the acts of the defendant therein complained of are not charged to have been negligently done, and are not such facts as constitute negligence, unless negligently done, and therefore do not furnish sufficient complaint upon which to base the verdict and judgment.

[2] There is evidence which tends to establish the averments as to the nature and character of the horses, but there is no direct evidence showing that the plaintiff received his injuries as a result of anything that the horses did in consequence of their peculiar nature or character, and therefore, in testing the sufficiency of the complaint as a basis upon which to rest the verdict and judgment, it may be conceded that these averments should be eliminated.

[3] In stating a cause of action based upon negligence, the general rule is that it is not necessary for the pleader to use the term "negligence," if the conclusion of negligence can be drawn from the facts stated. Silveira v. Iverson, 125 Cal. 266, 57 Pac. 996; South v. County of San Benito, 40 Cal. App. 13, 180 Pac. 354.

In the case of Silveira v. Iverson it is held that—

> "In cases where the facts stated do not constitute a cause of action unless done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence."

To the same effect is the opinion of the court in South v. County of San Benito, supra.

Defendant cites these cases as authority to support his contention that the complaint here under consideration does not state a cause of action. He argues that the facts stated are not such facts as constitute a cause of action, unless done negligently, and, further, that the facts themselves, as stated, do not necessarily exclude every hypothesis other than that of negligence, and therefore the complaint is bad for the reason that the facts stated are not alleged to have been negligently done.

[4] From the facts stated in the complaint as to the age and want of experience of plaintiff in leading and handling horses, and defendant's knowledge thereof, together with the averments that plaintiff was susceptible to the influence of defendant and easily dominated by him, the law raises the duty on the part of defendant not to place plaintiff, while so under the influence and domination of defendant, in a position which he, defendant, knew to be dangerous, and which the plaintiff did not know to be dangerous. A violation of that duty is shown by the further averments in the complaint that defendant directed the plaintiff to get into the automobile and lead the horses, and that he knew that it was dangerous for plaintiff to lead the horses, and knew that the horses were likely to pull back and jerk the rope in plaintiff's hand, and knew that, if they did pull back and so jerk the rope, plaintiff was likely to be injured thereby. These averments, followed by the further allegations that plaintiff did get into the automobile to lead the horses, and that as a result thereof the plaintiff sustained injury, bring to the complaint all the elements essential to the statement of a cause of action. See 29 Cyc. 419, 569. And such facts themselves, as stated, necessarily exclude any hypothesis other than that of negligence, and hence the complaint, independent of the averments as to the nature and character of the horses, states a cause of action.

[5] The second point raised by defendant is "that the verdict and judgment is against the evidence." Defendant testified that he did not direct the plaintiff to get into the automobile and lead the horses, but that it was Cowan, the brother-in-law of plaintiff, who directed him to do so. The plaintiff, Cowan, and Mrs. Cowan all testified that defendant directed the plaintiff to get into the

automobile and lead the horses, six in number. They further testified that defendant placed the lead rope in plaintiff's hand and directed him to keep the coil of the rope on the running board of the car, and that he told plaintiff that he might get his feet tangled in the rope if the coil was kept in the car, and further that he remonstrated with plaintiff when plaintiff was endeavoring to fasten the rope on an iron projection on the side of the automobile, and told him that to do so might pull the top off. Indeed, the defendant himself testified that plaintiff started to tie the rope around the bow of the top, "and I told him if he done that he would pull the top off." The evidence shows that plaintiff received his injury August 27, 1920. Plaintiff's father testified that the plaintiff was born October 20, 1907, and that he had never harnessed or led any horses. Plaintiff also testified that he had never led or handled horses in any way. Defendant testified that he was 56 years old, and that he had been doing ranch work practically all of his life, and worked horses and led horses ever since he was a boy.

From the testimony of plaintiff, Cowan, and Mrs. Cowan the jury was justified in finding that defendant directed plaintiff to get into the automobile and lead the horses. From defendant's own testimony they were justified in drawing the inference that defendant knew that the horses were likely to pull back and jerk the rope in plaintiff's hand, and that, if they did so, plaintiff was likely to be injured. From the testimony of plaintiff's father as to plaintiff's age and want of experience in handling horses the jury were justified in drawing the inference that plaintiff did not know that it might be dangerous to lead the horses. They were also justified in drawing the inference from this testimony that defendant knew, or should have known, that plaintiff was young and inexperienced in handling horses. It is not disputed that plaintiff was injured in the manner alleged. It therefore appears that the evidence supports the verdict and judgment.

[6] The third point contended for by defendant is that the court had no jurisdiction of the case, for the reason that if there was any relationship between plaintiff and defendant it was that of employee and employer, and the defendant was insured with the State Compensation Insurance Fund for all damages to all employees, and that the Industrial Accident Commission of California had exclusive jurisdiction over the case, and that the superior court of the county of Stanislaus was without jurisdiction.

The evidence shows that defendant was insured as claimed by him, and that his insurance was in full force and effect at the time of plaintiff's injury. It appears from the evidence, without conflict, that Mark Cowan, plaintiff's brother-in-law, was defendant's foreman on his ranch, and that he had authority to hire laborers on the ranch, and to draw checks in payment for labor; that at the time plaintiff was injured he was visiting his sister on defendant's ranch, and had been there for a couple of days. Defendant, who resides in Modesto, came to the ranch in the afternoon of that day, and directed Cowan, his foreman, to go with him to a ranch known as the Swan Ranch, some six miles distant, to bring his ranch horses from pasture. Defendant testified that when he directed Cowan to make preparations to go for the horses that he heard Cowan call to plaintiff, but that he did not hear what was said between them. The testimony of plaintiff and Cowan was to the effect that, while preparations were being made to go for the horses, plaintiff said to Cowan when he saw a saddle brought out, "I can ride a horse better than you. I will go along and ride the horse." Cowan testified that he did not hire plaintiff to help with the horses, and did not ask him to go to help with the horses. Plaintiff testified that before going for the horses he asked his sister if she thought he would be paid for helping with the horses, and she told him he would not, and that he said he would go along anyway and ride the horse.

Plaintiff was asked by defendant's counsel if he had not told one W. J. O'Connor at defendant's house in a conversation about his injury, that before he went for the horses that he had asked his sister, Mrs. Cowan, if he would be paid for going, and that she had told him that he would be paid. Plaintiff denied that he had so stated. O'Connor was not produced to contradict him. The defendant, however, testified that he had heard the conversation, and that plaintiff had told O'Connor that he went into the house and asked his sister if he would get paid for going on this trip for the horses, and she said, "Sure."

It appears from the evidence that Mark Cowan, as defendant's foreman, prepared an application and sent it into the State Compensation Insurance Fund in an effort to recover compensation for plaintiff's injuries. Plaintiff, however, had no part in this. Cowan testified that he filled out the blank application in obedience to the order and instructions of defendant, and he further testified that defendant first made out a blank in pencil, and directed him to copy the same, which he did.

It also appears that on September 23, 1920, nearly a month after plaintiff was injured, that Mark Cowan, as defendant's foreman, drew a check in favor of plaintiff for $2, intended as payment to plaintiff for his services in helping with the horses on the afternoon that he received his injury. Cowan testified that he did this because defendant insisted on his doing so. In his own language he stated:

"Mr. Covell kept after me until I finally made it out. I didn't want to do it at the time, but I didn't want to leave the ranch at the present time. He kept saying, 'I ought to pay the boy for the half day's work.'"

This check was mailed to plaintiff by defendant, but was not accepted by him. We think the jury was fully justified in concluding, as indicated by the verdict, that plaintiff was not in the employ of defendant at the time he was injured.

[7] In the court's instructions to the jury, instruction 4, given at the request of plaintiff, was as follows:

> "If you believe from the evidence in this case that the defendant in substance told Henry Gordon White to get into the automobile in which Henry Gordon White was riding at the time of the accident, and told said Henry Gordon White to lead the horses, and that the said Henry Gordon White at the request of said defendant did get into the automobile and did lead said horses, that said Henry Gordon White at that time was twelve years old, that said defendant in telling said Henry Gordon White to get into said automobile and lead said horses did not act with care and forethought, and that the horses pulled back and resulted in injuring the left hand of Henry Gordon White, and defendant's instructions were the proximate cause of such injury, and Henry Gordon White was not at that time in the employ of defendant, and was not himself guilty of negligence directly contributing to his injuries as in these instructions more particularly explained to you, then I charge you your verdict should be in favor of the plaintiff for such sum as from the evidence you find he is entitled, not to exceed the amount prayed for in the complaint for general damages, to wit, $50,000."

Defendant urges that this instruction leaves out the element of negligence, and that it was error to instruct the jury that the state of facts suggested therein entitled the plaintiff to damages for the reason that such facts and acts were not alleged to have been negligently done by defendant. We perceive this to be a proper instruction. The jury were thereby instructed that, if they believed defendant did the acts there specified which resulted in injury to plaintiff, and if they further believed that the defendant did not act with "care and forethought" in the doing of those acts, plaintiff should recover, this was tantamount to an instruction that if they believed that defendant negligently did the act specified, and that as a result the plaintiff suffered the injury complained of, that he was entitled to recover. Negligence had been defined to the jury as follows:

> "Negligence, as the term is used in the law, is a recognized ground of legal liability. Every person in the conduct of his affairs is under a legal duty to act with care and forethought, and, if injury results to another from his failure so to do, he may be held accountable in an action at law."

The word "negligence," as used when stating a cause of action, is merely a term employed to express the elements of which it is composed, and, if the very elements themselves which compose negligence are employed by the pleader, instead of the term "negligence," the statement of the cause of action is not impaired thereby, for the reason that the elements themselves which furnish the very foundation of the action can have no less force and significance than the word "negligence," which is a term permissive under the law, to express the equivalent of those elements.

Defendant complains of the following instruction given at the request of plaintiff:

> "If you believe from the evidence in this case that Henry Gordon White was not in the employ of defendant and that defendant was negligent in the manner complained of in the complaint, and that plaintiff was injured, and the proximate cause of such injury was the negligence of the defendant specified in the complaint, and that plaintiff was not guilty of negligence directly contributing to his injuries as in these instructions more particularly explained to you, and there was paid in his behalf for which he is responsible $56.85 hospital charges, and he is indebted $50 for medical attention, then I charge you that you should find that plaintiff is entitled to recover from defendant said sums in addition to the general damages, if any, you find he is entitled to recover from defendant."

Defendant urges that this instruction was predicated upon negligence alleged in the complaint, and was misleading to the jury for the reason that there was no negligence alleged in the complaint. Since we have concluded that the facts as stated in the complaint are sufficient to charge the defendant with negligence, our observations with respect to the allegations of the complaint dispose of defendant's contention as to this instruction.

[8] Defendant also complains of the following instruction given at the request of plaintiff:

> "An employer is liable for the results of the negligence of his employee, if the acts of negligence are committed by the employee while acting in the scope of his employment for his employer. And if you believe from the evidence that Henry Gordon White, at the time of the accident, was not an employee of defendant, and that he led the horses at the command and direction of Mark Cowan, and that Mark Cowan was the manager of the ranch of the defendant, and was acting at that time within the scope of his employment, and the said Henry Gordon White at that time was twelve years old, and that the said Mark Cowan, in commanding or directing the said Henry Gordon White to get into the automobile and lead said horses, did not act with care and forethought, that the horses pulled back and resulted in injuring the left hand of Henry Gordon White, and that said plaintiff was not guilty of negligence which directly contributed to his injuries as in these instructions more particularly explained to you, and Mark Cowan's instructions were the proximate cause of the injury, then I charge you that, if you find that Mark Cowan did so instruct Henry Gordon White to get into said automobile and lead said horses, and was thereby negligent, then the defendant is responsible,

and the plaintiff is entitled to damages in such a sum as from the evidence you find he is entitled, not to exceed the amount prayed for in the complaint for general damages, to wit, $50,000."

Defendant does not question the correctness of this instruction in stating the law as to an employer's liability for the negligence committed by his employee in the course of his employment, but he urges that this instruction is contrary to the theory and testimony of plaintiff, inasmuch as plaintiff and his witnesses testified that it was not Cowan who directed plaintiff with respect to leading the horses. It is true that plaintiff and his witnesses did so testify, but it is also true that defendant alleged in his answer, and testified at the trial, that he did not instruct plaintiff with regard to leading the horses, but that it was Cowan who did so; therefore an issue was made by defendant's pleading and his testimony as to whether it was he or Cowan who directed the plaintiff to lead the horses. It was proper for the court to instruct the jury as to the law applicable to defendant's liability for the negligence of his employee, so that, if the jury believed the testimony of the defendant, they would be properly advised as to the law applicable to the facts, in the event that they also believed that Cowan, in giving such directions to plaintiff, was acting within the scope of his employment.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [9] The application for transfer and hearing by this court after decision by the District Court of Appeal is denied. In addition to the instructions quoted in the opinion of that court, defining negligence as a failure "to act with care and forethought," other instructions were given in which negligence was accurately defined, and the degree and quantum of care required of the parties were fully and correctly described. Read in the light of these other instructions, the definition contained in the quoted instructions cannot be said to be either incorrect or misleading.

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67 Cal. App. 175

PEOPLE v. COSTA. (Cr. 1058.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1924.)

1. Homicide 🔑212—Defendant has right to show dying declarations of decedent.

Defendant has a right in a murder prosecution to show dying declarations of decedent.

2. Homicide 🔑216—Objection to question seeking to elicit an answer to serve as foundation for introduction of decedent's dying declarations held improperly sustained.

An objection to a question asked witness in a murder prosecution, seeking to elicit an answer which would serve as a foundation for introduction of decedent's dying declarations upon ground that no foundation was laid, was improperly sustained.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Louis Costa was convicted of manslaughter, and he appeals. Reversed.

John Hyland and Byron M. Marble, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. Defendant was charged with the crime of murder. He was found guilty of manslaughter, and now appeals from a judgment of conviction and from an order denying his motion for a new trial. The grounds advanced for a reversal of the judgment are two: First, errors of the court in sustaining objections to questions asked on behalf of the defendant for the purpose of proving certain dying declarations of the deceased; second, errors of the court in refusing to give certain instructions offered on behalf of the defendant.

Defendant killed the deceased, Edward Farmer, on Monday evening, September 17, 1923, in the city of Los Angeles. On Saturday, immediately preceding this evening, there had been some controversy between the two, at which time the deceased said to the defendant, "I am going to get you, or you are going to get me." Whereupon, according to the testimony of the defendant, he walked away from the deceased to avoid trouble. Defendant and the deceased were both members of the order of Eagles, and it was in the Eagles' clubrooms in that city where the above-mentioned controversy took place. The defendant further testified that on the night of the homicide he attended a meeting at the clubrooms of the degree team of the order of which he was a member; that on this evening he took with him his pistol, a 25 automatic, fearing that he might have trouble with the deceased. He went to the clubrooms and remained there until a little after 10 o'clock, when he decided to go home. He walked out of the clubhouse onto Sixteenth street, being the street on which the clubhouse faced, and then went towards Georgia street, which is the next street west of the clubhouse, running at right angles with Sixteenth street. Defendant then walked west on Sixteenth street, and was attacked by deceased in the following manner:

"Well, the first thing I was startled with, why, was a blow on the back of the neck. So

I turned around real quick and recognized that it was Farmer. Then I ran around an automobile that was parked on the curb, and I told him, I says, 'Now, leave me alone.' I says, 'I don't want to have any trouble with you.' I says, 'Let us settle this at the meeting next Thursday night.' And he says, 'No; you won't.' He says, 'I am going to settle it right now, you dirty bastard.' After he hit me my hat fell off. * * * I picked up my hat and he grabbed me. So I broke away from him, and just as I broke away from him he reached for his hip pocket with his right hand. As he done that I pulled my gun out of my pocket. I had it in my coat pocket. And he was on top of me, and he had his—put his right hand around my neck and with his left hand he grabbed my arm, and I kept it away, just like that, kept it away from him, between him and I. And he says to me, he says, 'Put that gun up, you son of a bitch;' and I says, 'I will, if you leave me alone.' And then I noticed his right hand shift again to his hip pocket and his left hand, he grabbed me by the throat and tried to choke me, and as he done that, why, I started to shoot. I was so excited I didn't remember how many shots I fired. After he dropped, he said, 'Well, Lou,' he said, 'you got me.' So I put my hat back on my head and walked down to the club, and I met Johnnie Bouett on the steps, and I handed him the gun and I told him to call the officers."

There was no direct contradiction of this story of the defendant. An eyewitness to the tragedy, Walter J. Higgins, on behalf of the prosecution, testified as follows:

> "As I turned around I saw two men fighting in the middle of the block on the sidewalk.
>
> "Q. On what side of the sidewalk? A. On the north side, the same side I was on.
>
> "Q. Just a moment. Were they between you and Georgia street or between you and Figueroa? A. Between me and Georgia street, and I started up that way to catch my car at Georgia, and I seen one of these men—there was a few blows passed, and one of these men run out in the street and around a Ford coupé that was standing there and back on the sidewalk and run west on Sixteenth street towards Georgia, and this other man run after him and caught him right in front of a printing shop there, about 200 feet from the corner of Georgia, on the north side of Sixteenth street, and my car was just coming up towards Georgia then, and I went up to catch my car. I was just about a distance of 5 feet, standing there watching them fighting, and this one man had his arm around the other one's neck and they were fighting, and this other man had a gun in his right hand and he was holding it out away—holding it straight out, and so just about then the car was pretty close by there, and this man that got shot says, 'Put that gun away, you son of a bitch.' And this other fellow says, 'Turn me loose and I will.' Just about then he started shooting."

This witness further testified that after the shooting the defendant "picked up his hat, put it on his head, and put his gun in his pocket and started walking down the street"; that he, the witness, walked over to Farmer and the latter said to him:

> "For Christ's sake help me out, I am bleeding to death. Christ, don't let me lay here this way."

On cross-examination, this witness testified that Farmer on this occasion said:

> "For Christ's sake come over and help me out. I am shot; he got me that time. Get an ambulance; I am bleeding to death; he done a good job that time."

Another witness for the prosecution, T. L. Miller, stated that he went over to Farmer immediately after the shooting and asked him what was the trouble, and in reply Farmer said he wanted an ambulance and wanted help; that he was bleeding to death. Farmer was immediately taken to the receiving hospital, where he died about 10 o'clock the next morning.

Paul J. Braud, a witness called on behalf of the defendant, testified that he saw Farmer, the deceased, at the receiving hospital at the time he was shot, after which the following proceedings were had:

> "Did you hear the deceased make any statement at that time there, to any one there, to show that the deceased knew he was dying?
>
> "Mr. McCartney (deputy district attorney): Now, just a moment. I object to that as no proper foundation laid, and I know the testimony that this witness is called here to give, and I will show it to the court, and I submit that it is not material and it calls for a conclusion.
>
> "The Court: All right, hand it up.
>
> "Mr. McCartney: On page 21 (showing same to court)—on the ground that that statement, even if the proper foundation was laid, your honor, is an opinion and conclusion of the person giving it."

In the meantime counsel presented to the court what appears from the evidence to have been a transcript of the testimony of the witness Braud taken at the preliminary examination. The court examined this document and thereupon stated:

> "Well, the testimony given here by this witness shows clearly that no sufficient foundation was laid for the testimony that was sought, and the testimony on pages 22 and 23 of a similar nature to that in line 16 on page 21 is incompetent. The objection will be sustained as far as that testimony is concerned."

Following this statement of the court a colloquy ensued between the court and counsel for the defendant, at the close of which the court made the following ruling:

> "There is no proper foundation for the statement in the first instance, and in the second instance it is a mere conclusion."

No further effort was thereafter made by appellant to interrogate this witness.

Two other witnesses, nurses employed at the receiving hospital were thereafter sworn on behalf of defendant and interrogated for the purpose of showing that the deceased made a dying declaration. The proceedings of the court while these two witnesses were under examination were similar to those which we have just recited as taking place while the witness Braud was on the stand. One of these witnesses was asked by defendant's counsel whether, from the best of his recollection, the deceased made any statement. He replied to this question:

> "From the best of my recollection, I think he made a statement."

The examination then proceeded as follows:

> "Q. What was that statement?
>
> "Mr. McCartney: I object to that as no proper foundation laid. I'll show the court a statement here and I'll submit it as a conclusion which the witness couldn't come in and testify to it. (Showing transcript to court.)
>
> "The Court: Statements here made on page 31 of this transcript handed to the court, which purports to show the testimony of this witness, in which this witness purports to give a statement of what the deceased said, is clearly incompetent, and the objection to it being made here is sustained."

[1, 2] That the defendant had the right to show the dying declarations of the deceased, if any such were made by the deceased, we do not understand is questioned by the respondent; that such testimony is admissible on the part of the defendant is the established rule in this state. People v. Southern, 120 Cal. 645, 53 Pac. 214; People v. Lee, 13 Cal. App. 48, 108 Pac. 738. Wharton also lays down the rule as follows:

> "Dying declarations are admissible in favor of, as well as against, the accused, * * * and a declaration in favor of the accused must ever be taken to be more likely to be true, as it is not probable that a person should make a statement favorable to the person who has inflicted a mortal injury upon him, but rather the contrary." 1 Wharton on Criminal Evidence, p. 587.

On the same page of this volume we find the further statement that—

> "It is also said that the rules of evidence ought not to be so rigorously applied when the fact satisfactorily appears that they favor the accused as where they are urged against him."

The declarations of the deceased, if any were made by him, are not in the record, but the fact that the defendant was endeavoring to elicit this evidence would naturally lead to the inference that it was favorable to him. We are assuming therefore that, had the declarations been proven, they would have been in favor of the defendant.

Referring back to the proceedings at the trial while the witness Braud was on the stand, we think it sufficiently appears therefrom that the only objection interposed to the question asked this witness was that no foundation had been laid for the answer to such question. After the prosecuting officer had made this objection, and after he had shown to the court a document which we infer was a transcript of the testimony taken at the preliminary examination of the defendant, and which evidently contained some statement made by the witness at such examination, the prosecuting officer objected to the statement therein contained on the ground that it "is an opinion and conclusion of the person giving it." He did not, however, object on that ground to the question asked of the witness. Therefore the only objection interposed was that no proper foundation had been laid for the question. The question, as we have already seen, was.

> "Did you hear the witness make any statement at that time there, to any one there, to show that the deceased knew he was dying?"

It is clear that this was not such a question as would require the laying of any foundation before the witness could answer it. The evident purpose of asking this question was to elicit an answer which would serve as the foundation for the introduction of the dying declaration of the deceased. At this time there was before the court evidence of the statements made by Farmer, immediately after being shot, which tended to show that he realized that he was mortally wounded. A further statement from him indicating that he still held to that belief, coupled with the fact which was then in evidence that his wound was fatal and that he had died from the effects thereof a few hours thereafter, would in all probability have been a sufficient foundation upon which to base evidence of the dying declaration of the deceased. The defendant was denied the right to show this statement, if any was made, by the action of the court sustaining the objection, and in our opinion this ruling was not only erroneous, but was extremely prejudicial to the rights of the defendant.

Appellant insists that it was error on the part of the court to examine the copy of the transcript of the testimony containing the testimony of the witnesses taken at the preliminary examination while it had under consideration objections to certain questions asked of these witnesses called on behalf of the appellant. What the witnesses may have testified to at the preliminary examination, or what they may have said elsewhere, prior to their taking the witness stand in the case then on trial, could have no bearing upon the merits of the objections the court was then considering. The ruling of the court upon these objections should be governed entirely by the nature of the questions asked, their relation to the facts in the case then on trial, and the form of the objection, and not upon what the witnesses may have testified to or stated on some previous occasion. Their previous testimony or statements could have no possible bearing upon the admissibility of their testimony in the case on trial, nor upon the court's ruling upon the objections before it. Such practice finds no authority in law or reason, and it is not to be commended.

We are not prepared, however, to hold that such action on the part of the trial court would in all cases amount to reversible error, or that it had such a result in the present action. As we have already stated, the legality of the ruling of the court upon an objection to a question does not depend upon the source from which the court obtains its information, but upon the nature of the question and its applicability to the facts in the case. If the ruling of the court is proper, taken in connection with these pertinent considerations, then the fact that it received information in an unauthorized manner, or even from illegal sources, would not affect the legality of its ruling. On the other hand, if the ruling of the court is contrary to law, it would be a matter of no consequence from whence the court derived its information upon which it based its ruling. We have already held that in our opinion the court erred to the prejudice of the defendant in sustaining the objection to the question propounded to the witness Braud, upon the ground that the only objection made to this question was that no foundation had been laid, when from the nature of the question it was not necessary to lay any foundation to entitle the witness to answer it. Therefore the action of the court in using the transcript of the testimony taken at the preliminary examination, whether authorized or not, becomes of no importance in so far as this appeal is concerned.

We have examined the proposed instructions on behalf of the defendant which were refused by the court, and we discover no error in the ruling of the court upon these instructions. The subjects thereof were adequately covered by other instructions given.

For the reason that, in our opinion, the court erred in sustaining the objection to the question propounded to the witness Braud, the judgment is reversed and the defendant is granted a new trial.

We concur: CONREY, P. J.; HOUSER, J.

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66 Cal. App. 650

JOSEPHIAN v. LION et al. (Civ. 2670.)

(District Court of Appeal, Third District, California. April 22, 1924.)

1. Principal and surety 🔑179—Surety may sue to compel principal to pay his obligation at maturity.

In view of Civ. Code, § 2846, surety may maintain suit in equity to compel principal to pay his obligation on its maturity.

2. Indemnity 🔑16—Exoneration doctrine applicable.

Doctrine of exoneration applies where a party, although he has not made himself liable to a creditor, has promised the debtor to pay the obligation and hold the debtor harmless.

3. Equity 🔑54—Indemnitee may by suit compel indemnitor to perform agreement.

Suit by indemnitee against indemnitor to compel latter to specifically perform his agreement is cognizable in equity, under maxim that party should be required to do that which he has promised.

4. Principal and agent 🔑28—Relation of principal and agent not changed by agent's hypothecation of her property to secure loan procured for principal.

Where defendant requested plaintiff to procure for him a loan, and plaintiff consented to do so, relation of principal and agent thereby created was not changed by fact that plaintiff became surety and, as such, hypothecated her property to secure repayment of loan.

5. Principal and surety 🔑9, 179—Plaintiff hypothecating her property to secure loan for another held surety for such other; surety entitled to exoneration.

Where plaintiff secured a loan for defendant, and executed note, and hypothecated her property as security for the repayment of the debt, plaintiff became, for defendant, a surety, as defined by Civ. Code, § 2831, and, as such, was entitled to exoneration.

6. Evidence 🔑423(8)—Apparent principal may be shown by parol to be surety.

Under Civ. Code, § 2832, except as against persons who have acted on faith of his apparent character of principal, one who appears to be principal may be shown by parol evidence to be surety.

7. Frauds, statute of 🔑44(1)—Verbal agreement of principal to repay surety not within statute.

Where defendant, at plaintiff's request, procured loan for him, and became surety for him on the obligation by executing her note and mortgage, agreement of defendant to pay the debt was not within Civ. Code, § 1624, subd. 1, requiring agreements not to be performed within one year to be in writing.

8. Limitation of actions 🔑56(3)—Surety's suit to compel principal to perform contract not barred.

Where plaintiff secured a loan for defendant, and executed note, and hypothecated her property as security for the repayment of the debt, neither Code Civ. Proc. § 339, subd. 1, nor section 337, nor section 726 applied to bar plaintiff's right to exoneration by defendant, but such right existed as long as the mortgagee's right to sue on the note was not barred.

9. Principal and surety 🔑190(7)—Proposed written contract held admissible to show oral agreement, where defendant admitted that it correctly stated oral agreement.

In surety's suit to compel principal to perform his obligation to repay money she borrowed for him, by mortgaging her own property, evidence of proposed written agreement, setting forth that money borrowed was for principal for his use, and that he did use it and agreed to repay it, was admissible, although principal refused to sign it, as showing what oral agreement was, where principal, after reading the writing, admitted that it contained correct statement of the oral agreement.

10. Evidence 🔑423(8) — Oral testimony admissible to show real relation.

In suit by surety, under Civ. Code, § 2846, to compel principal to repay note for money borrowed by plaintiff for him, oral testimony is admissible under Civ. Code, § 2832, to show their relation in the transaction.

11. Principal and surety 🔑190(10)—Decree protecting rights of holder of debt, as to which exoneration was sought, held proper.

In surety's suit to compel principal to pay the debt, to secure which the surety had mortgaged her property, decree taking care of and safeguarding the rights of the owner and holder of the note and mortgage *held* proper; for the court, having all parties before it, was under the duty to protect, by its decree, all the equities of the respective parties as they were exposed by the evidence.

12. Constitutional law 🔑83(3)—Principal and surety 🔑3—Exoneration statute not unconstitutional as imprisoning for debt.

Civ. Code, § 2846, providing that a surety may compel his principal to perform the obligation, is not unconstitutional, as subjecting the principal to imprisonment for debt, in case he disobeys mandates of the decree and is cited for contempt.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Rosa K. Josephian against Alex Lion and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Frank Kauke and M. F. McCormick, both of Fresno, for appellant.

C. K. Bonestell, of San Francisco, for respondent.

HART, J. The plaintiff, claiming to be a surety upon a certain obligation upon which it is alleged the defendant Alex Lion is the principal, brought this suit to compel the latter to perform said obligation, the same being due. The action was brought upon the authority of section 2846 of the Civil Code, which provides: "A surety may compel his principal to perform the obligation, when due."

The obligation, to enforce the performance of which is the object of this action, arose out of a transaction culminating in the execution by the plaintiff of a certain promissory note, and, as security therefor, a mortgage on certain of her real property, situated in the city of Fresno, in favor of one Lelia A. Yocum. The latter, after the obligation had run for some time, sold and transferred the same to the defendant W. A. Conn, who as such creditor of defendant Lion, was made a party defendant.

The cause was tried by the court, without the aid of a jury, and judgment passed for the plaintiff. Thereby it was adjudged that the defendant Lion pay said note, together with accrued interest, to the defendant Conn, and that the latter "do accept such payment, and thereupon cancel said note or deliver the same up to be canceled, and release the property * * * from the lien of said mortgage in the manner required by law."

The judgment proceeds:

> "It is further adjudged that, in the event of a renewal of said note and mortgage, to prevent the collection of the indebtedness evidenced thereby from becoming barred by the statute of limitations, before its payment by the defendant Lion, or in the event of the commencement of an action to foreclose said mortgage for the same purpose, such renewal or such action shall in no way affect this judgment or its enforcement, or the right to compel the payment of the indebtedness by the defendant Lion; nor shall the right, of defendant Conn, to demand and receive such renewal or bring such action be affected hereby."

The defendant Lion appeals from said judgment.

Lion, the appellant, is the son-in-law of the plaintiff. In the month of June, 1913, being in need of the use of the sum of $2,000, and being required to borrow said sum, he asked the plaintiff for a loan of said sum. The plaintiff told appellant that she was without sufficient means with which to comply with his request, and he thereupon proposed to her that, if she would herself borrow the money, execute a note therefor, and a mortgage on several lots she owned in the city of Fresno to secure the same, he would pay the debt and "hold her harmless." The defendant Conn, an attorney at law, was then called upon by appellant and asked by the latter if he (Conn) could secure him a loan of $2,000 on lots 31 and 32, block 120, city of Fresno, belonging to the plaintiff. Conn replied that he had a client (Mrs. Yocum) who had money to loan, and, after visiting and inspecting the property, called upon Mrs. Yocum and told her that it was safe security for the sum mentioned. The loan was finally made, the plaintiff executing and delivering to Mrs. Yocum, through Conn, her promissory note for $2,000, and a mortgage on the property referred to as security for said note. The note was dated June 13, 1913, and was payable two years after date. It provided for interest at the rate of 8 per cent. per annum, payable semiannually.

In the month of May, 1914, appellant made application to Conn for an additional loan of $500, to be secured by a mortgage on the same property. Conn presented the matter to Mrs. Yocum, and she was agreeable to the proposition. A promissory note for said sum and a mortgage on the plaintiff's property, upon which the mortgage lien for $2,000 still subsisted, were prepared by Conn and taken to the plaintiff, who thereupon signed the note and signed and acknowledged the mortgage. This note was dated May 9, 1914, was made payable two years from date, and called for interest at the rate of 8 per cent. per annum, payable semiannually.

In or about the month of November, 1918, Conn called either for the payment of the notes or a renewal thereof. The appellant, on being asked by Conn to take up the notes, stated that "they" were unable then to satisfy them. Thereupon Conn asked that a new note, embracing the total indebtedness on the two notes already held by Mrs. Yocum, be executed and delivered to him for his client, together with a mortgage on the same property to secure the same. This was satisfactory to appellant, and, accordingly, a note for the sum of $3,366.65, the aggregate amount of the two notes then held by Mrs. Yocum, and as security for the payment thereof, a mortgage on the property referred to, were prepared and presented to the plaintiff, and she executed the instruments, the same being delivered to Conn for his client. This note was dated November 19, 1918, payable one year after date, and provided for interest at the rate of 8 per cent. per annum, payable semiannually. This is the note involved in this action.

At a date subsequent to the execution of the note and the mortgage last referred to, Mrs. Yocum (who, after the above transactions, intermarried with a Mr. Willis) became insistent on the payment of the note, so Conn testified, and he (Conn) thereupon concluded to purchase the note and the security, and did so. Conn testified that the appellant told him that he (appellant) received the money obtained on the note and the mortgage; that:

> "It was borrowed for his benefit, and that he got it all and was going to pay it; that he paid the interest (any interest that had been paid was paid by him) which was a fact; * * * that Mrs. Josephian would not have to pay a cent of it; and I asked him to put that in writing, asked him if he would sign an agreement to that effect, and he expressed his willingness to do so."

This conversation occurred a few days only before the 16th day of February, 1921. On the last-mentioned day, Conn, after talking with plaintiff relative to the proposed written agreement, and presumably acting for her, prepared a writing, dated that day, to be signed by the appellant and the plaintiff, in accordance with the agreement with respect to the loan between them, as explained by the appellant to Conn. Said agreement, after reciting the fact of the execution of the note and the mortgage by the plaintiff, and that the same were so executed at the request of and for the accommodation of the appellant, and that the latter received for his own use the whole of the consideration for the said promissory note, to wit, the sum of $3,366.65. and that no part thereof was received by the plaintiff or for her account, reads:

> "Now, therefore, in consideration of the premises, the parties of the first part do hereby acknowledge to have received for their own use and benefit the entire proceeds of said promissory note, to wit, the sum of $3,366.65, and the parties of the first part do hereby jointly and severally agree to pay in full, upon demand of said second party or the holder of said promissory note, said promissory note, and to hold second party, her heirs, and assigns harmless therefrom."

Said writing, either on the day that it was dated or within a very few days thereafter, was submitted to the appellant. After reading the same, he objected to certain words it contained, and Conn said to him that the words referred to could be stricken from the writing without changing its legal effect, and they were, accordingly, eliminated. What particular words were expunged from the writing, the witness (Conn) did not point out. However, after the appellant had taken further time to determine whether he would sign the agreement, he refused to sign it for the reason, as given by him, that other members of the Josephian family were trying to "get the best of him," and that "he was afraid to sign anything" for fear that they would succeed. Conn stated, though, that the appellant, upon reading the proposed agreement, declared that it set forth correctly the agreement between him and the plaintiff. He further testified that the appellant paid $366.65 of the principal in February, 1922, and, as above stated, that he paid all interest which was paid on the note, with the exception of two items, to wit, the first on January 12, 1922, in the sum of $96.85, which paid the interest to November 19, 1921; the second on February 20, 1922, in the sum of $123.20, which paid the interest to May 19, 1922, said items having been paid by the plaintiff.

The fact that the money obtained on the note and the mortgage was so obtained for appellant, and at his request, and the fact that he received the money and used it for his sole purposes and benefit, were corroborated by several members of the Josephian family, including the plaintiff. The appellant offered no proof, and did not himself testify in the case.

The facts embraced in the above statement, with the exception of certain probative facts embodied therein, which are gleaned from the testimony of Conn, are set out in the second amended complaint. The appellant demurred to the complaint on the general, and on numerous special, grounds and, the demurrer having been overruled, he filed an answer denying all the allegations of said complaint. He further pleaded the statute of limitations (sec. 337, subds. 1 and

2; sec. 339, subd. 1, Code Civ. Proc.), and also section 726 of the Code of Civil Procedure which provides, among other things, that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter."

Conn demurred to the complaint on the general ground, the same being overruled. He thereupon filed an unverified answer, denying the averments of the complaint. As to this answer, however, the verification thereof was waived, and it was stipulated by counsel that all general denials therein "shall be considered as a specific denial of all allegations controverted."

The findings of the court follow substantially the averments of the complaint.

[1] That a surety may maintain a suit in equity to compel the principal to pay the obligation upon its maturity is not questioned by appellant, but is conceded by him, as in view of section 2846 of the Civil Code, no other position could be taken. The principle underlying said section is of equitable origin and cognizance, and proceeds upon that consideration of natural justice that a person shall perform his agreement, acting upon which "a court of equity, in the exercise of well-regulated and judicial discretion, enforces the actual accomplishment of a thing stipulated for, on the ground of what is lawfully agreed to be done ought to be done." Magee v. McManus, 70 Cal. 553, 556, 12 Pac. 451, 452.

The doctrine is stated in 4 Pomeroy's Equity Jurisprudence (4th Ed.) § 1417 (footnote, citing California Civil Code, § 2846, and Dering v. Earl of Winchelsea, 1 Cox, 318), as follows:

> "After an obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor—in the nature of a bill quia timet—to compel him to pay the debt or perform the obligation, provided the creditor can himself enforce the payment or performance, and neglects or refuses to do so. The creditor is, of course, made a codefendant."

See, also, same author, vol. 5, § 2342; 2 Story, Eq. Jur. (14th Ed.) § 1011.

While, as stated, the appellant in his briefs expressly concedes that the right to resort to the equitable remedy above spoken of resides in a surety, and may be exercised or invoked after the principal obligation has matured, or the debt has become due and it has not been performed or paid, it is nevertheless, contended by him that such remedy is not available to plaintiff for the reason that he did not at any time execute a note or mortgage, or other writing, or ever promise to pay the mortgagee the money obtained on the note and the mortgage, or at any time ever became "a debtor, principal or otherwise, to the mortgagee." It follows from said premise, so the appellant declares, that the plaintiff could not be a "surety for him," as alleged in the complaint.

It is further contended by the appellant that, even if the transaction is such as the complaint describes it, and that the relation of principal and surety between the appellant and the plaintiff was thereby established, still the obligation is within the statute of frauds and not enforceable, because it involved an agreement not in writing which, by its terms, was not to be performed within a year from the making thereof. It is also claimed, as the answer alleges, that any right of action which the plaintiff might have had to enforce performance of the obligation against the appellant is barred by the above indicated provisions of the statute of limitations, and also by section 726 of the Code of Civil Procedure.

The foregoing points are involved in the general contention that there is no evidence in the record which supports the findings. They were raised below by the demurrer to the complaint, and later by objections to the evidence, offered and received in support of the allegations of said pleading.

[2] This leads us to observe that, since the objections raised by the demurrer to the complaint were not waived at the trial by failure to object to the evidence offered, it is not only proper, but not out of place to notice, at this juncture, one of two alternative points made as against the plaintiff's second amended pleading. Counsel contends that the demurrer should have been sustained for either one or the other of two reasons, to wit: (1) That as to whether the note was or was not executed by the appellant, the complaint is uncertain and ambiguous; (2) that, if the allegations of the complaint are reasonably subject to the construction that the note was executed by the plaintiff, "then the complaint shows on its face that the money obtained from Mr. Yocum was applied to the use of defendant Lion," and the transaction, therefore, merely amounted to a loan made to him by the plaintiff, "and any cause of action that might have been maintained thereon has long since been barred by the statute of limitations." The proposition last suggested goes to the gist of this controversy, and is practically involved in the points first above stated, and will later be considered. The first proposition is clearly without merit. The complaint, after reciting the circumstances leading to the application to the plaintiff by the appellant for the loan of the money for which the note was given, alleges that the plaintiff, being herself without means to accommodate the appellant, at the latter's request, borrowed the money from Mrs. Yocum, executing and delivering to the latter a promissory note for the amount,

and, as security for its repayment, executing and delivering to Mrs. Yocum a mortgage upon certain of her property. These facts are set out in detail and with clearness. Nowhere does the complaint allege, nor do its allegations in any wise or in any degree so imply, that the appellant signed or actually joined in the execution of any of the notes which had been executed during the pendency of the transaction. As to the mortgage, of course, the signature of the appellant thereto as one of the mortgagors would have added no legal force to the instrument—indeed, it would have been wholly without any effect, since he owned no interest of any kind or nature in the mortgaged premises, and the complaint, with equal clearness, states that the note was executed solely and alone by the plaintiff, as it does that the mortgage was so executed.

As to the transaction involved herein, the contention of the appellant may be stated in condensed form, as follows: That the doctrine of exoneration does not apply where, as here, a party, although he has not made himself liable to the creditor, has promised the debtor to pay the obligation and hold the latter harmless.

The plaintiff contends that her position in the transaction comes within the description of a contract of indemnity, as given by section 2772 of the Civil Code, as follows: "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."

[3] The authorities are to the effect that the doctrine of exoneration, in equity, applies as well to contracts of indemnity as to those of suretyship. 5 Pom. Eq. Jur. (4th Ed.) § 1417; Story's Eq. Jur. (14th Ed.) § 1169. See, also, Reybold v. Herdman, 2 Del. Ch. 34, 41; Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343; West v. Chasten, 12 Fla. 315; Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582; Ardesco Oil Co. v. N. A. Mining Co., 66 Pa. 375; Davis v. First Nat. Bank, 86 Or. 474, 161 Pac. 93, 168 Pac. 929. In the cases just named there was no promise made by the indemnitor or surety directly to the creditor. Thus it would seem that whether the appellant here is technically an indemnitor or a surety is a matter of no particular consequence in the decision of this case; for, if upon other grounds the judgment is not subject to reversal, the same may be affirmed upon either theory—that is, either upon the theory that he is an indemnitor or a surety. If the former, there being no express statute law authorizing a suit by an indemnitee against an indemnitor for a decree requiring the latter to specifically perform his agreement, the suit is, nevertheless, cognizable in equity upon the general maxim practiced in equity courts that a party should be required specifically to do that which he has promised or agreed to do, if the promise or agreement in no way contravenes public policy, or is not contra bonos mores.

[4] We are of the opinion, however, that the plaintiff, in the transaction, acted in two different and distinct legal roles, to wit: (1) As the agent of the appellant in procuring the loan for him, and (2) as surety. There can be no doubt that when the appellant requested the plaintiff to procure for him a loan, and she consented to do so, the relation of principal and agent was thereby created, and existed. The fact that she became surety and, as such, hypothecated her property to secure the repayment of the loan could not have the effect of changing the character of their legal relations, in the first instance.

[5] Upon the consummation of the loan, and the agreement of the plaintiff to secure or assure the repayment thereof, then the relation between them became that of principal and surety—the appellant principal, because it was his debt and he promised to repay the same; the plaintiff surety, because she executed the note and hypothecated her property as security for the repayment of the debt, thus becoming a surety in a double sense. The relationship of the plaintiff to the appellant in the transaction comes within the description of a surety as given by section 2831 of the Civil Code, as follows:

> "A surety is one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor."

[6] And here it may be suggested that, except as against persons who have acted on the faith of his apparent character of principal, one who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is, in fact, a surety (section 2832, Civ. Code), which, of course, means that such a showing may be made by parol evidence.

The case of Kellogg v. Lopez, 145 Cal. 497, 78 Pac. 1056, is, in its facts, strikingly similar to the case at bar. There, it appears, one Lopez executed and delivered to one Anderson, as payee, his promissory note. The evidence disclosed that Anderson and Lopez and one Stackpole were stockholders of the San Mateo Coursing Association, a corporation, and made and indorsed the note for the accommodation of the association; "that this was done, in pursuance of an agreement to that effect, made at one time, and as part of one transaction; that the note was then delivered to an agent of the association to be discounted for its use, and that the money was received and used by the association. Upon this state of facts," said the court, "it is clear, at least in this state, that in equity—where 'the form of the instrument may be * * * disregarded'—the parties to the note are to be regarded as mere sureties of the association, and, as such, entitled to contribution from each other." See, also, White v. Fratt, 13 Cal. 521; Magee v. McManus, supra.

In White v. Fratt the agreement was similar to the one here, and the equitable rule that a surety may seek and be granted relief through the doctrine of exoneration in cases where the circumstances reveal peculiar equitable considerations, was considered and approved, but the court declined to apply that doctrine on the ground that the plaintiff had an adequate remedy at law. The agreement involved was an indemnity bond to the plaintiff, as sheriff, to hold him harmless on the sale of certain property seized under a writ of attachment. The court said that the measure of the liability of the defendants was the amount of the judgment, and that, therefore, the damages resulting to the plaintiff, by reason of the breach of the agreement, were susceptible to precise admeasurement, for which reason equity will refuse to interfere.

In the case of Magee v. McManus the agreement was much of the same nature as the one here. The relief sought was refused solely on the ground that the agreement found was not the agreement pleaded.

A distinction between the case of White v. Fratt and the present case will, upon comparison of the circumstances of the one with those of the other, be readily noted. It is manifest that in this case there are equitable features which are entirely absent from the case above named. Here the plaintiff is a mere accommodation surety. Her property is burdened with a mortgage lien to secure the repayment to the mortgagee of money borrowed for, and received by, the appellant for his sole use and benefit, and which he did so use. If she were required to rely upon her remedy at law to recover the debt from the appellant, the result to her would be the expense, inconvenience, and annoyance of a foreclosure suit, and she would, moreover, be compelled to postpone proceeding against him until a decree foreclosing the mortgage was rendered and entered. The appellant, as seen, was, by virtue of the terms of his agreement, the principal, and his promise was, not to pay the judgment, but to pay the note as being his own debt. There could hardly be conceived a case where the circumstances could the more appropriately or more strongly call for the interposition of equity than the case at bar.

There is, in this case, no such ground for the objection that was urged and sustained in the case of Magee v. McManus, there being no claim that there is a variance between the agreement found by the court and the one pleaded in the complaint.

[7] The agreement of appellant to pay the debt was not subject to the objection that it is void for the reason that it fails to measure up to the demands of section 1624 of the Civil Code. We assume that appellant's specific contention as to this point is that his agreement falls within the provisions of said section contained in subdivision 1 thereof, which provides that "an agreement that, by its terms, is not to be performed within a year from the making thereof," if not in writing, or there is no memorandum thereof signed by the party to be charged, is invalid. As seen, the evidence shows that, upon the obligation evidenced by the note, the appellant became the principal, and the plaintiff the surety. The facts, as found, correspond with the evidence, and show that the legal relation between the appellant and the plaintiff in the transaction is as just stated. The obligation, as before stated, was created by the plaintiff as the agent of and for the appellant. In other words, he authorized her to secure the money covered by the note for him and his sole use, and, acting upon that authority, she procured the money, and became the surety for him on the obligation by executing the note and hypothecating her own property to secure its payment. In equity the transaction is precisely the same as if the appellant himself had actually signed the note, and this, as before suggested, upon the principle that "what ought to be done is to be considered as done" (2d Spence's Eq. Jur. 253), or, as Story puts it, "equity looks upon that as done which ought to have been done." Therefore the plaintiff's right to compel the appellant's performance of his obligation accrued to her immediately after it became due, and was available to her so long as the note remained unpaid and subject to enforced payment by the payee in a foreclosure suit.

[8] The defense based upon the statute of limitations cannot be supported. The note executed on November 19, 1918, embracing the amounts represented by the two notes previously executed, involved a new agreement between the parties, the transaction resulting in the execution of said note and the mortgage to secure it having been carried on by and between Conn, assignee of the note, the appellant and the plaintiff. Said note, according to its terms, matured on the 18th day of November, 1919, and was subject to enforcement by the foreclosure of the mortgage at any time within four years after the date of its maturity. Neither the original nor the first amended complaint is in the record, and, therefore, it is not thus made to appear when the action was commenced. The second amended complaint upon which, with the answer, the cause was tried, was filed March 8, 1922. It does not appear, nor is it pretended, that the cause of action stated in the second amended complaint is

different from that stated in the original complaint. We must, therefore, presume, in support of the judgment, that, whether the plaintiff's action comes within subdivision 1 of section 339 of the Code of Civil Procedure, or within section 337 of said Code, it was in either case brought within the statutory time. But, upon the theory we have of this case, as it is revealed by the issues, the evidence and the findings, and as explained above, the appellant being the principal obligor on the note, and the plaintiff the surety, the latter's right to enforce performance of the obligation by the appellant will exist so long as the right to sue upon the note is not barred.

The plea that the plaintiff's action is barred by section 726 of the Code of Civil Procedure proceeds upon the erroneous assumption that she is, by this action, in effect, seeking to foreclose the mortgage. The action here is, in part, to prevent (if thus it may be done) the foreclosure of the mortgage upon her own property.

[9] The ruling, admitting in evidence the proposed written agreement between appellant and plaintiff, setting forth that the money borrowed on the note was for the appellant, for his own use and benefit, and that he did so use it and that he agreed with plaintiff to repay said money to the payee of said note, was admissible as showing what the oral argeement between appellant and plaintiff as to the transaction was, the former having admitted, after reading the writing, that it contained a correct statement of said agreement.

[10] All the oral testimony admitted at the trial, and bearing upon and explaining the agreement between appellant and plaintiff, was properly allowed under the theory of the case as made by the complaint. Section 2832, Civ. Code.

Counsel has not pointed out wherein there is a basis for his contention that the decree goes beyond the issues, the findings, and the conclusions of law. But we can see no ground for the contention. The complaint undoubtedly states a case under section 2846 of the Civil Code. As stated, the findings follow the averments of the complaint, and as between the findings and conclusions of law there is no inconsistency.

[11] The decree, it is true, does take care of and safeguard the rights of Conn, owner and holder of the note and the mortgage, and this was proper. The court had all the parties before it, including Conn, and it was its duty, sitting in chancery, to adjudicate, adjust, and protect, by its decree, all the equities of the respective parties as the same were exposed by the evidence.

[12] The claim that the appellant is, under the decree, subject to imprisonment for debt, in case he disobeys the mandates thereof, and is haled before the court on a citation for contempt, involves an argument which may or could be made in any case founded on section 2846 of the Civil Code, and it could be sustained only upon the theory that said section does not represent a valid enactment. The section, though, is perfectly valid, for it involves only a statutory recognition of one of the well-established doctrines of equity jurisprudence. The decree, by its own terms, becomes a lien on any property of appellant not exempt from execution. If he has no property to which the lien may lawfully attach, the liability fixed against him by the decree must stand undischarged until it can be legally satisfied, if at all. If he has no means with which to discharge his debt, upon a showing to that effect upon a citation for contempt, if any such proceeding were instituted against him, the court could not impose a condition by way of a penalty upon him until he satisfied the debt.

There are no other points requiring consideration.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J

67 Cal. App. 128

PEOPLE v. FARRELL et al. (Cr. 1052.)

(District Court of Appeal, Second District, Division 2, California. May 3, 1924.)

1. Criminal law 🔑1144(13)—Duty of appellate court in passing upon sufficiency of evidence to sustain a conviction stated.

In passing upon sufficiency of evidence to sustain a conviction, appellate court must consider in strongest light, testimony introduced by prosecution, and disregard all evidence conflicting therewith which was offered by defendants, and affirm judgment if there is any substantial showing tending to connect accused with commission of alleged crime.

2. Larceny 🔑64(7) — Possession of stolen property with slight corroboration of other inculpatory circumstances will support conviction.

While recent unexplained possession of stolen property standing alone does not justify conviction of larceny, such possession, with slight corroboration of other inculpatory circumstances tending to show his guilt is sufficient.

3. Larceny 🔑64(1)—Considerations in determining weight to be given to recent possession of stolen property stated.

In determining weight to be given to recent possession of stolen property, jury may consider proximity of place where found to the place of the alleged grand larceny; lapse of time since property was taken; its character and nature; concealment; whether party denied or admitted possession; and demeanor and character of accused.

4. Larceny 🔑64(6)—Falsity of accused's explanation of possession of stolen property may be considered.

Falsity of explanation given by accused to account for his possession of stolen property is an incriminatory circumstance to be considered by jury in determining whether his possession justifies inference of guilt.

5. Larceny 🔑64(6)—Evidence held sufficient to support conviction.

Evidence that within two and one-half hours from time of theft defendants were in possession of stolen property which they left in a garage without any explanation, and their fabrication of a story to account for their possession, while not conclusive, *held* legally sufficient to support conviction for larceny.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Dan Farrell and Paul Farrell were convicted of grand larceny, and they appeal. Affirmed.

Arthur C. Webb, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendants were convicted of the crime of grand larceny, the charge being that they feloniously took and carried away automobile tires of the aggregate value of $1,100, the property of a firm doing business in the city of Los Angeles under the name of Martin & Green. The appeal is from the judgment and from the order denying defendants a new trial.

[1] It is contended that the only evidence of guilt is the circumstance that defendants were in possession of the stolen property shortly after the theft; and since evidence of recent unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty of larceny, it is claimed that the evidence is insufficient to support the verdict. In passing upon this claim it is, of course, our duty to consider in the strongest light the testimony introduced by the prosecution, to disregard all evidence conflicting therewith which was offered by the defendants, and to affirm the judgment if there be any substantial showing which tends to connect the accused with the commission of the alleged larceny. The facts, in substance, as illustrated by such testimony, are these: Defendants are brothers. They previously had been convicted of a felony and at the time of the theft were but recently out of the state penitentiary on parol. On July 7, 1923, the tires in question, as well as certain tubes—new tires and tubes which were a part of the stock owned by Martin & Green—were stored in that firm's place of business in the city of Los Angeles. They were there as late as 9:30 o'clock of the evening of that day, at which hour Sam Green, one of the members of the copartnership, closed his firm's place of business by locking the doors and windows, and then left the premises. The articles were stolen some time during the night. At about midnight, or within two and a half hours after Sam Green had closed the store, the two defendants, in an automobile which one of them was driving and which was laden with 33 of the stolen tires and about 50 of the stolen tubes, drove into the Hill View Garage in the city of Los Angeles. It is claimed by appellants, though the point does not seem to be urged with any great degree of confidence, that the evidence is insufficient to establish the identity of the tires and tubes which defendants brought to the Hill View Garage with those which admittedly were stolen from Martin & Green's place of busness during the night in question. Without specifically reciting the evidence which bears upon this phase of the case, let it suffice to say that we are satisfied from a reading of the record that the jury was warranted in its conclusion that the tires and tubes which defendants brought to the Hill View Garage were a part of those which had been stolen from Martin & Green.

When defendants drove into the Hill View Garage the only person whom they found there was a night watchman. Defendants unloaded the tires and tubes on the floor of the garage and with the aid of the watchman put them away in a closet where such merchandise was customarily stored by the proprietors of that establishment. At the same time defendants made out a list of the tires and tubes, and thereupon took their departure. Neither defendant had any interest in the Hill View Garage. Nor did either of them vouchsafe any information to the night watchman as to why they had brought a load of new tires and tubes to that particular place at that hour of the night. Indeed, the night watchman testified that defendants had no conversation with him whatever. About noon of July 9th defendants returned to the Hill View Garage and made an offer to sell the tires and tubes to one of the proprietors. The latter replied that he did not want to buy the articles and ordered their immediate removal. In compliance with this demand defendants loaded the tires and tubes into their automobile and carried them to a gasoline station in the city of Los Angeles conducted by a man of the name of Damerel. The articles were taken by defendants from the Hill View Garage in three separate loads. Upon arriving at Damerel's gasoline station with the first load one of the accused, in the presence of his brother, asked Damerel, who previously had bought tires of defendants, if he wanted to purchase some more tires, telling him that the tires which he could buy were in a garage. Upon being told by Damerel that he did not wish to buy any more tires, the defendant who was carrying on the conversation with Damerel asked the latter if the tires could be left at his gasoline station until defendants could deliver two of them to their mother, when they would call again and take away the remaining tires and tubes. On the evening of July 12th, at about 9:30 o'clock, the defendant Paul Farrell drove to Damerel's gasoline station in an automobile and was then taken into custody by the officers who were waiting to make the arrest. Part of the tires were found by the officers at the gasoline station, part in Damerel's home, and two of them were found later on the wheels of an automobile standing on the premises occupied by defendants' mother. The defendant Dan Farrell was arrested between 2 and 3 o'clock on the morning of July 13th, as he was unlocking the door to his room. Neither defendant offered any explanation prior to the trial to account for his possession of the stolen property. Dan Farrell, upon being asked by the arresting officers if he wished to tell them his story of the tires, hung his head for a long time and then said: "Well, I can't say anything that would do me any good, and anything that I would say would be used against me."

Both defendants testified at the trial as witnesses in their own behalf. They disclaimed all knowledge that the property had been stolen, stoutly maintaining that they had received it innocently from Damerel. They testified, in substance, that at about 8 o'clock on July 7th or 8th they drove to Damerel's gasoline station; that the latter asked them to carry some tires to the Hill View Garage; that in compliance with this request they loaded the tires and tubes into their automobile, drove to the Hill View Garage and left them there with the night watchman, after making a list of the articles; that two or three days later, at Damerel's request, they brought the tires and tubes back to the latter's gasoline station; and that the defendant Dan Farrell purchased from Damerel, for $50, the two tires which later were found at the home of defendants' mother. Defendants who, as we have stated, made an offer to one of the proprietors of the Hill View Garage to sell him the tires, admitted while on the witness stand that Damerel had not requested either of them to sell the property. The jury evidently believed Damerel's version of the facts, and thus stamped as false and fabricated the story told by defendants to account for their possession of the stolen articles.

[2-4] We think it clear that the evidence abundantly supports the verdict of the jury. While it is the law that evidence of recent unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty of larceny, it equally is the law that if a person be found in possession of such property, "slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction." People v. Cataline, 54 Cal. App. 36, 200 Pac. 1060. In determining the weight to be given to the recent possession of stolen property the jury may consider the "proximity of the place where found to the place of the alleged grand larceny; the lapse of time since the property was taken; the character and nature of the property taken; whether the property was concealed; whether the party denied or admitted the possession; and the demeanor and character of the accused." People v. Farrington, 140 Cal. 659. The falsity of the explanation given by an accused to account for his possession of the property is an incriminatory circumstance to be taken into account by the jury in determining whether his possession justifies the inference of guilt. In People v. Cataline, supra, the court says:

> "The recent possession * * * of the stolen car, together with his false denials and his conduct at and about the time of his apprehension, are sufficient to sustain the verdict of conviction."

See, also, People v. Luchetti, 119 Cal. 501, 51 Pac. 707; People v. Lang, 142 Cal. 482, 76 Pac. 232; People v. Miller, 45 Cal. App. 494, 188 Pac. 52; People v. Howard, 58 Cal. App. 344, 208 Pac. 1022. In People v. Lang, supra, it is said:

> "The authorities hold that where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained."

[5] The evidence discloses incriminatory circumstances of a most damaging character to corroborate the circumstance that defendants had in their possession the recently stolen property. At midnight, within 2½ hours from the time when it was possible for the theft to be committed, defendants drove into a garage with the stolen tires and tubes. Such property—33 new tires of different makes and 50 tubes—is not of a character which customarily is hauled about at midnight for any innocent purpose and left in a garage without giving to the person in charge any explanation of why such property happened to be brought to such a place at such an hour. But perhaps the most damaging circumstance of all is the fabricated story put forth by appellants while on the witness stand to account for their possession of these tubes and tires. These and other circumstances to which we might allude did space permit fully warrant the conclusion that the evidence, though circumstantial and not conclusive, is legally sufficient to support the verdict.

Appellants have presented two or three other points, but they are so utterly lacking in merit that we do not deem them worthy of any special notice or consideration. A careful examination of the entire record convinces us that there is no error justifying a judgment of reversal.

The judgment and the order appealed from are affirmed.

We concur: WORKS, J.; CRAIG, J.

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67 Cal. App. 46

COATS & WILLIAMSON, Inc., v. MORAN & CO. et al. (Civ. 4652.)

(District Court of Appeal, First District, Division 1, California. April 30, 1924.)

1. Principal and agent 🔑123(7)—Evidence held not to authorize sale of hay by parties in possession.

Letter written persons in possession of land asking them to haul and protect certain hay thereon, and letter stating selling price of the hay, in response to inquiry, *held* not to show a transfer of possession, accompanied by power of disposition, within Civ. Code, § 1142, relative to purchases in good faith from parties in possession.

2. Sales 🔑234(3)—When buyer of hay from party in possession protected.

Before Civ. Code, § 1142, providing when buyer from party in possession acquires title, is available to buyer of hay, he must establish transfer of possession by owner, accompanied by power to dispose of it and purchase in good faith in ordinary course of business.

3. Contracts 🔑20—Even where time is not of essence, acceptance must be within reasonable time.

Even where time is not of the essence, acceptance of an offer must be within reasonable time, under Civ. Code, § 1587, subd. 2.

4. Sales 🔑22(5)—Wait of two weeks before accepting offer to sell hay held too long.

Where hay market was fluctuating, a wait of two weeks before acceptance of offer to sell hay *held* too long.

5. Sales 🔑244(3)—Alleged purchase of hay from parties in possession held not in good faith.

Evidence *held* to support finding that purchase of hay from parties in possession by one from whom defendants claimed title was not made in good faith, within Civ. Code, § 1142.

6. Trover and conversion 🔑25—One transporting property liable for conversion.

Where one transporting hay by barge for a person who had no title knew of plaintiff's claim to the hay before he moved it, he was jointly liable for conversion.

7. Appeal and error 🔑1151(2)—Error in amount of judgment held curable by modification.

In action for conversion, where there was no finding that action was prosecuted with reasonable diligence, as required by Civ. Code, § 3336, judgment for highest market value between conversion and judgment was unauthorized, though defendant did not plead want of diligence; but, where court also found market value at conversion, error in judgment was curable by reduction to market value at time of conversion.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Coats & Williamson, Inc., against Moran & Co. and another. Judgment for plaintiff, and defendants appeal. Modified and, as modified, affirmed.

W. F. Williamson, of San Francisco (A. S. Hutchinson, of San Francisco, of counsel), for appellant Moran & Co.

Hankins & Hankins, and Olin F. Nuckolls, all of San Francisco, for appellant Erickson.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, for respondent.

KNIGHT, J. This is a joint appeal by the defendants from a judgment rendered against them in the sum of $2,769.50 and costs for the alleged conversion of 95½ tons of hay. During the month of October, 1919, the hay in question was stored in a barn on an island near Vallejo, of which C. R. Windeler and S. Benson at that time had control. On November 8, 1919, Windeler & Benson made a purported sale of said hay to Goss & Son. On November 13, 1919, Goss & Son sold the hay to the defendant Moran & Co. Within a few days thereafter Moran & Co. shipped the hay on a barge under the control of defendant Erickson from said island to its warehouse located in South San Francisco.

The appellants claim a valid sale of said hay to Goss & Son under the provisions of section 1142 of the Civil Code, upon the ground that Windeler & Benson, at the time of said purported sale, were in possession of said hay under authority to sell the same granted by plaintiff through its representative Lucius L. Solomons, and that Goss & Son, relying upon the authority thus granted, purchased said hay from Windeler & Benson in good faith and in the ordinary course of business.

[1] The trial court found that Windeler & Benson were not authorized to sell said hay; that they retained possession thereof merely as caretakers; that Goss & Son did not purchase said hay upon the faith of any authorization from plaintiff to Windeler & Benson to sell the same, and they had knowledge that said hay was the property of plaintiff, and that they did not purchase the same from Windeler & Benson in good faith or in the ordinary course of business. Appellants attack these findings upon the ground that they are not supported by the evidence. We find no merit in the contention.

It appears from the evidence that in October, 1919, Windeler & Benson took possession of an island near Vallejo known as island No. 2, under a contract of purchase for the purpose of farming the same. The hay in question was grown on said island during the year 1919 by former tenants under a crop lease, and said hay constituted the one-fourth share belonging to plaintiff. Owing to certain financial difficulties in which said former tenants became involved, the entire crop of hay could not be sold as a whole, as had been the usual custom, and consequently the one-fourth share belonging to plaintiff was left in the field. The condition of the weather at that time had been threatening, and for that reason Lucius L. Solomons, who had been acting as the attorney for plaintiff, wrote Windeler & Benson on October 13, 1919, as follows:

> "[You] are hereby authorized to furnish the necessary labor to haul and protect the hay belonging to the undersigned at island No. 2, the same to be placed on the levee or elsewhere awaiting sale or shipment according to their discretion and at our expense."

The hay was accordingly hauled to and stored in the barn on said island by Windeler & Benson. They also had a quantity of hay stored therein belonging to themselves. About that time Solomons planned a trip East, and in contemplation of his absence requested a hay broker named Eaton to dispose of plaintiff's hay at the highest market price. Before his departure, however, Solomons received a letter from Windeler, dated October 22, 1919, as follows:

> "If Mr. Williamson's hay is for sale, would you please let me know his price as soon as possible."

In a reply letter dated October 24, 1919, Solomons stated:

> "That the price of Mr. Williamson's hay is $13.50 per ton delivered at the barn on island No. 2, where your men have recently hauled it, I believe."

Solomons departed for the East on October 29, 1919, and did not return until the end of the following month. During his absence, to wit, on November 8, 1919, Benson, unknown to Windeler, made a purported sale of said hay to Goss & Son. Two days later, on November 10, 1919, Windeler wrote to Solomons stating:

> "We will take that hay of Williamson's at $13.50 per ton. We will pay for it as soon as we get the weight of it."

The Windeler letter of November 10, 1919, was shown to Eaton by Solomons' stenographer, and Eaton thereupon, in Solomons' absence dictated and mailed a reply in Solomons' name, in which it was stated:

> "Since I heard nothing from you in reply to my letter the hay has been sold some two weeks or more."

As a matter of fact, said hay had not been sold, but, as Eaton explained while testifying, the statement in said letter related to a transaction in which he and another hay broker had inspected the hay and indicated they would buy it. This circumstance, however, is immaterial.

It is principally upon the authority of the Solomons letters, dated October 13, 1919, and October 24, 1919, respectively, and the fact that Windeler & Benson had possession of the hay, that appellants base their claim of a valid sale to Goss & Son under the provisions of section 1142 of the Civil Code.

[2] Before the provisions of said Code section are available to appellants, however, it is apparent that two propositions must be established by the evidence: First, a transfer of the possession of said hay by plaintiff to Windeler & Benson, accompanied by the power to dispose of the same, and, secondly, a purchase by Goss & Son in good faith and in the ordinary course of business. The evidence, we think, fails to prove either proposition.

[3] From the testimony given by Solomons it is quite clear that Solomons' only purpose in requesting Windeler & Benson to "haul and protect said hay" was to save it from the elements, and it is evident from the face of his letter of October 24, 1919, that said letter was not intended as an authorization to dispose of said hay, but, as Solomons testified, was written merely as a reply to an inquiry made by Windeler as to the price of said hay. Even if said letter be construed as a grant of authority to sell said hay to others at the price stated therein, there was no valid sale made thereunder, for the reason that the offer of the hay at that price was not accepted within a reasonable time. Subdivision 2, § 1587, Civ. Code.

> "In mercantile contracts such as contracts for the manufacture or sale of goods and the like, it is generally held that the parties have intended that the time is the essence of the contract. 13 Corpus Juris, 688, and cases cited." Jensen v. Goss, 39 Cal. App. 427, 179 Pac. 225.

And even in cases where time is not the essence of the contract, acceptance must be made within a reasonable time, and the question of "what is a reasonable time must be determined from all of the circumstances of the individual case. 2 Mechem on Sales, §§ 1129, 1130, 1132, 1133." Martyn v. Western Pacific R. R. Co., 21 Cal. App. 589, 132 Pac. 602.

[4] Appellants concede that the hay market at that particular time was on the rise, Windeler & Benson waited over two weeks before making reply. Their acceptance therefore came too late.

Appellants make no claim that Windeler & Benson were ever the owners of said hay. Their whole case rests upon the theory that they were vested only with a selling power as defined by section 1142 of the Civil Code. It is therefore unnecessary to discuss the question of whether or not Windeler & Benson actually became the owners of said hay.

[5] Upon the second proposition we think that the trial court was fully justified in finding that the purchase by Goss & Son was not made in good faith. The evidence shows that Windeler & Benson were desirous of having the hay disposed of so that they could use the barn for other purposes. The purported sale of November 8, 1919, to Goss & Son was consummated through a representative named Lewis. He was first told that the hay was for sale by Windeler while visiting at the home of Lewis in Concord. Later Lewis inspected the hay at the barn on the island. At that time Windeler told him that he "had no authority to sell Mr. Williamson's hay," and he gave Lewis the address of Solomons and made the request that he communicate with him. Benson on this same occasion requested Windeler to write to Solomons about the sale of the hay. This request resulted in Windeler's letter of October 22, 1919. Lewis again visited the island some time during the first week in November. At that time he was shown Solomons' letter dated October 24, 1919, in which it was stated that the price of the hay was $13.50 a ton. Windeler had demanded $15 per ton, but explained that the extra amount covered the charges for hauling and storing the hay. Lewis went away without purchasing the hay, for the reason that Goss had limited him to a buying price of $13.50 per ton. After communicating with Goss the latter instructed him to buy the hay if it was good stock hay.

A few days later, on November 8, 1919, in Pacheco, in the absence of Windeler, Lewis purchased from Benson the entire lot of hay in the barn, consisting of 1,400 bales, 900 of which belonged to plaintiff. The sale was evidenced by a written bill of sale signed by Benson, in which Windeler & Benson were named as vendors and Goss & Son as vendees. Upon Benson's return to the island two days thereafter he informed Windeler of the sale and requested him to write to Solomons and say, "We would take the hay at that price." Windeler accordingly wrote the letter of November 10th above quoted.

While Lewis was carrying on his dealings with Windeler & Benson, Goss opened negotiations with Eaton. He first phoned Eaton to inquire the price of said hay, and upon being told that the price was $20 per ton declined to take it. A few days later he again phoned Eaton and said, "Now let's get down to business. What will you take for that Coats & Williamson hay up there on island No. 2?" to which Eaton again replied that the price was $20 a ton. After some discussion Goss ended the conversation by saying that he did not want the hay "at that money." Following that conversation Eaton, together with another hay broker, inspected the hay on the island with a view of buying it themselves. Upon his return to San Francisco, Goss again phoned Eaton to inquire the price of the hay and Eaton told him then that the price was $25 per ton. The following conversation then took place between them:

> "He [Goss] said, 'What are you holding that hay at?' I said, '$25.' He says, 'Well, I don't want to pay for it; that is out of reason.' And he said, 'I will tell you what I want to know for. Through a mistake our man has loaded 600 bales of that hay on the barge, and it is on the road to San Francisco,' or 'ready to leave for San Francisco.' And he says, 'I offered $15 for it the other day; I will give $17.50 for it now.' I told him, 'No; that I wouldn't take it;' and I told him, 'Without he was ready to give the price, he could put the hay back in the warehouse.' He said, 'Well, I will put it back, but I won't put it in the warehouse.' I said, 'You will get in serious trouble if you don't put it where you found it. You got that hay in the warehouse, and I want it put back in the warehouse where you got it.' He said, 'All right,' he would notify Captain Peterson to put it back in the warehouse."

Immediately following that conversation Eaton phoned to the defendant Erickson to ascertain if he had yet moved the hay, and the following conversation, according to Eaton, took place between them:

> "I [Eaton] called up Captain Erickson, and asked him if he had removed that hay, and he said, 'There is 600 bales of it on the barge.' 'Well,' I said, 'Mr. Goss tells me that he has ordered it to be put back.' 'Well,' he says, 'Mr. Goss may have told you that, but he has just told me—I got word from him a few minutes ago, that he sent an extra man up there to hurry up and load the balance of that hay and get it down to San Francisco.'"

The testimony given by Eaton concerning these phone conversations was not denied, and in our opinion fully support the conclusions of the trial court upon the question of the good faith of the purchase by Goss & Son from Windeler & Benson.

Appellants also contend that the evidence is insufficient to support the finding of the trial court to the effect that, while Solomons represented himself to be the agent of the plaintiff in reference to the selling of the hay, he did not have the authority to sell the same, and that plaintiff was not bound by his acts in that respect. We believe that the evidence supports the finding, but inasmuch as Solomons did not transfer said hay to Windeler & Benson with the power of selling the same, it becomes unnecessary to discuss the question of the real or ostensible authority of Solomons.

[6] Appellants also claim that the evidence is insufficient to charge the defendant Erickson with liability. It is evident, we think, from the testimony given by Eaton concerning the conversation over the phone with Erickson, which occurred prior to the time that any hay was removed from said island, that sufficient notice was given Erickson of the adverse claim of title to said hay by plaintiff, and coupled with the fact that Erickson thereafter removed said hay from the island and transported it to the warehouse of Moran & Co. was sufficient to charge him with joint liability for the conversion of the hay.

[7] The last contention of appellants to be considered is the one wherein it is claimed that the findings are insufficient as a matter of law to support the judgment. This contention is based upon the ground that there is no finding, either express or implied, to the effect that "the action has been prosecuted with reasonable diligence." Section 3336, Civil Code.

The complaint alleged, and the court found, that the conversion was committed on November 19, 1919. The action was commenced on December 23, 1919, but was not tried until the 4th and 11th days of October, 1920, and the findings were not signed until February 19, 1922. Judgment was entered on February 14, 1922. Plaintiff in the complaint elected "to claim the highest value of said property from the time of said conversion to the date of the judgment in the action," and in this respect alleged that the highest market value between the date of the conversion and the date of the filing of the complaint was $2,500. The court made two separate findings on the issue of the market value of said hay. It found, first, that the market value thereof on the date of the conversion was $1,757, and it found, secondly, that the highest market value between the date of the conversion and the date of the judgment was $2,769.50, or $29 per ton. Judgment was given for the latter amount.

We are of the opinion that in order to support the judgment for the greater amount it was essential that there be a finding to the effect that the action has been prosecuted with reasonable diligence. Section 3336, Civil Code. In the case of Niles v. Edwards, 90 Cal. 10, 27 Pac. 159, 296, it was said:

> "We could, perhaps, say, as matter of law, that the action was commenced in time to entitle the plaintiff to the benefit of the rule allowing the highest market value, but a whole year having elapsed between the commencement of the action and the trial, it cannot be concluded as matter of law that it was prosecuted with due diligence. It may have been or it may not have been so prosecuted, and without an express finding in his favor on this point, the plaintiff is not entitled to a judgment based on the highest market value."

Respondents endeavor to escape the effect of the ruling stated in that case by advancing the claim that the defendants by their answers tendered no issue on that point, and that consequently no finding was necessary. There are two answers to respondent's theory: First, in the very nature of things it would be quite impossible for a defendant in any case to plead such fact in advance, for the reason that the lack of diligence on plaintiff's part may not then have occurred; and, secondly, where a judgment is obtained for a greator amount than is called for by the ordinary measure of damages, the record must affirmatively show sufficient proof and findings to justify the allowance of such greater amount. We are satisfied, however, that the error may be cured by a modification of the judgment (Brown v. Caldwell, 13 Cal. App. 29, 108 Pac. 874), and that it will not be necessary to reverse the judgment as was done in the case of Niles v. Edwards, supra, for the following reasons: In the latter case there was but one finding upon the issue of value—the highest market value between the date of the conversion and the date of the judgment. It was held that the absence of a finding as to the use of reasonable diligence prevented the application of the measure of damages for the greater amount. Consequently the record was left barren, with no finding whatever on the issue of value, and without which no judgment could be rendered. A retrial was therefore necessary to determine, first, whether diligence had been used, and, if so, then to again give judgment for the greater amount, but, if found that reasonable diligence had not been used, then to determine the market value of the property at the time of conversion, so that judgment might be given for the lesser amount.

In the instant case the decision, as above stated, contains two findings on the issue of value. Like the case of Niles v. Edwards, supra, the absence of a finding as to the use of reasonable diligence has eliminated the measure of damages for the greater amount, but, unlike that case, there still remains the finding of reasonable market value of the property on the date of the conversion. Consequently there is a complete set of findings to support a judgment for the lesser amount which respondent in its brief has intimated it is willing to accept. Appellants could not possibly expect to be benefited by a retrial. It could result only in possible advantage to the respondent, for the reason that the only issue to be tried would be the question of the use of reasonable diligence in the prosecution of the action. If the court found that such diligence had been exercised, it would again apply the measure of damages for the greater amount. If it found that such diligence had not been used, it would then apply the measure of damages for the lesser amount, which, as before stated, respondent has intimated it is now willing to accept.

It is therefore ordered that the trial court enter a judgment on the findings in favor of plaintiff for the sum of $2,030.30, that being the market value of said property as found by the court on the date of the conversion, with the added interest at 7 per cent. per annum from the date of the conversion to the date of the entry of said judgment, and that the entry of such judgment be made nunc pro tunc as of the date of the original judgment, the 14th day of February, 1922, and as thus modified the judgment will stand affirmed. It is further ordered that appellants recover costs of this appeal.

We concur: TYLER, P. J.; ST. SURE, J.

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66 Cal. App. 767

DUFFIELD et al. v. PAYNE et al.
(Civ. 2655.)

(District Court of Appeal, Third District, California. April 28, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Carriers 🔑316(1) — No presumption of negligence from proof of injury or death.

No presumption of negligence arises from mere proof of injury or death of a person while a passenger.

2. Carriers 🔑320(25) — Whether brakeman was negligent in opening vestibule and trapdoors while passenger was on platform held for jury.

In action for death of passenger sustained when brakeman opened vestibule and trapdoors and left them unguarded while passenger was on platform ready to alight, negligence of brakeman *held* question for jury.

3. Carriers 🔑347(9)—Contributory negligence of passenger killed when brakeman opened vestibule and trapdoors held for jury

In action for death of passenger sustained when brakeman opened vestibule and trapdoors and left them unguarded while passenger was on platform ready to alight, the contributory negligence of passenger *held* for jury.

4. Negligence 🔑138(2) — Trial 🔑260(3) — Refusal of instruction as to burden of proof held not error.

In action for death, refusal of instruction to find for defendant, if in a state of reasonable uncertainty as to whether plaintiffs were entitled to recover, *held* not error, in view of its tendency to mislead jury into belief that plaintiffs were required to prove their case beyond a reasonable doubt, and its shifting of burden as to contributory negligence, and in view of other instructions as to burden of proof.

5. Death 🔑99(4)—$10,000 for death of 74 year old husband held not excessive.

$10,000 verdict given wife and children for death of 74 year old husband and father, who was in perfect health and was doing his own work on his farm and was supporting his family at the time of his death, *held* not excessive under Code Civ. Proc. § 377.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Mary E. Duffield and others against John Barton Payne, as Agent appointed pursuant to Transportation Act 1920, § 206 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ee), as successor to Walter H. Hines, Director General of Railroads, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank Freeman, of Willows, for appellants.

Arthur C. Huston and Arthur C. Huston, Jr., both of Woodland, for respondents.

FINCH, P. J. Plaintiffs, the surviving wife and children of Jesse D. Duffield, deceased, were given judgment for damages in the sum of $10,000 for the death of the latter, alleged to have been caused by the negligence of defendants in the operation of a railroad train upon which he was a passenger. The defendants have appealed.

Appellants contend that they are entitled to a reversal of the judgment on the following grounds: (1) That the evidence does not show negligence on the part of defendants; (2) that it shows contributory negligence on the part of deceased; (3) that the court erred in refusing certain proposed instructions; (4) that the verdict is excessive.

The evidence shows that Harrington and Coyle are flag stations at which there are no buildings or lights, the latter being a mile north of the former. Deceased was a passenger on the north-bound train from Sacramento to Coyle. He had purchased a ticket to Harrington only, as tickets were not being sold to Coyle. He requested the conductor to let him off at Coyle instead of Harrington, and the latter agreed to do so; there being no other passenger for either place. The accident occurred shortly after 9 o'clock at night. It was dark at that time. The weather was clear. The train passed Harrington at a speed of 35 miles an hour. Immediately thereafter the brakeman signaled the engineer to stop at Coyle and then walked from the rear to the center of the smoker, in which deceased was riding, and announced that the next station was Coyle. He then went to the rear platform. Duffield followed and stood in the door, with one foot probably on the platform. While standing there he said "something about being home soon," and the brakeman replied, "Yes." No other conversation was had between them. In the vestibule, at the side of the car door, was a guard rail which stood in a perpendicular position when the vestibule door was closed and was lowered to a horizontal position when it was opened. When so lowered the guard rail served to hold the vestibule door open and as a hand rail for passengers boarding or alighting from the car. On reaching the platform the brakeman opened the vestibule and trapdoors and lowered the guard rail to the horizontal position. While the guard rail was being let down, "Duffield had his hand on it." He did not remove his hand, but "let it slide right down." When last seen prior to the accident, he had hold of this guard rail. What occurred thereafter can best be told in the language of the brakeman, who testified:

> "I turned around and stepped across to the vestibule (of the next car to the rear), about six feet, and picked up my lantern, and as I turned around and stepped back, I just saw a glimpse of an object disappearing out the doorway, and I pulled the signal for the engineer to stop, and when we did, we picked up Mr. Duffield where he was lying there by the track."

The train was brought to a stop in about ten car lengths. The signal given was not an emergency signal, but a stop signal. When the signal to stop at Coyle was given, the engineer shut off steam, allowing the train to drift, and then "made a light application of the air, five or six pounds, to take up the slack in the brakes and gradually reduced the speed" to about 25 miles an hour within a quarter of a mile. It was constantly decreasing from that time on. At the time the second signal was given the train was within about 100 rods of Coyle. The track was in good condition. There was no "jar or jerk" of the train at any time. The vestibules of both cars were lighted. The light was shining on the steps, but it was not strong enough for the brakeman to recognize the object which he saw disappearing through the door.

The conductor who had charge of the train testified as follows:

> "There is no laid down rule in regard to opening the trapdoors. Q. Well, what instructions if any did the brakeman have? A. To open the door as conveniently to the station as they can. Q. Well, what about guarding them? A. Guarding them as much as they can. Q. And is it a question of guarding them as much as they can, or guarding the trapdoor while open? A. Well, it is as much as you can."

The brakeman testified:

> "Q. What duties were you given in connection with the operation of this train? A. Protecting the train and announcing stations. * * * Q. What was your duty in regard to opening and closing these trapdoors and the vestibule of the car? A. Approaching a station, to open it. Q. And close them when? A. After leaving the station. Q. And what, if any, were your duties with reference to guarding these trapdoors while open? A. Well, when it was possible to stay there and look after them. Q. And did you receive instructions with reference to these trapdoors under any rule? A. No, sir. Q. And who gave you your instructions? A. There were no instructions given us. * * * Q. Well, then, how did you learn that it was your duty to guard these doors in the manner in which you have described? A. Well, it was a matter of 'safety first.' Q. * * * In calling your station and giving the signal after you left Harrington, was that the usual way of stopping the train for Coyle? A. Yes, sir. * * * Q. And no greater distance between the time of giving that signal that night than any other night? A. Just the same."

The deceased was 74 years of age at the time of his death. "He was in perfect health, * * * perfectly active; did more work than most of the young men are doing nowadays." He had full use of all his faculties. His eyesight was very good. He was not weakened from age in the way of handling himself and walked vigorously. He had been accustomed to alight from the train at Coyle and had alighted there several times at night.

[1] No presumption of negligence arises from mere proof of injury or death of a person while a passenger. Rystinki v. Central California T. Co., 175 Cal. 336, 344, 165 Pac. 952; Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 379, 143 Pac. 718.

In the absence of a rule or custom to keep vestibule doors closed or guarded while trains are in motion, it has generally been held that mere proof of an open and unguarded vestibule door during the time a train is slowing down for the purpose of stopping at a station is not sufficient to establish negligence on the part of a carrier or to constitute an invitation to passengers to alight while the train is in motion. In Baltimore & O. S. R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A. (N. S.) 115, it is said:

> "If there had been nothing more than the calling of the name of the station, or the fastening back of the vestibule doors, it could not be said that the appellee was invited by any employee of the company to alight."

It was held, however, that when these facts were considered in connection with other circumstances shown by the evidence, the question of the company's negligence was for the jury. In Union Pac. R. Co. v. Brown, 73 Kan. 233, 84 Pac. 1026, it is said:

> "It is necessary to the efficient and orderly conduct of the business of carrying passengers in vestibuled railway coaches, and necessary for the convenience and accommodation of the passengers, that the vestibules be opened before the stopping of trains at stations; and, as the practice does not expose the passengers to

any considerable danger, the opening of a vestibule at any time after the usual call for a station is not, under ordinary circumstances, and was not in this case, per se negligence."

In Gayle's Adm'r v. Louisville & N. R. Co., 163 Ky. 459, 173 S. W. 1113, the court said:

> "The announcement of the station and the opening of the doors did not constitute an invitation to alight until after the train stopped."

The case of Illinois C. R. Co. v. Dallas, 150 Ky. 442, 150 S. W. 536, is to the same effect.

In Elger v. Boston Elevated Ry. Co., 226 Mass. 84, 115 N. E. 242, in affirming a judgment for defendant, it is said:

> "On the facts disclosed the opening of the door and the announcement of the name of the next stop plainly did not" constitute an invitation to the plaintiff "to alight from a moving car."

To the same effect is the case of Hooker v. Blair, 189 Mich. 278, 155 N. W. 364.

In Pagnini v. North Jersey St. Ry. Co., 69 N. J. Law, 60, 54 Atl. 218, it was held that the mere opening of the gate before the car comes to a stop "will not raise a presumption of actionable negligence."

In Mearns v. Central R. Co., 163 N. Y. 108, 57 N. E. 292, the facts were similar to those in the instant case, except that there was no evidence relative to any rule or custom to guard the vestibule doors when they were open while the train was moving. The trial court rendered judgment in favor of defendant. The judgment was affirmed on appeal. Had the verdict and judgment in this case been in favor of defendants, an affirmance would be necessary, because the finding of a court or jury, based upon evidence from which opposing inferences may reasonably be drawn, is conclusive on appeal.

In Blue Grass Traction Co. v. Skillman, 31 Ky. Law Rep. 480, 102 S. W. 809, in which a judgment against the company was affirmed, the proof showed other circumstances indicating negligence in addition to proof of calling the station and then opening the door while the car was in motion. It was held that such proof was sufficient to show that the conductor knew of the passenger's danger, "or by the exercise of ordinary care could have known it;" and negligently failed to warn her of the danger.

The decisions are to the effect that where, to the knowledge of a passenger, it is a rule of a common carrier, or a custom of those in charge of its trains, to keep the vestibules closed or guarded at all times while the trains are in motion, an open and unguarded vestibule is in the nature of an invitation to such passenger to alight, if he have occasion to do so, and an assurance that he may alight with safety; the passenger, of course, being held to the exercise of ordinary care for his own safety, notwithstanding the open vestibules. The doctrine is analogous to that applying to open gates at railroad crossings.

> "The defendant was not bound to have the car vestibuled; but, having done so, it could not by acts and words lead its passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to passengers injured thereby." Crandall v. Minneapolis, etc., Ry. Co., 96 Minn. 434, 105 N. W. 185, 2 L. R. A. (N. S.) 645, 113 Am. St. Rep. 653; Rivers v. Pennsylvania R. Co., 80 N. J. Law, 217, 76 Atl. 455; Id., 83 N. J. Law, 513, 83 Atl. 883.
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> "It was the custom, of which plaintiff was aware, for the motorman not to open the doors to permit passengers to alight until the car had come to a full stop. * * * Plaintiff had a right to rely upon the custom shown in evidence." Tillery v. Harvey (Mo. App.) 214 S. W. 246.

This case is cited in Kirby v. United Rys. Co. (Mo. Sup.) 242 S. W. 79, where it is said:

> "It has been held that the opening of a vestibule door after a car had slowed down for a stop, but while moving very slowly, and before it had come to a full stop, was an implied invitation to alight, where, on account of darkness and other conditions, a passenger was misled thereby."

In Ferrell v. Washington Water Power Co., 83 Wash. 319, 145 Pac. 442, in reversing a judgment of nonsuit, it is said:

> "Assuming that it is a matter of common knowledge of a passenger that the gates of a pay-as-you-enter car are closed while it is in motion, we think it would be going too far to hold that the opening of the door was not an invitation to appellant to pass out of the car, or at least to step down into the vestibule."

The conductor testified that the brakemen were instructed to guard the trapdoors when open "as much as they can." The brakeman testified that it was his duty "when it was possible to stay there and look after them." The evidence shows that Duffield had frequently traveled on defendants' trains. It is a fair inference that he was familiar with the custom, or practice, of guarding the vestibule doors when open. The train was to stop in the dark at a mere siding where there were no buildings or lights from the observance of which a passenger could perceive that the train was moving. Only one passenger was to alight. There was but one door to open and guard. No duty of the brakeman called him elsewhere. Under such circumstances, to guard the door as much as he could, or as much as was possible, would be to guard it during all the time it was open. On that occasion the brakeman clearly did not follow instructions. The engineer had shut off steam and the train was smoothly drifting towards the siding, the movement thereof probably being imperceptible to Duffield. The brakeman knew, according to his own testimony, when the train passed Harrington, and the natural inference is that Duffield did not; there being no buildings or lights there, and it being a matter of common knowledge that passengers usually rely upon the announcement of their stations by the brakemen. His judgment was not so accurate as that of the experienced brakeman as to the length of time required for the slowing train to reach Coyle after the station was announced. While the light in the vestibule was sufficient to enable one to see the steps, a fair inference is that it was not strong enough to make the adjacent ground visible, because it was too dim for the brakeman to distinguish the object which he saw disappear out the door. The two men did not have equal knowledge of the situation. The brakeman was bound to the exercise of the highest degree of care and foresight for the safety of the passenger. The latter was bound only to the exercise of ordinary care. When the brakeman, knowing that Duffield was standing with his hand on the guard rail, ready to go down the steps to alight, opened the vestibule doors and then turned and walked back to the vestibule of the next car, it was most natural for Duffield, if he believed that the train had stopped, to interpret the acts of the brakeman as an invitation to alight.

[2, 3] It cannot be said as a matter of law that the acts and omissions of the brakeman, under the foregoing circumstances, do not warrant the inference that he was negligent or that the conduct of Duffield was free from negligence.

> "When it can be affirmed that all reasonable men would agree as to the quality of an act in respect of its being either negligent or prudent, the court may give effect to such consensus of opinion, and direct a verdict in accordance therewith. The direction is given, not because it is the judge's opinion alone, but because the judge is able to say that it is also the opinion that all reasonable men would entertain of the question. If there is doubt as to whether all reasonable men would draw the same conclusion from the evidence, then the question must be submitted to the twelve reasonable men appointed by the Constitution to determine disputed or doubtful questions of fact." Bronson v. Oakes, 22 C. C. A. 520, 76 Fed. 734.

The jury may have concluded, and reasonably so, that when the brakeman turned to pick up his lantern, after opening the doors, he should have anticipated that Duffield might be misled into the belief that the train had stopped and that he should have warned Duffield not to attempt to alight.

> "The carrier owes to the passenger the duty of protection during transportation. * * * This duty of care involves warning of danger so far as such warning may enable the passenger to protect himself against an injury which might be anticipated in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given. * * * There is no duty, however, to warn a passenger of his danger where the conditions which constitute the danger are as observable by him and apparently as obvious to him as to the employees of the carrier." 10 C. J. 910.

The conditions which constituted the danger to which Duffield was exposed were not "as observable by him and apparently as obvious to him as to the employees." The plaintiffs were under the necessity of relying entirely upon the testimony of the trainmen, defendants in the action, to prove negligence, a fact which was probably given due consideration by the jury in weighing the evidence.

[4] It is contended that the court erred in refusing to give two instructions proposed by defendants. All the propositions contained therein had been repeatedly stated in instructions given, except the following:

> "If, after considering all the evidence before you, your minds are still in a state of reasonable uncertainty as to whether plaintiffs are entitled to recover, your verdict must be for the defendant."

The requested instruction is a copy of one approved in Green v. Birmingham Ry., Light & Power Co., 187 Ala. 508, 65 South. 781. Whether or not the instruction is a correct statement of law, it would tend to mislead the jury into the belief that plaintiffs were required to prove their case beyond a reasonable doubt. If correct as applied to the question whether a plaintiff has made out a prima facie case, it does not follow that it would be correct as applied to conflicting evidence, where a prima facie case has been made. People v. Miller, 171 Cal. 649, 653, 154 Pac. 468. The defendants herein alleged that Duffield was guilty of contributory negligence. If the jurors found that the defendants were negligent, but their minds were "in a state of reasonable uncertainty" as to whether Duffield also was negligent, then the instruction would have required them to reverse the rule as to burden of proof of contributory negligence and return a verdict for defendants, notwithstanding the latter's negligence. In any event, the jury was fully instructed as to the proof necessary to entitle the plaintiffs to a verdict. Among others, the following instructions were given at the request of defendants:

> "A recovery of damages against the defendant in this case can only be had when after a careful consideration of all evidence before you, plaintiffs have satisfied you by a preponderance of such evidence that the death of the deceased was the result of the negligence of the defendant. * * * The burden of such proof is upon plaintiffs, and must be proved

by a preponderance of the evidence, otherwise your verdict must be for defendants."

[5] The deceased was of the age of 74 years and 2 months at the time of his death. The expectancy of life of a man of that age is nearly 7 years. Mr. Duffield was in perfect health, vigorous and active. "Never had a real sick spell" in 46 years. "Did more work than most of the young men are doing." From the condition of his health at the time of his death, the jury may have believed that Duffield's expectancy of life was more than 7 years. He and his wife were living on a 40-acre farm, of which 6 acres were in four year old almond trees. He was raising 20 to 25 head of cattle and a few hogs. He did his own work and supported his family. His wife, one of the plaintiffs, who had lived with him as such for 46 years, was of the age of 66 years at the time of his death. There was no direct proof, in terms of money, of the annual earnings of deceased or of the amount expended by him in support of his family. In estimating the pecuniary loss suffered by the plaintiffs, the jury had the right to include the value of the society, comfort, and protection of deceased of which they were deprived. In actions of this character "such damages may be given as under all the circumstances of the case may be just." Code Civ. Proc. § 377. While the amount of the judgment is large, it cannot be said that the damages awarded are so excessive as to warrant a reduction thereof on appeal or a reversal of the judgment.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

67 Cal. App. 145

HEANEY v. MADDEN et al. (Civ. 4822.)

(District Court of Appeal, First District, Division 2, California. May 5, 1924. Hearing Denied by Supreme Court July 3, 1924.)

Municipal corporations ⚷706(8) — Instructions held not objectionable as denying recovery, if passenger was struck in safety zone.

Instructions that alighting street car passenger was negligent if he walked into defendant's automobile, and that chauffeur has right to assume pedestrian using street will exercise ordinary care, and will see that which is plainly to be seen, *held* not objectionable as denying recovery, if passenger was struck in six-foot safety zone prescribed by ordinance.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Louise Heaney, administratrix of the estate of John F. Heaney, deceased, against Joseph Madden and D. D. Gibbons, copartners, doing business under the name of Madden & Gibbons, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. W. Molkenbuhr, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondents.

STURTEVANT, J. Plaintiff commenced an action against the defendants to recover damages for the death of her husband alleged to have been caused by the negligent operation of an automobile while operated by one of the servants of the defendants. The jury brought in a verdict in favor of the defendants, and the plaintiff has appealed under section 953a, Code of Civil Procedure.

On the 17th day of August, 1921, John F. Heaney, the deceased, alighted from the rear end of a Valencia street car near the southerly line of Eighteenth street in San Francisco. While passing from the street car to the sidewalk, a collision occurred between him and an automobile being operated by the servant of the defendants. On the trial of the case it was the theory of the plaintiff that the defendants' automobile was not operated with due care, and, secondly, that it was being operated within six feet from the lowest step of the street car on the right-hand side thereof. On the other hand, it was the theory of the defendants that their automobile was being operated in a careful manner, at a low speed, and in a zone outside of the six-foot space above mentioned. When the plaintiff opened her case, her attorney made an opening statement delineating her theory. When the defendants opened their case, their attorney made an opening statement delineating their theory. Each party thereafter introduced evidence, and after the arguments of counsel the court instructed the jury.

At this point it is proper to state that the evidence offered by the plaintiff consisted of an attempt to prove that the decedent was struck by defendants' automobile while the decedent was yet within the six-foot zone above mentioned. On the other hand, the evidence offered by the defendants consisted of evidence to the effect that the automobile of the defendants did not at any time approach inside of the six-foot zone, but, according to the testimony of some of the witnesses, it was eight feet away from the side of the street car.

In giving its instructions the trial court read to the jury sections 2 and 18 of ordinance 1857 (N. S.). Those two sections are respectively as follows:

> "Sec. 2. Every person riding, driving, propelling or in charge of any vehicle upon any of the streets, shall ride, drive or propel such vehicle upon such streets in a careful manner and with due regard to the safety and convenience of

pedestrians and other vehicles upon such streets."

"Sec. 18. Every person riding, driving, propelling or in charge of any vehicle upon any street, shall keep such vehicle at least six feet on the right-hand side from the running board or lowest step of any street car, which is stopping for the purpose of taking or discharging passengers, and if by reason of the presence of vehicles at the place where such car is stopping, or by reason of the narrowness of the street, or for any other reason, it is not possible to preserve such distance of six feet from the running board or lowest step as herein prescribed, then such person shall stop such vehicle until such car shall have taken on, or discharged its passengers and again started."

It also gave a formal charge and certain instructions requested by the plaintiff and certain instructions requested by the defendants. The instructions are very full and complete, and cover 15 pages of the transcript. The appellant claims that two of the instructions so given at the request of the defendants resulted in prejudicial error. One of those instructions was worded as follows:

> "If you believe the deceased alighted from the street car and without looking for approaching vehicles walked into the automobile in question, then you are instructed that he was guilty of contributory negligence and plaintiff cannot recover."

The appellant's objection to that instruction is this: The appellant claims the instruction was received by the jury as though it were worded as follows:

> "If you believe the deceased alighted from the street car, and while within six feet of the lowest step, without looking for approaching vehicles walked into the automobile in question, then you are instructed that he was guilty of contributory negligence and plaintiff cannot recover."

The other instruction complained of was as follows:

> "I instruct you that the chauffeur who is operating an automobile along a public street at a reasonable and moderate rate of speed, and with due care, has a right to assume that pedestrians using said street will exercise ordinary care in doing so, and will see that which is plainly to be seen."

The appellant's objection to the second instruction is that the jury received the instruction as though it were worded as follows:

> "I instruct you that the chauffeur who is operating an automobile along a public street at a reasonable and moderate rate of speed, and with due care, has a right to assume that pedestrians using that portion of the street within six feet of the lowest step of the car and other portions of said street will exercise ordinary care in doing so, and will see that which is plainly to be seen."

We think it is not necessary to go further than to state that the interpolations indicated do violence to the language used by the trial court, and that nothing is present in the record which justifies a construction of the language of the trial court as including such interpolations. The point is entirely without merit.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

66 Cal. App. 765

SCHMID v. SCHMID. (Civ. 4739.)

(District Court of Appeal, First District, Division 2, California. April 28, 1924. Hearing Denied by Supreme Court June 26, 1924.)

Divorce ⚷127(4)—Corroborative testimony of desertion held insufficient.

Corroborative evidence of desertion of husband by wife *held* insufficient.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Effie M. Schmid against Otto O. Schmid, in which defendant filed cross-complaint. From judgment denying relief to either, defendant appeals. Affirmed.

Clarence N. Riggins, of Napa, for appellant.

E. L. Webber, of Napa, for respondent.

NOURSE, J. Plaintiff sued for a divorce on the grounds of willful neglect and extreme cruelty. Defendant filed a cross-complaint on the ground of desertion. The court found that defendant was not guilty of neglect or cruelty and that plaintiff was not guilty of desertion. It then denied a divorce to each party. Defendant appeals from that portion of the judgment denying him a divorce on his cross-complaint. The action was commenced on January 23, 1923. The cross-complaint was filed on March 7, 1923, and the alleged desertion occurred on March 5, 1922. The facts of the case so far as material are that the plaintiff and defendant were married in 1905 and have three children, a boy aged 15, a girl aged 8, and a girl aged 6. The defendant has had no trade but has worked at odd jobs, earning usually less than $100 a month, from which he has endeavored to support his wife and children and pay for a small home which he and his wife were purchasing on the installment plan. His earning capacity was insufficient to support the family, and on that account the wife left his home in Napa and went to Santa Rosa, taking the two girls with her. There she obtained employment through which she was able to supplement the earnings of her husband for the support of the family. She testified that the defendant had continually nagged her regarding her expenditures in and about the home, and that when she left the home it was with the definite intention of separating from her husband because of his inability to support the family.

The appellant insists that upon this state of fact the trial court should have found that the separation on the part of the wife was with the intent to desert her husband. The respondent has not appeared upon this appeal, and we are left to the appellant's brief alone for a presentation of the issues involved. It would serve little purpose to give consideration to the cases therein cited on the general question of what constitutes desertion, inasmuch as we are satisfied that the judgment must be affirmed because the corroborating evidence of the alleged desertion on the part of the wife is wholly insufficient for that purpose. Outside of the admissions of the wife herself, the only evidence offered to corroborate the husband's testimony of his wife's desertion is that of a neighbor, who testified merely that Mrs. Schmid had gone away from her home about a year ago, and that Mr. Schmid continued living there after she had gone. The evidence is without conflict that the wife left her home with the consent of her husband for the purpose of making a visit with relatives in Santa Rosa. It is then contended on the part of the husband that she thereafter formed the intention of deserting him, and, of course, this was a matter concerning which the neighbor was unable to testify. The case is similar to Sweet v. Sweet (Cal. App) 222 Pac. 634. As the cases on the subject are fully discussed therein, it is unnecessary to make further comment here.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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66 Cal. App. 541

RICHMOND WHARF & DOCK CO. v. BLAKE BROS. CO. (Civ. 4650.)

(District Court of Appeal, First District, Division 1, California. April 16, 1924.)

1. Pleading 🔑36(2)—Plaintiff's claim held to admit that fixtures sued for became part of realty.

Claim of plaintiff, in action for conversion of fixtures as personalty, that they became property of plaintiff's assignors, as lessors, because not removed from premises during term of lease, is admission that they became part of realty.

2. Eminent domain 🔑243(3)—Defendant, answering in condemnation proceedings wherein fixtures were not separately valued, cannot sue for conversion and use thereof by condemnor.

Defendant, appearing and answering in condemnation proceedings, wherein fixtures on land were not separately valued, cannot sue for conversion and use of the fixtures, after final judgment of condemnation, on condemnor's refusal to deliver them on demand, as such action would be equivalent to collateral attack on judgment, in violation of Code Civ. Proc. § 1908.

3. Eminent domain 🔑200—Burden on condemnee to show value of property.

In condemnation suit, burden is on defendant to show value of property.

4. Eminent domain 🔑205—Agreement that condemnee might remove and retain fixtures held not shown.

That court, in condemnation proceedings, did not separately value fixtures on land, because not requested to do so, shows no agreement between condemnor and condemnee that fixtures might be removed.

5. Eminent domain 🔑243(3)—Condemnee, failing to have fixtures separately valued, waives right to recover therefor.

Condemnee, failing to have fixtures separately valued in condemnation proceedings, waives right thereto.

6. Trover and conversion 🔑16—Plaintiff's title held not to support recovery.

Nonsuit, in action against condemnor for conversion and use of conveyor on land condemned, *held* not error as to part of conveyor on land not included in condemnation suit, in absence of evidence that plaintiff ever had title to or possession of such land.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by the Richmond Wharf & Dock Company against the Blake Bros. Company. From judgment of nonsuit, plaintiff appeals. Affirmed.

Nusbaumer & Bingaman, of Oakland, for appellant.

Johnson & Shaw, of Oakland, for respondent.

NEEDHAM, Justice pro tem. This is an appeal taken by the plaintiff from a judgment of nonsuit entered in favor of the defendant, and the appeal is before us upon a bill of exceptions. The material facts are as follows: The action is brought by the plaintiff to recover from the defendant the value of certain alleged personal property claimed to have been converted by the defendant to its own use, and also for compensation for the use of said property by the defendant. The personal property claimed to have been converted by the defendant is a certain conveyor described in the complaint as—

> "that certain personal property commonly known and described as a conveyor, together with all belts, rollers, pulleys, appliances and personal property of every kind and description used in connection with said conveyor, which said conveyor and property then and there during all of said times herein mentioned was sit-

uated upon that certain wharf and approach to said wharf hereinafter described, and which conveyor at all times herein mentioned ran from the outer end of said wharf across the said wharf and across the approach to said wharf to the upland adjacent to the land end of the approach to said wharf. The said wharf and approach to said wharf above referred to during all the times herein named was situated upon tide lot No. 16, section 16, Tp. 1 N., R. 5 W., M. D. B. & M., which said tide lot is situate in the county of Contra Costa, state of California."

It is alleged that on August 3, 1906, one A. S. McDonald made a contract with Anson S. Blake, in which contract McDonald granted to Blake the possession of certain land for five years next ensuing, upon consideration that Blake fill the same within said five years, the land being submerged land and lying in the bay of San Francisco next to the shores of the city of Richmond, and also granted in the same contract to the San Pablo Quarry Company, a corporation, and of which Blake was president and practically the sole owner, the right to construct a wharf over said land. Blake was to have a one-half interest in the land if he filled it. The San Pablo Quarry Company constructed a wharf during the latter part of 1906 and the early part of 1907, over the demised land and beyond out to deep water, and installed a quarry and rock-crushing plant on the upland belonging to itself at the land end of the wharf, and constructed and installed from the quarry and the rock-crushing plant so situated on the upland, over the said wharf out to its outer end a belt conveyor, for the purpose of conveying from the rock-crushing plant to lighters, barges, and vessels lying at the outer edge of the wharf, the crushed product of said quarry. It was also provided in said contract that the San Pablo Quarry Company might sublet the wharf with the consent of all parties to the contract; but, in the event of said subletting, one-half of the rent was to be paid to McDonald, the owner of the land. The San Pablo Quarry Company, after constructing the wharf and opening the quarry and constructing the rock-crushing plant and the said conveyor, did sublet in November, 1908, all of said properties to the San Francisco Quarries Company, becoming bound thereby to pay McDonald one-half of the rentals. Blake did not comply with his contract and did not fill the land. These matters are referred to and set forth in the cases of Richmond Wharf & Dock Company v. Blake, 181 Cal. 454, 185 Pac. 184, and Richmond Wharf & Dock Company v. Blake et al., 39 Cal. App. 5, 185 Pac. 186.

The plaintiff, appellant herein, claims that in these cases it was held that the San Pablo Quarry Company was the tenant of McDonald during the five years from August 3, 1906, to August 2, 1911, and that upon the expiration of said contract the said San Pablo Quarry Company and its subtenant, San Francisco Quarries Company, were unlawfully holding over. The said actions last above referred to were brought to recover for the use and occupation of the wharf for the period beginning with the expiration of said contract, to wit: August 2, 1911, and ending with the condemnation of the wharf by the Castro Point Railway & Terminal Company on July 23, 1913, hereinafter more particularly referred to.

On or about the 23d day of July, 1913, the Castro Point Railway & Terminal Company, a corporation, obtained in the superior court of the county of Contra Costa a judgment of condemnation of a portion of the land included within the contract between McDonald and Blake above referred to, and under which contract, as before stated, the San Pablo Quarry Company built and was in possession of the wharf in question and upon which is situated the conveyor in question, and the said judgment of condemnation included that portion of said land upon which stood a portion of the wharf containing a portion of the conveyor, lying between the lands of the San Pablo Quarry Company and the outer land of McDonald. After the entry of the final judgment of condemnation on August 19, 1913, and the acquisition of the right of possession of the property condemned, the railroad corporation made no alteration in the use of said property. Up to the present time the said wharf, land, quarry, conveyor, and equipment are being operated in the same manner as they were on August 3, 1911, the date of the expiration of said contract.

The San Pablo Quarry Company, by its subtenant, San Francisco Quarries Company, continued in the possession of the premises and conveyor in question until about April, 1914, at which time the San Pablo Quarry Company sold and transferred to the Blake Bros. Company, a corporation, the defendant in the instant case, the said quarry and rock-crushing plant and everything connected therewith, and since that time the defendant corporation possessed and operated all of said property, including said conveyor.

Plaintiff in the present case offered in evidence and there was received an assignment from McDonald and others claiming or possibly having some interests or rights in said property which said assignment purported to transfer the title of said conveyor, including all moneys due for its use before the commencement of the present action. The defendant corporation, Blake Bros. Company, and the San Pablo Quarry Company and the San Francisco Quarries Company, after the entry of the condemnation judgment aforesaid, continued to use the property in question. Plaintiff, appellant herein, made demand upon defendant, the San Pablo Quarry

Company, and the San Francisco Quarries Company, for the delivery of the possession of the property in question, which demand was made on or about the 21st day of August, 1916, which demand was refused, and the defendant continued to use the property and was in possession thereof at the commencement of this action.

The foregoing is a detailed statement of the facts of the case, and although the statement is somewhat long and the facts of the case involved and difficult to keep clearly in mind, it is necessary to state them.

The plaintiff, appellant herein, alleges that the reasonable market value of the conveyor and its equipment at the time the demand was made for its possession was the sum of $7,000, but the proof of its value was the sum of $4,000. In a second cause of action in the same complaint the plaintiff alleges that the reasonable market value of the use made by the defendant of the conveyor and equipment from November 1, 1913, to August 21, 1916, was the sum of $200 per month, but the proof was the sum of $15 per month.

The plaintiff contends that the conveyor which is the subject-matter of the suit was a trade fixture placed upon the premises leased by the tenant during the lease, and that, since the tenant did not remove the trade fixture at the termination of the lease, the title thereto passed to the landlord. Appellant contends that the cases of Richmond Wharf & Dock Company v. Blake et al., 181 Cal. 454, 185 Pac. 184, and 39 Cal. App. 5, 185 Pac. 186, supra, hold that the San Pablo Quarry Company was a tenant of A. S. McDonald and his successors in interest from the construction of the wharf referred to in 1906 to August 2, 1911, on which date the lease expired, and that the San Pablo Quarry Company thereafter held over through its subtenant, the San Francisco Quarries Company; that, as the lessee did not during the pendency of the lease remove the trade fixtures, the title to said trade fixtures passed to the assignors of plaintiff, appellant herein, on the 3d day of August, 1911. Earle v. Kelly, 21 Cal. App. 480, 132 Pac. 262.

The attorney for plaintiff, appellant herein, stated at the beginning of the trial of the case:

> "Our claim is going to be that this conveyor while it was constructed by Mr. Blake, or his corporation, under a lease from us, that when the lease expired he did not remove it from the land and hence became our conveyor."

Let us concede for the purposes of this decision that this is true and has been established by competent evidence; that is, let us assume that the property in question, to wit, the conveyor and equipment, passed to the assignors of plaintiff, appellant herein, by reason of the fact that the said fixtures were not removed during the term of the lease and thereby became the property of the landlord.

The record shows, however, that in 1912 Castro Point Railway & Terminal Company began an action in condemnation in the superior court of the state of California, in and for the county of Contra Costa, to condemn a portion of the land upon which a greater portion of the fixtures in question were erected and on the 19th day of August, 1913, a final order of condemnation was entered. This case was appealed to the Supreme Court (33 Cal. App. 418, 165 Pac. 544), the remittitur having been handed down on April 16, 1917.

The plaintiff, appellant herein, argues that until the 19th day of August, 1913, the date of the entry of the final judgment in condemnation, above referred to, and until the said condemnation judgment became final by the handing down of the remittitur on April 16, 1917, that the title to these trade fixtures was in plaintiff's assignors and plaintiff, and the possession was and continued to be in the San Pablo Quarry Company and its subtenant, the San Francisco Quarries Company.

The plaintiff, appellant herein, made proof that on April 1, 1914, it made demand for the possession of the trade fixtures in question, the trade fixtures at that time being in the possession of defendant, and the defendant having refused to give possession to plaintiff (in whom it is alleged the title then vested) and claims that such action amounted to a conversion of the property in question and, therefore, the plaintiff is entitled to damages for the conversion of the property and for the use thereof.

[1] The claim of the plaintiff, appellant herein, that the fixtures in question became the property of the plaintiff's assignors and plaintiff, for the reason that the said fixtures were not removed from the leased premises during the term of the lease, is, in legal effect, an admission that this property became a part of the realty. Nevertheless, the plaintiff, appellant herein, in the court below, prays for damages for the conversion of these fixtures upon the theory that such fixtures are personal property.

[2] The court below, taking the position that the action could not be maintained upon this theory upon the evidence introduced, the plaintiff then introduced in evidence all the proceedings in the condemnation suit above referred to, and in its closing brief the appellant makes this statement:

> "In the case before the court, the sole question is whether or not in a condemnation action the condemnor and condemnee can verbally agree; that fixtures upon the land are not to be included in the condemnation action."

This is not an accurate statement of the sole question involved. The real question for decision, according to the record before us, may be stated thus: A final judgment of condemnation of land having been entered, upon which there are fixtures and in which condemnation proceedings the court fixed the value of the land without separately valuing the fixtures, and a party defendant in such a condemnation action appeared and answered, can such party defendant in a future action maintain an action for the conversion of such fixtures and the use thereof, where the condemnor refused to deliver the fixtures upon demand? We are satisfied that such an action cannot be maintained; it would be equivalent to a collateral attack upon a final judgment of a court of competent jurisdiction, and upon fundamental principles is not permissible. Code Civ. Proc. § 1908; 20 C. J. p. 1182; Harrelson v. Oro Grande, etc., 23 Cal. App. 479, 138 Pac. 932.

In the case of Castro Point Railway & Terminal Company v. Anglo Pacific Development Company et al., it must not be forgotten that the Richmond Wharf & Dock Company, the plaintiff in the instant case, appeared as a party defendant and filed a supplemental answer, and in said answer set up that the land sought to be condemned was of the reasonable value of $150,000, and that the damages which will accrue by reason of its severance from the portion sought to be condemned would amount to the sum of $50,000. At that trial the Richmond Wharf & Dock Company, appellant herein, was represented by counsel, and no effort was made by it to have the fixtures in question separately valued.

In the instant case the plaintiff put in evidence the transcript on appeal in the case of the Castro Point Railway & Terminal Company v. Anglo Pacific Development Company et al.; no point was made in that case or on appeal that the court did not separately value the fixtures or improvements. See Castro Point Railway & Terminal Co. v. Anglo Pacific Development Co., 33 Cal. App. 418, 165 Pac. 544.

[3] It is well settled that in an action of condemnation the burden is upon the defendant, the condemnee, to show the value of the property condemned. 10 Cal. Jur. p. 357, note 10, and cases cited; Kerr's Cyc. Code Civ. Proc. 1920, § 1248, note 20, and cases cited; Harrelson v. Oro Grande Lime, etc., Co., 23 Cal. App. 479, 138 Pac. 932.

[4] Conceding that in a condemnation proceeding the condemnor and the condemnee may agree or stipulate that improvements or fixtures situated upon the land sought to be condemned need not be included in the condemnation judgment, and that the condemnee may remove and retain such fixtures and improvements, yet the evidence introduced, or offered, failed to show any such agreement. At most, the evidence offered by the appellant, taken in its broadest sense, even if it had been admitted, would have amounted to no more than a showing that the court did not separately value such fixtures, evidently because it was not requested to do so. Such evidence, if received and admitted in the court below, giving to counsel for appellant the most liberal construction in his favor that the language of counsel in his offer of proof is capable, amounts to no more than a showing that in the condemnation proceeding the record is silent upon the question of valuation of the fixtures in question.

[5] We have seen, as hereinbefore stated, that the burden is upon the condemnee to show the value of all the interests in the land condemned, and it follows that, if the condemnee fails to have the fixtures separately valued in the condemnation proceedings, the question is held to have been waived. 10 Cal. Jur. p. 376; German Savings & Loan Society v. Ramish, 138 Cal. 127, 69 Pac. 89, 70 Pac. 1067; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18.

The true rule, we think, is well stated in Lewis on Eminent Domain, vol. 2, § 831, as follows:

> "If the commissioners or jury make a mistake in the assessment of damages, by omitting an item of damages which ought to have been allowed, by proceeding upon erroneous principles, *or otherwise*, the *remedy* must be sought in the *proceedings themselves*. Such mistake cannot be made the basis of an *independent suit*." (Italics ours.)

[6] There is one other point to be considered, and that is that the proof shows that a part of the conveyor is situated upon land not included in the condemnation suit and that as to such part of the conveyor so situated it was error to grant the nonsuit.

The appellant alleges that the conveyor is situated upon a wharf located upon tide land lot No. 16. The evidence shows that appellant acquired said lot No. 16 through sundry mesne conveyances, and there is no evidence that appellant at any time was the owner of the land outside and beyond said tide land lot No. 16, upon which the said portion of said conveyor is situated. The evidence fails to show that appellant at any time had title to or possession of that part or portion of the conveyor outside and beyond said tide land lot No. 16.

It follows for the reasons given that the court did not err in granting a nonsuit, and therefore it is ordered that the judgment be and the same is hereby affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

67 Cal. App. 183

PEOPLE v. GRAHLE. (Cr. 1030.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1924.)

1. Receiving stolen goods 🔑7(6)—Failure to prove corporate existence of injured party in prosecution for receiving stolen goods held immaterial.

In a prosecution for receiving stolen goods, failure to prove corporate existence of company from whom property was taken was immaterial, where it was not a factor in description either of property stolen or in persons by whom it was stolen.

2. Receiving stolen goods 🔑7(6)—Designation of thieves by fictitious names in prosecution for receiving stolen goods, when evidence showed real names, held not a fatal variance.

That an information in a prosecution for receiving stolen goods designated the thieves by fictitious names, when evidence showed their real names, was not a fatal variance between allegations and proof.

3. Receiving stolen goods 🔑7(3)—Information designating thieves by fictitious names held sufficient.

An information in prosecution for receiving stolen goods which designated thieves by fictitious names was sufficient, under Pen. Code, § 950.

4. Indictment and information 🔑176—Whether larceny committed on particular day held immaterial, if falling within statute of limitations.

In a prosecution for receiving stolen goods in which the date of larceny was alleged to have been on or about a certain day, whether it was committed on a particular day was immaterial, in view of Pen. Code, §§ 955, 956, if such date fell within the statute of limitations for the prosecution of offense and stolen property was shown to have been within possession of injured party at time larceny occurred.

5. Receiving stolen goods 🔑8(3)—Evidence held to sustain conviction.

In a prosecution for receiving stolen goods, evidence *held* to warrant a conclusion that defendant received the property with guilty knowledge that it had been stolen, and that his subsequent acts showed that he intended to prevent owner from again possessing his property.

6. Criminal law 🔑1169(1)—Admission of evidence of defendant's participation in sale of other property in prosecution for receiving stolen goods held not prejudicial error.

In a prosecution for receiving stolen goods, admission of evidence, for purpose of corroborating a witness who had testified regarding defendant's participation in the transaction, of a sale of other property made by defendant some time later which was not shown to be illegitimate, while immaterial, did not constitute prejudicial error.

7. Criminal law 🔑696(3)—That evidence conflicted with other evidence held no ground for striking out.

Court did not err in a prosecution for receiving stolen goods in refusing to strike out evidence introduced by prosecution for purpose of tracing stolen property, merely because it conflicted with other evidence.

8. Criminal law 🔑829(1)—Refusal of defendant's instruction, substantially covered by given instructions, held not erroneous.

Refusal of defendant's instructions, which were substantially covered by court's given instructions, did not constitute error.

9. Criminal law 🔑1173(2)—Refusal of defendant's instruction on reasonable doubt held not reversible error.

In a prosecution for receiving stolen goods, refusal of defendant's instruction on reasonable doubt, while proper to be given, did not constitute reversible error.

10. Criminal law 🔑1172(6)—Instruction that person presumed to intend natural and probable consequences of his own acts, while possibly inapplicable, held not prejudicial.

In a prosecution for receiving stolen goods, giving of an instruction that a person is presumed to intend all the natural, probable, and usual consequences of his own acts, while possibly inapplicable, was not prejudicial.

11. Criminal law 🔑823(4)—Instruction that it was immaterial when offense was committed if within statute of limitations held not misleading, in view of other instruction.

In a prosecution for receiving stolen goods, an instruction that it was immaterial on what day or night offense was committed, if within three years prior to filing of information, was not misleading, in view of other instruction that if jury found that property had been stolen it was immaterial by whom theft was committed.

12. Criminal law 🔑1172(6)—Instruction on buyer's duty in purchasing goods at reduced rates, while inapplicable, held not reversible error.

In a prosecution for receiving stolen goods, an instruction on buyer's duty in purchasing goods at reduced rates, while inapplicable under the evidence, did not constitute reversible error.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

H. J. Grahle was convicted of receiving stolen property, and he appeals. Affirmed.

Halverson & Price, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of receiving stolen property and from an order denying his motion for a new trial. The information under which defendant was prosecuted charged:

"That one John Doe and one Richard Roe, on or about the 13th day of November, 1922, * * * did willfully, unlawfully, and feloniously steal, take, and carry away ten cartons of cigarettes of the value of $600, * * * and of the personal property of the Pacific Electric Railway Company, a corporation; that thereafter, to wit, on or about the 14th day of November, 1922, * * * the said H. J. Grahle did willfully, unlawfully, knowingly, and feloniously * * * buy and receive from the said John Doe and Richard Roe the aforesaid ten cartons of cigarettes, * * * he, the said H. J. Grahle, then and there well knowing the same to have been stolen, as aforesaid."

The evidence showed that certain persons named Bird, Monahan, and Ketchum, who were switchmen working for the Pacific Electric Railway Company, broke into a box car at about midnight on the night of the 12th or the morning of the 13th of November, 1922, and stole the cigarettes therefrom, which they placed in an empty box car and later removed to Bird's home, in the town of Watts, on the early morning of November 13, 1922. It also appears that on the night following some of the cigarettes were taken to the home occupied by defendant and one of the said switchmen, and thereafter defendant materially assisted in attempting to conceal the identifying marks on the packages containing the cigarettes, and later made the necessary arrangements for their sale.

[1] It is first contended that because of the allegation that the cigarettes were the property of the Pacific Electric Railway Company, a corporation, it became necessary to prove that that organization was a corporation, which it is asserted the prosecution failed to do. The corporate existence of the Pacific Electric Railway Company was not a factor in the description either of the property alleged to have been stolen or in the persons by whom it was stolen. Defendant could not have been misled by such allegation, nor injured by reason of the failure of the prosecution to prove whether or not the Pacific Electric Railway Company was a corporation. That particular fact was wholly immaterial, and could neither aid nor hinder either the prosecution or the defense in any way. In such circumstances the failure to prove its status was of no consequence, and prejudicial error cannot be thereon predicated. People v. Goggins, 80 Cal. 229, 22 Pac. 206.

[2] Appellant next complains that because it is alleged in the information that one John Doe and one Richard Roe stole the cigarettes, and that the evidence showed that the offense was committed by persons named Bird, Monahan, and Ketchum, there is a fatal variance between the allegation and the proof. The gist of the offense of receiving stolen property is the receipt thereof by defendant with guilty knowledge of the fact, coupled with the intent of depriving the owner thereof of its possession. It is a general rule, supported by many authorities, that the information need not set forth either the name of the person from whom the goods were received by the defendant or the name of the person who committed the original theft. There are, however, some authorities which hold, in effect, that where the principal felon is named in the information or the indictment, and the evidence shows that the crime was committed by some other person, the variance is fatal. United States v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935; Huggins v. People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; Commonwealth v. King, 9 Cush. (Mass.) 284.

[3] All that is required of an information regarding the matter to which attention is directed is that it contain a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended. Pen. Code, § 950. The names John Doe and Richard Roe are so commonly, if not universally, used in English-speaking countries for the purpose of designating fictitious or unknown persons that any person of "common understanding" knows what is intended when such names are used in an indictment or in an information without any explanation regarding same. As applied to defendant, personally, there is nothing in the evidence which would indicate that he was not a person of at least "common understanding"; on the contrary, judging from the testimony given by him and the experience which he had had in his various occupations, including that of a policeman in the city of Los Angeles, it would be only fair to accord him a rating of intelligence and understanding rather above that possessed by the average person, and he must be presumed to have understood from the language of the information that certain persons whose names were unknown to the district attorney were by him alleged to have committed the larceny of the cigarettes, and that it was from such unknown persons that defendant received them. The purpose of the rule requiring that the allegation correspond with the proof regarding the name of the thief is that the defendant may be protected as against a subsequent prosecution for the same offense; but where, as here, the transaction of which complaint is made is clearly identified, the rights of a defendant may be as thoroughly and as completely protected as though the correct name of the thief had been accurately set forth in the information. In the instant case the evidence on the part of defendant, as well as that on the part of the prosecution, leaves no room for doubt regarding the subject-matter and the various parties connected therewith. It is manifest that a subsequent prosecution against this defendant could not be successfully predicated upon the facts of the case. There can be not the slightest danger to defendant, either immediate or remote, from such a

source; and there exists basis for the application of the rule that when the reason for the rule ceases so does the rule itself cease.

[4] There seems to have been some confusion in the evidence regarding the precise date upon which the cigarettes were stolen, from which fact defendant seeks to take advantage of an opportunity to argue that if the cigarettes were stolen on a given date they could not have been the property of the Pacific Electric Railway Company. The evidence tends to show that the cigarettes were being shipped on a railway car of the Southern Pacific Railway Company and that it was necessary that they be transferred from the possession of the Southern Pacific Railway Company to that of the Pacific Electric Railway Company. If the testimony of some of the witnesses is to be given full credence, at the time the cigarettes are alleged to have been stolen from the Pacific Electric Railway Company the cigarettes had not been delivered to that company. On the other hand, one witness for the prosecution testified that he and two other men stole the cigarettes from a car belonging to and being operated by the Pacific Electric Railway Company, and identified the cigarettes as being those which defendant was charged with feloniously receiving. The date of the larceny having been alleged as having occurred on or about a certain day, the question of whether the larceny was committed on a particular day is immaterial, so long as the date falls within the statute of limitations for the prosecution of the offense and the cigarettes are shown to have been within the possession of the Pacific Electric Railway Company at the time the larceny occurred. Pen. Code, § 955. As to the latter point, section 956 of the Penal Code provides:

> "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material."

There are many cases in this state bearing upon the effect of the foregoing statute, a number of which, together with several from other jurisdictions, are considered in the case of People v. Nunley, 142 Cal. 105, 75 Pac. 676. The conclusion there reached is that, where the act charged is otherwise identified, an erroneous allegation of ownership or possession of the subject-matter of the larceny is immaterial; from all of which it follows that appellant's contention in this regard cannot be sustained.

[5] Counsel for appellant also complains that the evidence is insufficient to support the verdict. The testimony of one of the men who participated in the larceny was, in substance, that soon after the cigarettes had been stolen they were taken to the house where defendant lived; that defendant was present when witness attempted to obliterate from the cover of the cartons the name of the consignee of the goods, and that defendant wrote the name of "Turner" on each of the cartons which contained the cigarettes; that defendant arranged for the sale of part of the cigarettes and directed the witness to where he could get a transfer man to deliver them to the prospective purchaser; that defendant assisted in loading the cigarettes into the truck on which they were to be transported, and, after the cigarettes were delivered to the purchaser thereof and payment received therefor (which was slightly less than the market value), defendant received a part of the purchase price. From a consideration of such evidence the jury was warranted in reaching the conclusion that defendant received the property with guilty knowledge that it had been stolen, and that his subsequent acts showed that he intended to prevent the owner from again possessing his property.

[6] The evidence shows that the transaction regarding the sale of the cigarettes was carried on under the name of "Turner," which was the name which had been written by defendant on the cover of the cartons. For the avowed purpose of corroborating a witness who had testified regarding defendant's participation in the transaction, and particularly as to the use by defendant of the name "Turner," evidence was introduced to the effect that three or four weeks after the sale of the cigarettes was made in the first transaction defendant made a subsequent sale of other "cigarettes and tobacco" apparently for a man named Turner, and for which merchandise defendant was paid the sum of $560 by means of a check, and which check was filed as an exhibit in the case. It was not an attempt to show the commission by defendant of a similar offense; neither was any claim made, nor was any evidence offered which tended to show, that the sale was not legitimate in all respects. Conceding that the evidence of this subsequent transaction was immaterial and should have been rejected, we are unable to perceive any prejudicial error in its admission.

[7] No error was committed by the judge of the trial court in refusing to strike out certain evidence introduced by the prosecution for the purpose of tracing the movements of the cigarettes and the car in which they were being transported. The assumption by defendant that such testimony was in conflict with other evidence is no good reason why it should be taken from the consideration of the jury.

Defendant's request that the court peremptorily instruct the jury to return a verdict of not guilty was properly refused. The evidence as heretofore outlined was sufficient in weight and character to warrant the court in submitting it to the jury for the purpose of having it determine the guilt or the innocence of the accused.

[8, 9] Defendant urges that the court erred in refusing to give to the jury, at defendant's request, certain other instructions. The first of these, to the effect that the jury could find defendant guilty only of the particular offense of which he was charged, was fully and fairly covered by another instruction which was given to the jury. Certain other instructions which related to the presumption of defendant's innocence, to the necessity of proving his guilt beyond a reasonable doubt, to the unlawfulness of convicting defendant on mere suspicion or speculation, or because the evidence preponderated in favor of his guilt, all of which were offered by defendant and by the court refused, were likewise substantially covered by the court in other instructions given to the jury. One of defendant's refused instructions was:

> "That if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty."

In the cases of People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, People v. Howard, 143 Cal. 316, 76 Pac. 1116, and People v. Wong Loung, 159 Cal. 520, 114 Pac. 829, it is held that such an instruction is proper and should be given. However, the refusal to give such an instruction does not constitute such error as will for that reason alone justify the reversal of the case. People v. Singh, 20 Cal. App. 146, 128 Pac. 420; People v. Fisher, 16 Cal. App. 276, 116 Pac. 688; People v. Loomer, 13 Cal. App. 654, 110 Pac. 466; People v. Svendsen, 25 Cal. App. 1, 142 Pac. 861; People v. Walton, 53 Cal. App. 35, 199 Pac. 824; People v. McNabb (Cal. App.) 219 Pac. 1031.

[10] Appellant challenges the giving by the court to the jury of several different instructions. The first of these is:

> "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts."

That the giving of such an instruction is not error is held in the case of People v. Webster, 13 Cal. App. 348, 109 Pac. 637. That was a murder case, and the instruction was clearly applicable. In the instant case there might be some question regarding the applicability of the instruction to the evidence. But, in any event, we are unable to discover any prejudicial effect, however slight, which resulted to defendant from the giving of the instruction.

[11] The next instruction of which complaint is made by appellant is to the effect that it was immaterial on what day or what night the offense charged in the information was committed, provided that it was committed within three years prior to the filing of the information. It is admitted by appellant that the instruction correctly stated the law, but it is objected that it was misleading and confusing to the jury, in that the jury was elsewhere instructed that if it found that the cigarettes had been stolen it was immaterial by whom such theft was committed. The question of the sufficiency of the allegation concerning the names of the persons who committed the theft has already received attention herein. As heretofore set forth, there is authority for holding that, where the information in a case of this character contains a specific allegation that the goods were stolen by a certain designated person, any material departure in the proof as to the name of that person will constitute such a variance as to entitle the defendant to an acquittal. But in view of the fact that defendant here was, in effect, advised by the information that the theft of the cigarettes was committed by unknown persons, the instruction was unobjectionable. Nor are we able to discover how the giving of the instruction as to the immateriality of the time when the offense was committed could have misled or confused the jury in any manner.

[12] Another criticized instruction given by the court to the jury contained the statement that—

> "He [defendant] is required to use the circumspection usual with persons taking goods by private purchase, and this is eminently the case with dealers buying at greatly depreciated rates."

Standing by itself, that part of the instruction which has been quoted bore no relation to the evidence in the case. It was not claimed that defendant personally purchased the cigarettes in the sense that he ever bought them from the persons who stole them. Defendant's connection with the transaction consisted in receiving the stolen property after the larceny had been committed and in assisting in the sale of the stolen property to another person. Besides, it was not shown that the cigarettes were sold at such a reduction from their market value as would justify the intimation that they had been sold "at greatly depreciated rates." While it would appear that the language of the instruction to which reference has been made was unwarranted from the facts in the case, the error was not of that grave importance which would justify this court in ordering a reversal by reason thereof. It would seem extremely unlikely that the particular matter to which attention has been directed could greatly or at all have influenced the jury in the way of finding a verdict of guilty, or that without such instruction a verdict of acquittal would have been rendered.

After an examination of the entire cause, including the evidence, this court is of the opinion that the errors to which appellant has directed attention have not resulted in a miscarriage of justice.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

67 Cal. App. 165

DEVLIN (MAGUIRE et al. Substituted) v. POWELL et al. (Civ. 2728.)

(District Court of Appeal, Third District, California. May 7, 1924. Rehearing Denied June 6, 1924. Hearing Denied by Supreme Court July 3, 1924.)

1. Adverse possession 🔑117—General verdict held not affected by special verdict as to adverse possession.

Where jury, in answer to question whether plaintiffs acquired title by adverse possession, stated, "No; the description in the Hooker deed covers the entire tract in dispute," question of title by adverse possession was not eliminated from case, and answer did not affect general verdict for plaintiff.

2. Deeds 🔑100—Referring to natural objects construed as of date of execution.

A deed referring to natural objects must be interpreted, and intention arrived at according to circumstances and conditions existing upon date of execution, unless there is something in instrument manifesting a contrary intent.

3. Deeds 🔑100—Rule as to construction of ambiguous deeds.

Where description in deed is in any wise ambiguous, courts will resort not only to character and condition of subject-matter to ascertain intention of parties, but will interpret deed in light of surrounding circumstances.

4. Boundaries 🔑3(3)—Courses, distances, lines, and angles give way to natural objects.

One cardinal rule of construction is that, where natural objects or monuments are referred to, courses, distances, lines, and angles must give way if there is any conflict or ambiguity, in view of Code Civ. Proc. § 2077.

5. Boundaries 🔑3(3)—Bank of stream prevails over courses and distances.

Where boundary is designated to be bank of river or stream, and courses and distances are also given, latter yield to actual line of stream.

6. Adverse possession 🔑100(1)—Party entering in good faith under color of title deemed to have possession of whole tract within boundaries of deed.

Under Code Civ. Proc. § 322, where a party enters in good faith upon tract of land under color of title, under deed purporting to convey tract with specific boundaries, no person being in adverse possession at time, and takes and holds actual possession of part, claiming title and possession of whole tract, he is deemed to have possession of whole tract within boundaries of deed.

7. Adverse possession 🔑114(2)—Evidence held sufficient to show possession up to line claimed.

Evidence *held* sufficient to show adverse possession up to boundary claimed, under Code Civ. Proc. § 323.

Appeal from Superior Court, Sacramento County; H. D. Gregory, Judge.

Action by Wm. H. Devlin, executor of the last will and testament of John Mackey, deceased, Mary J. Maguire and another, substituted plaintiffs, against Robert Powell and others. From an adverse judgment, the named defendant appeals. Affirmed.

C. E. McLaughlin, C. P. McLaughlin, and Charles B. Harris, all of Sacramento, for appellant.

Martin I. Welsh, Wm. Rigby, and Robert H. Schwab, all of Sacramento, for respondents.

PLUMMER, J. Plaintiffs had judgment in an action to recover 28.153 acres of land in the county of Sacramento, state of California. From this judgment the defendant Powell appeals.

The complaint in this action describes certain land situated in the county of Sacramento, and claimed to belong to the plaintiffs, as follows, to wit:

> "Beginning at a point where the northerly boundary line of the city of Sacramento, in said county and state, is intersected by the center line of Twenty-Fifth street of said city, if extended northerly, and running thence north 18° 57′ east a distance of 1,410 feet, more or less, to the south bank of the American river as the same now exists, running thence along the said south bank of said river north 50° 56′ west 462.528 feet, thence north 62° 32′ west 190.872 feet; thence north 52° 43′ west 173.25 feet, more or less, to a point on the south bank of said American river as the same now exists where said south bank is intersected by the center line of Twenty-Third street in said city if extended northerly to said south bank of said river; thence in a southerly direction along the said extension of the center line of Twenty-Third street to the north boundary line of said city of Sacramento, thence easterly along the said north boundary line to the point of beginning."

The foregoing premises are claimed by the plaintiffs by adverse possession founded upon color of title under a deed dated April 23, 1894, executed by Elizabeth H. Hooker, James H. Hooker, and Amy May Hooker, and delivered to John Mackey (predecessor in interest of the plaintiffs), describing certain lands as follows:

> "All that real property situated in the city of Sacramento, county of Sacramento, state of California, bounded and described as follows:

Blocks bounded by A and B and Twenty-Third and Twenty-Fourth streets, A and B and Twenty-Fourth and Twenty-Fifth streets, C and D and Twenty-Third and Twenty-Fourth streets, C and D and Twenty-Fourth and Twenty-Fifth streets, D and E and Twenty-Third and Twenty-Fourth streets, D and E and Twenty-Fourth and Twenty-Fifth streets. Also block 1 bounded by A street and the American river and Twenty-Fourth and Twenty-Fifth streets, block 2 bounded by A street and American street and Twenty-Third and Twenty-Fourth streets, block 29 bounded by American street and American river and Twenty-Third and Twenty-Fourth streets."

The cause was tried before a jury, and a general and special verdicts returned. The general verdict reads as follows:

"We, the jury in the above-entitled action, find a verdict for the plaintiff for the recovery of the possession of the premises described in the complaint, and for the sum of no dollars damages for the withholding thereof by said defendants from the said plaintiff."

As to the special verdicts, we need give attention only to question No. 4 and the answer of the jury thereto. The question propounded to the jury and known as No. 4 reads:

"Did the plaintiffs or their predecessors in interest acquire title by adverse possession to any land not described in the deeds from Elizabeth Hooker and others to John Mackey, introduced in evidence as Plaintiff's Exhibit 1? If so, describe the land so acquired."

The jury answered as follows:

"No; the description in the Hooker deed covers the entire tract in dispute."

[1] Basing his argument upon the answer of the jury to the special interrogatory No. 4, it is urgently insisted by the appellant that title by adverse possession is entirely eliminated from this case. We do not so read the verdict of the jury. It is apparent that the jury by its general verdict intended to find that the plaintiffs were entitled to recover all the lands described in the complaint, and that the Hooker deed, though differing in the words used describing the lands conveyed, was in truth and in fact an instrument covering the same tract of land described by different language in the complaint. In other words, if all the elements necessary to constitute adverse possession, under color of title or otherwise, appear from the testimony sufficient to give title to the premises described in the plaintiffs' complaint, then the general verdict is not affected by the answer of the jury to the special interrogatory No. 4, unless the Hooker deed by force of its terms limits or circumscribes the conveyance to a lesser tract of land. Thus, if the Hooker deed and the description set forth in the plaintiffs' complaint refer to the same tract of land, the finding of the jury cannot be held adverse to any claims made by the plaintiffs or to any title upon which they base their claims by reason of the fact that the jury by its general verdict found the plaintiffs entitled to recover the entire tract mentioned in their complaint.

The jury, by its general verdict, has found that the Hookers intended to convey, and that the plaintiffs took possession of, became the owners of, and are the owners of the entire tract of land for the recovery of which this action was prosecuted.

[2] The Hooker deed was executed and delivered on the 23d day of April, A. D. 1894, speaks as of that date, refers to natural objects as of that date, and the interpretation to be given thereto and the intent and meaning of the conveyance must be based upon the circumstances and conditions as they existed upon that date, unless there is something in the instrument manifesting a contrary intent.

The controversy as to what the Hooker deed means or as to what is conveyed thereby arises from the fact that some time between the years 1862 and 1868 the American river channel was shifted slightly by natural means, but principally by artificial agencies, a little distance north of where it existed about the year 1850. From 1868 at least down to the time of the execution of the deed relied upon by the plaintiffs as giving color of title the American river flowed in the channel identical with the channel as it existed on April 23, 1894. The appellant claims title originating in a Spanish grant and culminating in a United States patent for some 44,000 acres of land known as the Rancho Del Paso. The boundaries of this grant carried the southerly line thereof to the channel occupied by the American river in 1850. Thus, while the complaint in this action describes a tract of land including something over 28 acres, the controversy in fact relates only to 7.05 acres lying between the site of the old channel of the American river as it existed at the time of the grant, and its present location, as definitely fixed in 1868.

For some 26 years prior to the execution of the Hooker deed, the American river to all intents and purposes in its present location constituted a natural object as fully and completely as though its course had been entirely created by its own action and not partially by artificial means. The conditions of the entire tract described in the plaintiffs' complaint, including the course of the river, were, at the time of the trial, the same as they had existed for some 50 years; hence, the testimony as to the course of the river and its changed location depended upon the testimony of the witnesses who were very young at that period of time, and necessarily had but a hazy recollection of the occurrences taking place between 1862 and 1868.

[3] It is a rule of construction that, where the description in the deed is in any wise

ambiguous, courts will resort not only to the character and condition of the subject-matter to ascertain the intention of the parties, but will interpret the deed in the light of the surrounding circumstances.

> "The court will place itself, as nearly as possible, in the position of the parties, and ascertain their intent in the same manner as in the case of any contract. And in this connection all the facts and circumstances by which the parties and the subject-matter were surrounded are relevant and pertinent." 4 Cal. Jur. 374.

The Hooker deed was executed and delivered in 1894; hence the condition of the premises in controversy, all the circumstances, including natural boundaries, if any, referred to in the instrument, will be taken into consideration in determining the extent of the premises included within the calls of the deed being interpreted.

[4, 5] It is one of the cardinal rules of construction that, where natural objects or monuments are referred to, courses, distances, lines, and angles must give way, if there is any conflict or ambiguity, and the natural objects or monuments will prevail. Section 2077, Code Civ. Proc.; Curtis v. Upton, 175 Cal. 322, 165 Pac. 935; 9 C. J. 314; 4 Id. 401.

> "Where the boundary is designated to be the bank of a river or stream, and courses and distances are also given, the courses and distances yield to the actual line of the stream; for a boundary will be determined by reference to a natural monument, if that can be found." 4 Cal. Jur. 402.

It is also a rule of construction that, unless there is something in the instrument to the contrary, a deed of conveyance referring to natural objects and boundaries speaks as of the date of its execution. As applied to this case, the instrument being considered speaks as of April, 1894. There is no reference in the instrument as to the American river channel as it existed or as it is claimed to have existed in 1850. The reference to the American river is as of the date set forth in the deed and of no other time. As between grantor and grantee, the terms of the deed call for the American river as the northern boundary of the tract conveyed as it existed when the deed was executed, unless the instrument by its terms limits the northern boundary to a less distant line. The calls in the deed as to the northern boundary read:

> "Also block 1 bounded by A street and the American river and Twenty-Fourth and Twenty-Fifth streets. * * * Block 29 bounded by American street and American river and Twenty-Third and Twenty-Fourth streets."

That the deed contains words of limitation and withdraws the northern boundary from the banks of the American river as the same existed in 1894 is the contention of appellants, and to support such contention the case of Oldham v. Ramsner, 149 Cal. 540, 87 Pac. 18, is relied upon. That case, however, rests upon the tax title executed by the tax collector of the city of Stockton. The land in controversy was described as lying within the city of Stockton, to wit, lots 9 and 10, block C, McCloud addition. There were no such lots. There was a McCloud addition outside of the city, and it is claimed that the description should be interpreted to mean "without" instead of "within." It was held that no such interpretation could be given. Being a tax title, it could not be corrected or interpreted to read to include land other than that expressly described, and upon which the tax had been levied. It was not a question between grantor and grantee as to what was intended to be conveyed and what lands were really intended to be included by the description given, but rested upon the technical accuracy of the proceedings leading up to the sale of the property for delinquent taxes and the deed executed in pursuance thereof. The opinion in that case further states what would have been considered if the circumstances were as they are here, that is, the intention of the parties and the lands and premises which the grantor purposed to convey and the grantee to purchase.

[6] This leads us to the real point in issue in the instant case—possession under color of title. In the first place:

> "Section 322 of the Code of Civil Procedure deals with the constructive adverse possession of land where the possession is taken under color of title. The general rule under this section, as declared by the cases, is that, where a party enters in good faith upon a tract of land with color of title, under a deed purporting to convey the tract with specific boundaries, no person being in the adverse possession at the time, and he takes and holds actual possession of a part, bona fide, claiming title and possession of the whole tract described in the deed, he is deemed to have possession of the whole tract within the boundaries of the deed." 1 Cal. Jur. 580.

As to what constitutes adverse possession by any person claiming a title founded upon an instrument in writing, section 323 of the Code of Civil Procedure specifies the following requirements as being sufficient:

> "1. Where it has been usually cultivated or improved;
>
> "2. Where it has been protected by a substantial inclosure;
>
> "3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;
>
> "4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

[7] There is sufficient testimony in the transcript to sustain a verdict, if believed by the jury, of the taking of possession in good faith by the plaintiffs and their grantors of the entire tract of land described in the complaint and included within the terms of the conveyance, if that conveyance be held to extend the northern boundary to the American river as it existed at the time of the execution of the deed. It appears from the testimony that the plaintiffs and their grantor established a home upon the premises, cultivated the same, used it for pasturage, cut wood along that portion immediately adjoining the banks of the river and made use of the same as a supply for fuel, used such portion for pasturage, and generally did all those things which are usual in ordinary course of husbandry to be done and performed and which would be done and performed in the ordinary course of husbandry by any one claiming and owning the entire tract. It also appears from the transcript, notwithstanding appellant's contention to the contrary, that taxes were paid by the plaintiffs and their grantors for the requisite period of time, that the described property assessed ran to the American river, and that these taxes were paid to the county of Sacramento, state of California, for the requisite period of time. The point is made by appellant that certain of the taxes were allowed to become delinquent, but it appears from the transcript that these taxes were subsequently paid, and that redemption was had of the property while the plaintiffs and their grantors were in the undisputed possession, and therefore the rights of the plaintiffs in this particular are the same as though the taxes had not been allowed to go delinquent. In the case of Owsley v. Matson, 156 Cal. 401, 104 Pac. 983, the court says:

> "Where a tax on the land adversely possessed is allowed to become delinquent and a sale has taken place, and, so far as appears, a redemption has been made thereof in good faith by the adverse possessor or his successor in interest while in undisturbed possession, such redemption operates as a payment of the tax, within the terms of the statute requiring the adverse possessor to pay the taxes upon the property claimed."

As we read the general and special verdicts in this case, in the light of what has been said, we find no conflict whatever. We think the jury intended to find and did find that the plaintiffs had been in adverse possession of the entire tract described in plaintiffs' complaint; that possession was taken of the entire tract described in plaintiffs' complaint and by virtue of the terms of the Hooker deed; and, that the plaintiffs for the requisite period of time claimed under color of title and exercised dominion over and maintained and held by adverse possession of all the premises set forth in the complaint. The language of special interrogatory No. 4, to say the least, is not very happily chosen, and if the jury entertained the views on the subject of adverse possession which we have shown the testimony might support, and also that the plaintiffs and their grantors took possession of the entire tract in controversy under the Hooker deed, no other answer than that returned could very well have been made. To conclude the whole matter, we think the testimony is sufficient to support the general verdict of the jury that the plaintiffs had acquired title to the entire premises described in the complaint, and that the judgment should be affirmed irrespective of special interrogatory No. 4 and the answer thereto, whether the same be considered or laid aside as meaningless.

The judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

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67 Cal. App. 155

CAMPBELL v. HANFORD et al. (Civ. 4601.)

(District Court of Appeal, First District, Division 2, California. May 7, 1924. Hearing Denied by Supreme Court July 3, 1924.)

1. Attorney and client 🔑166(4)—Finding that clients severed relationship by employing another attorney held supported by evidence.

Evidence *held* sufficient to support implied finding, in action for value of legal services, that defendants severed relationship of attorney and client between them and plaintiff's assignors by filing complaint in suit by another attorney, so that assignors were not guilty of breach of such relationship in assigning claim and directing action thereon without notice or demand for payment.

2. Attorney and client 🔑166(3) — Judgment for value of legal services rendered held sustained by evidence.

In action for value of legal services rendered by plaintiff's assignors, evidence of relationship of attorneys and client between assignors and one defendant *held* sufficient to sustain judgment against latter.

3. Appeal and error 🔑994(2) — Full weight given testimony in support of judgment, though contradicted.

In view of jury's implied finding in judgment against defendant denying relationship of attorney and client between him and plaintiff's assignors in suit for value of legal services, assignor's testimony as to such relationship must be given full weight, though contradicted by defendants.

4. Corporations 🔑451—Not bound to pay for services rendered in absence of contract, ratification, or estoppel.

Corporation is not bound to pay for services of benefit to it, in absence of contract, ratification, or estoppel.

5. Corporations 🔑407(2)—President and vice president not authorized to contract for legal services on behalf of corporation.

Neither president nor vice president of corporation, by virtue of such office alone has authority to contract for legal services on its behalf.

6. Principal and agent 🔑22(1)—Agent's authority cannot be established by his own declarations.

Authority of agent cannot be established by his own declarations, under Civ. Code, § 2319, subd. 2.

7. Corporations 🔑398(3)—Corporation liable for legal services rendered under contract by officers owning practically all capital stock.

Corporation practically all of whose capital stock was owned by president and vice president *held* liable for legal services rendered under contract made in its behalf by president and ratified by vice president, though without observance of formal requisites prescribed by charter or by-laws.

8. Appeal and error 🔑197(4)—Variance between pleading and proof in action for value of legal services held not available.

That action was on balance of account for services rendered, while proof showed no account, payments made, or balance due, *held* not available on appeal, in absence of objection to variance when pleading might have been amended to conform to proof, or prejudice to defendants, in view of judgment according with proof, if not technically with pleadings.

9. Appeal and error 🔑197(4)—Objection to evidence of value of lawyer's retainer held not available.

Defendants making no objection to plaintiff's hypothetical question as to value of legal services sued for, on ground that bill of particulars did not include claim for retaining fee, *held* precluded from urging such objection to evidence of value of retainer on appeal, as question might have been corrected or plaintiff ordered to furnish further account under Code Civ. Proc. § 454.

10. Attorney and client 🔑141—$25,000 for legal services rendered held not excessive.

Judgment for $25,000 for legal services rendered *held* not excessive, in view of expert testimony as to value thereof, and testimony of members of firm as to constant work of seven attorneys and their clerical assistants for over month and a half on defendants' business.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by G. W. Campbell against R. G. Hanford and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. P. Henshall, of San Francisco, for appellants.

Samuel M. Shortridge, of San Francisco (A. H. Ricketts, of San Francisco, of counsel), for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment for $25,000 against them in an action brought by the plaintiff, as assignee of the law firm of Metson, Drew & Mackenzie, to recover from the defendants the reasonable value of legal services alleged to have been rendered by said firm to the defendants at their request.

According to the testimony which appears in the record in support of the verdict, the defendant Hanford called at the office of the law firm of Metson, Drew & Mackenzie in San Francisco, and stated to Mr. Metson that he was representing himself and each and all of the defendants, all of whom were interested, in a greater or less degree, in the legal problems and entanglements upon which he sought advice and legal action. The amount of property involved in the various transactions from which relief was sought was something over twelve millions of dollars, and it became necessary for the law firm to examine and study a great number of documents which had resulted in the situation then existing.

Mr. Metson testified that, after Mr. Hanford had explained, in outline, the difficulties in which the affairs of the defendants were involved, Mr. Metson told him that the situation required an immense amount of work, and naturally there would have to be a large fee paid. Mr. Hanford said they were able, aside from their securities and interest in the United Properties Company, to pay handsomely, and that they could secure a reasonable fee. Mr. Metson then told him that his firm would accept the employment. This conversation continued for several hours. Mr. Hanford telephoned from the law office to the defendant Tevis as to what was being done, and later sent over certain papers concerning the transactions to be investigated by Mr. Metson. Mr. Metson testified, in part, as follows:

> "Well, it became apparent at the first interview, and I told Mr. Hanford that an examination of these papers would become necessary. From time to time I advised Mr. Hanford with reference to the situation. These papers were furnished by Mr. Hanford and were studied. And in an examination of the Public Utilities Act, for the purpose of blocking before the Railway Commission * * * we proceeded to check up on the facts so far as the documents would check them, and in every way checked up on what Mr. Hanford's facts were. * * * Then we were to advise him accordingly. He wanted action, and he wanted to be in a position to be prepared, so that if he could not get the option, or the interests which he represented could not get the option, or that Rollins and Halsay had the inside facts, and was about to get the option, then we would be prepared to jump in there and prevent it, if possible. So that meant the studying of all of these propositions and the laying out of a line of action. We were to sue on behalf of their interest, if nec-

essary. Finally, after examinations, it became apparent to us that it was a big battle. We added to our organization and we farmed out work in the office, some looking up one problem of law and some looking up another problem of law; and we concluded that Mr. Hanford was wrong in his opinion that he could bring suit against Smith, and we so told him; that, by reason of the various contracts that had been signed by Hanford and Tevis, and their interests, a great many legal questions could come in, and which would have to be overcome on behalf of the Hanford and Tevis people. There was the question of the ratification in so far as the many signatures were concerned, following a long lapse of time, and laches in objecting and forcing Smith when he was in default originally; they had allowed it to drift along. And the various signatures made it manifest that we should pick out somebody who had not signed any contract, and who had not, at least to any material extent, cut out his legal rights. We suggested that to him, and he brought a list of the stockholders, and we talked over the stockholders' list to find out who we might know, and who might possibly be a client of ours, or who we might be able to influence. Finally we picked out Cartwright, he having been in the origin of the transaction, and he having done the least to cut away the foundation of his rights; and he was connected as a party to be the plaintiff in the litigation that we anticipated. * * * That was the foundation, and we prepared the Cartwright notice, and worked out and prepared the Cartwright complaint. We worked constantly for weeks with the proposition with our entire force and organization."

Mr. Metson testified further that numerous legal questions became involved as the examination of the documents proceeded, and that he had advised Mr. Hanford and Mr. Tevis as well upon all these matters; that all the members of the law firm gave practically their entire time to the matters involved for many weeks; that there were three other lawyers associated with the firm at that time, and a fourth was added to the organization to cope with the volume of work, and the entire force including clerks and stenographers, worked upon the business of the defendant; that Mr. Metson gave his entire time for 45 or 50 days, including most of the Sundays and evenings during that space of time; that during that period other business was given out to outside lawyers because it could not be handled in the office of Metson, Drew & Mackenize. A lengthy stockholders' complaint was prepared in the so-called Cartwright suit, after the preliminary steps had been taken and this complaint was submitted to Mr. Hanford. About this time Mr. Hanford wrote a letter to Mr. Mackenzie, which was introduced as an important element in the defense to the action, in which he assumed that all the work which had been done theretofore by the law firm had been done without expectation of compensation and he stated that, if the attorneys were willing to make their arrangements contingent upon securing a large loan in the east for the defendant Union Land Company, he was ready "to tie up to-day"; otherwise, he hoped that, if the negotiations came to nothing, he would be pardoned for having taken up so much of the time of the members of the law firm. The members of the firm testified that they did not understand this communication; that they considered it a self-serving declaration, and an attempt to get out of an obligation; and Mr. Mackenzie accordingly called up Hanford, and asked him if the letter was to be construed as severing their relations of attorney and client, or if his firm was to continue to represent the defendants. Thereupon Hanford stated that the letter was not so intended; that the attorneys were to continue in their employment, and he would see them about the Cartwright suit in a few days. The attorneys continued doing the work contemplated, until, without further notice to them, a complaint substantially similar to the one they had prepared in the so-called Cartwright suit was filed by another attorney. No explanation was made to them by any of the defendants, and they, thereupon, considered that the relationship of attorney and client had been severed by the defendants, and assigned their claim for services to the plaintiff, who began this action.

The testimony of Mr. Metson above set forth was substantially corroborated by Messrs. Drew and Meckenzie of the same firm. The reasonable value of the services rendered was established by expert testimony.

The appellants contend that the action of the law firm in assigning their claim for services and directing that an action be brought thereon, without notice or demand for payment of the same, was a breach of the relationship of attorney and client; that there is no substantial evidence to sustain the judgment against the defendants Tevis, Hanford Investment Company, and Union Land Company; that the action is brought upon a balance of account, and the evidence does not show any balance of account due; that error was committed in allowing the expert witnesses to answer certain hypothetical questions regarding the value of the services rendered, because such questions included as an element a retaining fee, and the bill of particulars submitted to defendants contained no such item; that the verdict and judgment are grossly excessive.

[1] It is perhaps true that, when the law firm construed the filing of the complaint in the Cartwright suit by another attorney as a breach of faith upon the part of their clients, severing the relationship of attorney and client between themselves and the clients, and immediately brought suit for the value of their services, they took the chance of being mistaken in their judgment. It is

conceivable that the clients might have shown that they had been guilty of no breach of the relationship, and that the attorneys were the first to cause the breach. The present record does not, however, present such a case. The law firm came to the conclusion that its former clients had severed the relationship of attorney and client; they acted accordingly, and there is sufficient in the record to base an implied finding of the jury to that effect. Mr. Cartwright, in whose name the action was to be brought, testified:

> "Why, subsequent to the preparation and signing of the Metson, Drew & Mackenzie complaint, which as I understand, was not entered or was not filed, it was determined to bring suit through Randolph Whiting, and Mr. Hanford or Tevis and Mr. Albert Hanford and Mr. Tevis and myself spoke on that subject, and Mr. Tevis, I think it was, requested me to see Mr. Whiting to verify the complaint."

While Mr. Cartwright says he thinks it was Mr. Tevis who requested him to verify the complaint at the office of Mr. Whiting, nevertheless the testimony above quoted makes it clear that the defendant Hanford was also a party to the discussion and to the determination to make a change in attorneys. Furthermore, as we shall discuss hereinafter, the record is such as to warrant the implied finding of the jury that Tevis also bore the relationship of client to the law firm. We think, therefore, that the first point urged by the appellants is without merit.

[2, 3] As to the alleged insufficiency of the evidence to sustain a judgment against the defendant Tevis, we think the contention of the appellant is also without merit. That judgment rests upon the testimony of Mr. Metson, who stated that Mr. Tevis had talked with him frequently over the telephone in regard to the legal matters involved; that he had talked to Mr. Hanford over the telephone in Mr. Metson's presence regarding the same matters; that Mr. Tevis had frequently gotten advice from Mr. Metson in regard to the legal questions involved, and had stated that he was glad that Mr. Metson's firm had been employed "by them for their interest." It is true, the defendants contradicted these statements; but that merely raised a conflict in the evidence, and, in view of the implied finding of the jury in its judgment against Tevis, we must give full weight to Mr. Metson's statements appearing in the record.

[4-6] It is urged by the corporate appellants that the judgment against them is erroneous because it must rest either upon the testimony of the attorneys that the services rendered were of a nature to be beneficial to the corporations, or upon the admissions in the record that Hanford and Tevis were president and vice president of these corporations, or upon the testimony of Mr. Metson representing himself as having authority to act for the defendant corporation. We concede to said appellants that it is not the law that a corporation is bound to pay for services which may prove of benefit to it in the absence of a contract to pay for the same or the existence of the elements of ratification or estoppel. It is also settled that neither the president nor vice president of a corporation, by virtue of such office alone, has authority to contract for services such as those involved here on behalf of the corporation. Pacific Bank v. Stone, 121 Cal. 202, 206, 53 Pac. 634. And it is equally well settled that the authority of an agent cannot be established by his own declarations as to his agency. Civ. Code, § 2319, subd. 2; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Petterson v. Stockton, etc., Co., 134 Cal. 244, 66 Pac. 304; Smith v. Liverpool, etc., Co., 107 Cal. 432, 437, 40 Pac. 540; Pease v. Fink, 3 Cal. App. 371, 379, 85 Pac. 657.

[7] However, there is another legal doctrine which we find applicable to the record before us, and which justifies the judgment against the corporate defendants. It is admitted in the record that the defendants Tevis and Hanford owned all of the stock of the R. G. Hanford Company. It is also admitted that this company held 19,997 shares of the capital stock of the defendant Hanford Investment Company out of a total of 20,000 shares. The remaining three shares were owned by Albert Hanford and the defendants R. G. Hanford and William S. Tevis. It will be seen, then, that there was but one share of stock of this company which was not owned by the defendants Hanford and Tevis. As to the defendant Union Land Company, the 1,000,000 shares of the capital stock of that company were owned as follows: Albert Hanford, 10 shares; B. M. Aiken, 10 shares; C. E. Gilman, 10 shares; R. G. Hanford, 499,985 shares; and William S. Tevis, 499,985 shares. This being the admitted situation, we think the doctrine of the case of Commercial Surety Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 Pac. 964, is applicable. It was said in that case:

> "The evidence shows—indeed, it is admitted—that, at the time the transaction constituting the basis of this litigation took place, Skow and Morris were, practically, the defendant—that is, the corporation itself. They owned all the stock but one single share, which, as is often so with so-called 'close corporations,' was put in the name of Attorney Walthall undoubtedly for the sole working purposes of the corporation. * * * As a matter of fact, and to all practical intents and purposes, Skow and Morris were partners in the business of the defendant, although in legal contemplation they were, under the name of the defendant, a corporation. * * * The question may be asked: May a corporation, whose capital stock is entirely owned, practically, by two persons, one of whom, being in the active management of the business of such corporation has made an

agreement for the benefit of the corporation, and the other of whom has virtually indorsed or by conduct ratified it, refuse performance of its obligations under the agreement? Having received the benefits, or some of them, of an agreement obviously made for it and for its benefit (and ostensibly by it), with the consent and concurrence of the owners of substantially all its capital stock, will a corporation be permitted to dodge or escape liability for obligations arising upon such agreement by the plea that the contract was made without observance of the formal requisites or prerequisites prescribed by its charter or by-laws with respect to the making of contracts? The answer to these questions may be found in the principles of equity and justice applicable to such a case as we have here. Indeed, it would be deemed a hard rule or one of more than mere unsubstantial technical texture if the courts could not consistently break through it, and so hold that a corporation is bound by a contract made under such circumstances as characterized the making of the contract in the present case."

The cases of Sargent v. Palace Café Co., 175 Cal. 737, 167 Pac. 146, Clement v. Duncan, 39 Cal. App. Dec. 13, and Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673, also take notice of the foregoing rule of law.

[8] Appellants contend that the action was technically an action on a "balance of account" for servies rendered; that the proof did not show any account; that there had been no payments made and no balance due. This objection, we think, is of no avail upon appeal under our system of leading. No objection to the variance between the pleading and proof was made at a time when the pleading might have been amended to conform to the proof, and no prejudice has resulted to the defendants by a judgment which accords with the proof, if not technically with the pleadings. Plaintiff was given the relief to which the evidence indicated he was entitled, and the trial court had power to permit an amendment to the pleadings to conform to the proof had the matter been called to its attention in time.

[9] The last objection is that no evidence should have been received to establish the value of the legal services rendered which included as an element of that value a retaining fee. Appellants admit that since the decision in the case of Knight v. Russ, 77 Cal. 410, 19 Pac. 698, it is settled law in this state that evidence as to the value of a retainer is admissible without any special allegation regarding the same, but they contend that, when a bill of particulars, furnished at the request of the defendant, does not include such an item, evidence of its value may not be received at the trial. That situation was presented in the instant case, and the case of Knight v. Russ, supra, is relied upon to establish the appellants' contention. That case does not pass upon the question raised by the appellants here, and it is unnecessary for us to pass upon that question in the instant case because it was not raised in the trial court by a proper objection to the evidence of which complaint is made. The hypothetical question of which complaint is made covers twenty pages in the record. The defendants objected thereto upon numerous grounds, the objections and arguments thereon covering several pages more. As objections were urged upon various grounds, the attorney for the plaintiff stated that he would correct his facts embodied in the hypothetical question if the objections indicated that anything stated therein had not been shown by the evidence. Despite the multitude of objections which able counsel found to urge against the question, no objection was made upon the ground that the bill of particulars did not include a retaining fee. We think, therefore, appellants are precluded from urging that objection upon appeal. Had that specific objection been urged at the proper time, the hypothetical question might have been corrected, or the trial court might have ordered the plaintiff to furnish to the defendants a further account under the power given by section 454 of the Code of Civil Procedure.

[10] In view of the expert testimony appearing in the record as to the value of the services rendered, and the testimony of the members of the law firm that seven attorneys and their clerical assistants devoted over a month and a half to constant work upon the business of defendants, we are not prepared to say that the judgment is excessive.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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67 Cal. App. 70

PETERSEN v. CIVIL SERVICE BOARD OF CITY OF OAKLAND et al. (Civ. 4811.)

(District Court of Appeal, First District, Division 1, California. April 30, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Municipal corporations ⚷189(2)—Civil service board could not impose "fine" upon policeman without declaration he was guilty of breach of duty.

Civil service board of city of Oakland could not impose a fine upon a policeman in proceedings for his removal under City Charter, §§ 81, 82, without declaration in language, at least sufficiently clear to fairly indicate its conclusion, that such officer was guilty of some breach of duty for which he could be subjected to punishment; word "fine" as used in charter signifying a pecuniary punishment for an offense committed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fine.]

2. Trial 🔑404(2)—Recitals in judgment held not to constitute findings.

Recital in judgment of trial court reviewing action of civil service board of a city that the board intended, when making deduction on reinstatement of policeman, to fine him, *held* not finding which may not be reviewed, but only legal construction given by trial court to decision of board.

3. Municipal corporations 🔑185(13)—Every intendment not given in favor of decision of civil service board of city.

Every intendment need not be taken in favor of decision of civil service board of a city removing a policeman, because such doctrine has no application to jurisdictional essentials of an inferior tribunal and jurisdiction must affirmatively appear, and it cannot be presumed that, where such board fined a police officer in proceedings for his removal, such fine was based on finding that he was guilty of an offense.

4. Municipal corporations 🔑185(13)—Burden of establishing jurisdiction of civil service board rested upon it on certiorari to review decision fining policeman.

In certiorari by policeman to review part of decision of civil service board imposing a fine after reinstating him, burden of establishing jurisdiction to impose fine rested upon respondents, and not policeman, and it was necessary to bring up record to show jurisdiction.

5. Municipal corporations 🔑185(13)—Court on certiorari limited to question whether inferior tribunal exceeded jurisdiction.

In certiorari to review decision of civil service board of a city removing a policeman, court cannot enter a judgment affirming decision as far as it reinstates policeman and annul it relative to deprivation of salary, power of court on certiorari being limited to question of whether board exceeded jurisdiction or illegally pursued its authority, and no affirmative action may be directed.

6. Municipal corporations 🔑186(4) — Civil service board held without power to withhold salary of reinstated policeman because he accepted other employment on suspension.

On reinstatement of policeman, part of decision of civil service board withholding a portion of salary for time he was employed by others during period of suspension was null and void; determination as to whether he was entitled to double salary being a question of law to be presented to and decided by court in any action instituted by policeman to recover salary for full period of suspension.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Petition by Walter J. Petersen for certiorari to review decision of Civil Service Board of the City of Oakland and others, attempting to remove petitioner from Police Department. From judgment dismissing writ, petitioner appeals. Reversed in District Court of Appeal, and hearing denied in Supreme Court.

Cedric W. Petersen, of Oakland, and Charles W. Fisher, for appellant.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for respondents.

KNIGHT, J. This is an appeal by the petitioner, Walter J. Petersen, from a judgment dismissing a writ of certiorari theretofore issued at his request, for the purpose of having reviewed the decision of the civil service board of the city of Oakland concerning the attempted removal by the commission of that city of said Petersen from the office of captain of inspectors of the Oakland police department.

From the record it appears that on September 11, 1920, the commissioner of public health and safety of said city, acting under the authority of section 81 of the charter of said city, made an order removing Petersen from office, assigning as reasons therefor 21 separate grounds of alleged misconduct, incompetency, failure to perform the duties of said office, and failure to observe the rules of the department. Thereupon Petersen appealed from said order to the civil service board, whose duty it was, under section 82 of said charter, to "fully hear and determine the matter." Much delay preceded and attended the trial of said Petersen, and after the matter was ordered submitted for decision more delay followed, due to the sickness and subsequent resignation of one of the then members of said board, and the retirement of another. After two new members had been appointed, the matter was ordered resubmitted for decision, and on June 2, 1922, said new board gave its decision in writing, containing the following conclusions:

"Resolved:

"1. That the evidence is not sufficient to warrant the discharge or removal of said Walter J. Petersen from the office of captain of inspectors of the police department of the city of Oakland upon all or any of the particular grounds set forth in said order of discharge; and

"2. That, from the foregoing findings of fact, the civil service board determines that the discharge and removal from office of said Walter J. Petersen by said commissioner was unwarranted and that he should be immediately reinstated in his former position of captain of inspectors, upon the condition hereinafter stated; and

"3. That, now therefore, it is hereby decided, determined, ordered, adjudged, and decreed by the civil service board that said Walter J. Petersen be reinstated immediately in his former position of captain of inspectors; and

"4. That he receive from the city of Oakland the salary attached to said position, from the 11th day of September, 1920, to the date upon which he accepted employment with the Waterfront Employers' Union, in the city of San Francisco, and that from and after said date he shall receive no compensation from the said city of Oakland."

Petersen then applied for and was granted by the superior court a writ of certiorari by which he sought to have reviewed and annulled that part of said decision of said civil service board whereby it ordered that he be deprived of a portion of the salary of said office, which accrued during his wrongful suspension. After a hearing upon the merits, said writ was by the trial court dismissed, and Petersen has appealed from the judgment of dismissal entered therein.

Appellant makes three main contentions on this appeal: First, it is claimed that if the order of said board depriving appellant of part of the accrued salary of said office be considered as the imposition of a fine, that there was a want of jurisdiction to impose the same for the reason that said board did not at any time find appellant guilty of any offense for which a fine might, under the charter provisions, be imposed; secondly, that the decision of said board, wherein it declared that the evidence presented was insufficient to warrant a removal of appellant from said office, "upon all or any of the particulars set forth in said order of discharge" and his removal and discharge "was unwarranted, and that he should be immediately reinstated," was in effect a verdict of acquittal upon all of the charges upon which he was tried, and that consequently the condition of reinstatement imposed by said board, namely, a loss of salary, cannot be construed in the nature of a fine, but that it was in fact an arbitrary act on the part of said board, based upon the belief of its members that appellant should not receive a salary from the city during that period of his suspension that he accepted remunerative employment from other sources; thirdly, that if that part of the decision of said board be declared void for want of jurisdiction, it should be ordered annulled and the remainder of said decision, wherein appellant is ordered reinstated, should be affirmed.

[1] Irrespective of whatever may have been the intention of said board, we believe the first contention made by appellant must be sustained for the reason that it is our opinion that under the charter provisions of said city it is essential to the jurisdiction of said civil service board before it becomes vested with power to impose a fine upon a person holding a classified civil service position that it declare in language at least sufficiently clear to fairly indicate its conclusion in that respect that such officer has been guilty of some breach of duty for which he may, under the charter provisions, be subjected to punishment. Assuming therefore, but not deciding, that the order for loss of salary was intended as the imposition of a fine, we hold that there was a want of jurisdiction on the part of said board to impose the same for the reason that it made no finding, either affirmatively or inferentially, that Petersen had committed any offense for which he might be legally fined. The provisions of sections 81 and 82 of said charter from which said board derives its power to suspend, fine, or remove a classified civil service officer, are in effect a limitation upon the power of said board and beyond which its authority may not extend. Cook v. Civil Service Commission, 160 Cal. 598, 117 Pac. 662; Lindblom v. Doherty, 102 Ill. App. 14. Section 81 provides that—

> "All persons holding positions in the classified civil service shall be subject to suspension, fine and also to removal from office or employment by the commissioner * * * for misconduct, incompetency or failure to perform their duties under or observe the rules and regulations of the department or office. * * *"

Section 82 provides that—

> "Any person suspended, fined or discharged may * * * appeal therefrom to the civil service board, which shall fully hear and determine the matter. * * *"

It will be observed that there is nothing contained in said section 82 which grants unto said civil service board any greater power than is given to the commissioner. Both are limited in the matter of the imposition of fines to the causes stated in said sections. It would necessarily follow, therefore, we think, that unless there be some finding of misconduct, incompetency, or failure to perform official duty, no fine may be imposed. Such rule doubtless prevails in cases of removal from office, and the charter provisions here make no distinction between cases of removal from office and those where a fine shall be imposed. In discussing cases of removal McQuillin on Municipal Corporations (volume 2, p. 1248, § 568), states the rule as follows:

> "There should be a finding of guilty or not guilty on charges. Ordinarily a sentence of dismissal will be illegal without a finding of guilty. But the judgment dismissing the officer need not be in the precise accuracy of a record in a criminal case. The record of the proceedings of removal should show affirmatively: (1) That charges sufficient in law were preferred; (2) that due notice was given; (3) that a trial was had where the officer was permitted to be heard, and (4) that a judgment or order for cause was rendered."

Furthermore, the word "fine" as used in said charter provision must be interpreted according to its ordinary meaning, which signifies a pecuniary punishment for an offense committed. Bouvier's Law Dictionary, 589; 25 Corpus Juris, 1148; Southern Express Co. v. Commonwealth, 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; State v. Missouri Pac. Ry. Co., 64 Neb. 679, 90 N. W. 877; State v. Belle, 92 Iowa, 258, 60 N. W. 525. Turning then to the record, we find nothing to show in the remotest degree that Petersen has been guilty or found guilty of any misconduct, incompetency, or other breach of duty. In fact, there is no intimation by said board anywhere that his private or official conduct had been unsatisfactory or even subject to censure; nor is any reason given by the decision of said board, or elsewhere, why said board imposed as a condition precedent to reinstatement that Petersen be deprived of a portion of the salary of the office from which he was suspended. It should be remembered that appellant is making no attack upon the jurisdiction of said board to hear and determine this matter, nor upon its power to revise the punishment ordered by the commissioner. Neither does he question the right of said board to impose a fine upon him for any act of wrongdoing covered by the charter provisions, even though it may have further found that the commission of such act would not justify his removal from office. It is the foundation of the judgment of said board that he assails, claiming that if the loss of salary be considered a fine he has been punished without having been found guilty of any offense. We think it manifest that it was just as essential to the complete jurisdiction of said board that appellant be found guilty of some violation of duty before he can be punished as it was to give him notice of the trial before he could be legally tried.

Respondents have cited us to the case of Hackett v. Morse, 45 Cal. App. 788, 188 Pac. 308, upon which they rely to a large extent. That case arose under the same charter provisions involved here. A fireman holding a position in the classified civil service of the city of Oakland was ordered discharged by the commissioner for insubordination. Upon appeal to the civil service board it was found that plaintiff was not guilty of insubordination that would warrant his discharge from his position, and that such penalty would be unjust, and it was ordered that he be retained in his said position, and that he report for duty and resume his work in said position upon August 1, 1918. The board further stated in its decision:

> "That it is the opinion of the board that for making any objection to being transferred to Engine Company No. 6 that said Thomas Hackett should not be entitled to or receive any compensation from the city from June 3, 1918, to August 1, 1918."

The decision of said board was sustained by the trial court. The commissioner appealed and made the contention that the authority of said civil service board was limited to an inquiry as to whether or not said employee was guilty of the offense charged, and in the event it was found that he was guilty, that then said board had no power to change the punishment inflicted by the commissioner. It was held, on appeal, that the authority to "fully hear and determine the matter" as granted said board by the charter provisions, carried with it the power to revise the punishment in accordance with its findings.

The conclusions we have reached in the instant case do not conflict at all with the rule stated in Hackett v. Morse, supra. The plain distinction between the two cases is that in that case, although the board found that the employee was not guilty of such an offense as would warrant his removal, it did in fact find him guilty of some offense, namely, insubordination, before it attempted to penalize him. There there was no finding whatever of any breach of duty, but the board nevertheless penalized the employee by ordering a loss of salary.

It was the contention of respondents before the trial court, as here, that since said board had acquired jurisdiction to hear the matter of said appeal, and had the power in the exercise of its jurisdiction to deprive the petitioner of his salary during a specified period of time, in the nature of a penalty (Hackett v. Morse, 45 Cal. App. 788, 188 Pac. 308), and in fact did deprive him of all salary during a specified time, that every intendment must be taken that said board in so doing intended to and did thereby impose a penalty, and that therefore the decision of said board must be sustained. The trial court apparently adopted the views of respondents for the reason that while no findings of fact were made, the judgment of the court contains the following recitals, to wit:

> "It further appears from an examination of said return of said respondents that said respondents, in said judgment, did intend to and did punish said petitioner by loss of salary and compensation for the period specified in said order, because of his guilt and misconduct in matters, as found by them.
>
> "It further appears from said return that said respondents had authority to impose said fine, and that there was evidence before them sufficient to authorize them to impose such fine."

[2, 3] Respondents now make the further point that those recitals in the judgment constitute findings upon the question of the intent and that therefore this court is concluded by such finding on this appeal. In this respect, however, it may be stated that the record shows that the judgment of the trial court was not based upon any evidence adduced at the trial other than the written return made by respondents to the writ of review, and said return admittedly contains no part of the evidence received or actual proceedings had before said board at the trial of appellant, nor does it show that any findings were ever made by said board other than those above quoted. It is therefore obvious that those recitals in the judgment, to the effect that said board intended to punish petitioner by a loss of salary "because of his guilt and misconduct, in the matters, as found by them," and "that there was evi-

dence before them sufficient to authorize them to impose such fine," amount to no more than the legal construction given by the trial court to the terms of the decision of said board, aided by such intendments in its favor as it was believed said decision was entitled to, and the same did not constitute findings upon questions of fact, such as would bind this court on appeal. Furthermore, we cannot agree with respondents' contention that every intendment must be taken in favor of the decision of said board, for the reason that such doctrine has no application to the jurisdictional essentials of an inferior tribunal. Jurisdiction in such case must affirmatively appear. It cannot be presumed. While it is true as a general proposition, as respondents contend, that where jurisdiction of an inferior tribunal is shown to have attached, its subsequent proceedings are presumed to be regular (15 Rul. Case Law, § 360; Featherston v. Small, 77 Ind. 143; 1 Black on Judgments, § 287), and that if the decision of such tribunal is regular on the face of the record it will be supported by every presumption that follows a judgment of a court of record (Pac. Gas & Elec. Co. v. Devlin, 188 Cal. 33, 203 Pac. 1058), nevertheless, in cases of a subordinate tribunal created by statute, such as a civil service commission, it is fundamental that jurisdiction must affirmatively appear on the face of the proceedings; no presumptions will be indulged in from it, as in case of a court of general jurisdiction (McQuillin on Mun. Corp., vol. 2, § 566, and cases cited; Lindblom v. Doherty, 102 Ill. App. 14). From what has been stated we are convinced that the decision of said board may not be upheld by the aid of legal presumptions or the doctrine of intendments.

[4] Respondents make the further point that the judgment of the trial court must be affirmed because there was no adequate or complete transcript of the proceedings held before the civil service board placed before the reviewing court. We find no merit in this point. The only useful purpose that could have been served by furnishing such transcript would be to establish the jurisdiction of said board in the matter of said penalty, that is, to show by the record of said board that it had in fact found appellant guilty of some offense for which he might legally be fined. The burden of establishing jurisdiction, however, rested upon the respondents and not upon appellant. As already pointed out, the jurisdiction of an inferior tribunal is not to be presumed, and the expression used in the opinion in Hackett v. Morse, supra, that "the presumption that public officials will do their duty applies to a civil service board," is not available to respondents in this respect, for the reason that its use in that case did not pertain to the question of jurisdiction, but was used as an answer to the contention of appellant "that the civil service board may at some time abuse its power and render unjust decisions."

[5] The order for loss of salary being void, the next question arising is the effect of its invalidity upon the entire decision of the said board. Appellant urges:

> "That the judgment of the lower court be reversed and that it be directed to enter a judgment affirming the decision of the civil service board relative to the reinstatement of the appellant to the office of captain of inspectors but annulling it relative to the deprivation of the salary," etc.

We cannot agree with this contention. The power of the court upon certiorari is limited to the question of whether the inferior tribunal has exceeded its jurisdiction or has legally pursued its authority, and where its authority has not been legally pursued the writ should be limited to annulment of its proceedings and should not direct any affirmative action. Section 1074, Code Civ. Proc.; Green v. Rogers, 18 Cal. App. 572, 123 Pac. 974. It cannot modify the record of the judgment or decision of such inferior tribunal (Will v. Sinkwitz, 39 Cal. 570), for the simple reason that a writ of review cannot be used as a writ of error (Central Pac. R. Co. v. Placer Co., 46 Cal. 670; Buckley v. Superior Court, 96 Cal. 120, 31 Pac. 8; Bergevin v. Wood, 11 Cal. App. 643, 105 Pac. 935), nor as a writ of mandamus (Townsend v. Copeland, 56 Cal. 612).

[6] At least three possible courses of action were open to said board in the disposal of the Petersen charges. It could have found him guilty and a penalty of suspension, removal, or a fine imposed. It could have found him not guilty and reinstated him with no conditions, or it could have reinstated him with a loss of salary for the commission of some specified violation of duty shown by the evidence (Hackett v. Morse, supra), or it could have found that evidence was insufficient to justify removal but order his conditional reinstatement with loss of salary for the commission of some specified act of breach of duty. It did find that the evidence was insufficient to warrant removal and ordered his reinstatement with the right to the accrued salary during suspension up to the date he accepted outside employment. That part of the board's decision was entirely within the lawful exercise of its jurisdiction and has therefore become final and conclusive and is not open to review or reconsideration. The only matter left open then to a complete disposal of the case was the matter of the accrued salary from the date on which Petersen accepted outside employment to the date of his reinstatement. For some reason not apparent from the record nor disclosed by the decision itself, that part of the salary was withheld. It is our interpretation of the law, as already stated, that no portion of said accrued salary may be withheld except in the nature

of the imposition of a fine, after a finding that some breach of duty has been committed for which a fine may be imposed. That was not done. The order withholding a portion of said salary is therefore void. But the question of whether said board, by its said order, intended, and in fact attempted, to impose a fine, or whether its order in that respect was made for arbitrary reasons not justified by the charter, we have not considered or passed upon. It may be, as appellant contends, that said order was made under the belief that Petersen should not be allowed to collect two salaries covering the same period of time, if so, its order is wholly void for the reason that the determination of that question is one of law to be presented to and decided by the courts in any action instituted by Petersen to recover the salary for the full period of his suspension, or it may be, as respondents claim, that said order was intended in the nature of a fine, for the commission of some act of wrongdoing, on Petersen's part, of which said board omitted to find him guilty. If so it was an attempt on the part of said board to exercise its lawful jurisdiction, but it was done in an illegal manner. If a directed judgment be now ordered, in the form requested by appellant, it would be in effect a predetermination by this court of the question above stated in appellant's favor.

Judgment reversed.

We concur: TYLER, P. J.; ST. SURE, J.

On Hearing in Supreme Court.

PER CURIAM. The petition for transfer to and hearing by this court after decision by the District Court of Appeal is denied. The statement is made in the opinion of that court that a certain portion of the decision of the civil service board "was entirely within the lawful exercise of its jurisdiction and has therefore become final and conclusive and is not open to review or reconsideration." We interpret this statement as applying only to the situation presented by the record then before the court for review, and as not intended to foreclose the parties from bringing a more complete record before the court for review upon a retrial of the case.

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66 Cal. App. 693

DAVIE v. BOARD OF REGENTS, UNIVERSITY OF CALIFORNIA, et al.

(Civ. 4536.)

(District Court of Appeal, First District, Division 1, California. April 24, 1924. Hearing Denied by Supreme Court June 23, 1924.)

1. Colleges and universities 🔑10—Complaint for malpractice held to establish that university in operation of infirmary did not conduct private and proprietary enterprise.

Complaint in malpractice case against Board of Regents of University of California *held* to establish fact that defendant, in operation of infirmary, did not conduct a private and proprietary enterprise, but that infirmary was department conducted as educational and public activity.

2. Municipal corporations 🔑724—Liable for torts in private capacity.

A municipal corporation has a double character, and, when acting in private capacity, its liabilities arising out of either contracts or torts are same as those of natural persons or private corporations.

3. Colleges and universities 🔑5—Maintenance of infirmary by university a governmental function.

Maintenance of an infirmary by state university as an educational activity is a governmental function, and it is not liable for tortious acts of employees, though fees are charged.

4. Colleges and universities 🔑5—State university had power to maintain infirmary.

State university had power to establish and maintain an infirmary, in view of Const. art. 9, § 9, and Pol. Code, § 1618a (St. 1919, p. 128).

5. Appeal and error 🔑854(3)—Order sustaining demurrer sustained if complaint insufficient upon any ground properly specified.

If complaint is insufficient upon any ground properly specified in demurrer, order sustaining demurrer must be sustained though lower court may have deemed it sufficient in that respect and may in its order have declared it defective only in some particular in which reviewing court holds it good.

6. Appeal and error 🔑1178(8)—Judgment on demurrer not reversed merely in order to allow amendment where plaintiff elected to stand upon complaint.

Where plaintiff elected to stand upon his complaint, judgment against him on demurrer will not be reversed merely in order to allow an amendment.

Appeal from Superior Court, Alameda County; Jos. S. Koford, Judge.

Action by Stanley Davie against the Board of Regents, University of California, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McGee, Sapiro & Thomson, of Oakland, for appellant.

J. M. Mannon, Jr., of San Francisco, for respondents.

TYLER, P. J. This action was brought to recover damages for personal injuries alleged to have resulted in consequence of the negligence of a physician in charge of an infirmary maintained by defendant at the University of California at Berkeley. A demurrer, both general and special, was interposed to the complaint primarily upon the ground that it shows defendant to be a state agency in charge of a governmental function, and that the infirmary being maintained in connection with and as a part of that educational institution, defendant is not liable for the alleged torts of its agents in the operation thereof. The demurrer was sustained, and upon plaintiff's failure to amend judgment was entered in favor of defendants, and plaintiff appeals.

The complaint alleges that prior to and after the 3d day of April, 1920, plaintiff was a duly enrolled and attending student in one of the courses at the University of California; that it is one of the rules and regulations of the university that before a person can become a regularly enrolled student he must pay an infirmary fee of $3, and thereafter semiannually, which fee the plaintiff paid, and had thereby become entitled to consultation and medical and hospital care at the infirmary thus operated by defendant corporation. There is no charge, so it is alleged, beyond the infirmary fee for ordinary hospital and medical services; but if a surgical operation or special nurse is required the cost thereof must be borne by the patient. The complaint, proceeding, recites that defendant corporation collected the infirmary fee above referred to from several thousands of students each year and held the same as its own funds, and that the students of said university, including plaintiff, did not acquire any interest in the money so paid by them, and that defendant thereby realized a large profit in the administration of the infirmary conducted by it through the collection and retention of such fees required to be paid by all the students. Then follow allegations to the effect that the infirmary is wholly maintained and supported by the fees and charges paid by those entitled to receive treatment, and is so conducted and maintained by defendant separate and apart from its duties as the governing body of the University of California. Further recitals are to the effect that defendant for an adequate and valuable consideration, in addition to the infirmary fee mentioned, undertook and agreed to perform an operation upon the plaintiff for the removal of his tonsils, and undertook and agreed to render all necessary medical and surgical treatment incident thereto. It is charged that in the course of said operation defendant used negligent, careless, and improper methods and treatment, resulting ultimately in a dislocation of the jawbone and a fracture of the left side of the posterior arch of the atlas vertebræ of plaintiff's neck, which injuries, it is claimed, are permanent. Damages in the sum of $151,433.35 are prayed for.

The main contention of appellant and the one chiefly relied upon for a reversal is that the complaint shows that defendant has undertaken to do something separate and apart from any educational function, and in consequence thereof has become liable for the alleged tortious act. In support thereof it is argued that the defendant corporation, the Regents of the University of California, has a dual character—governmental and also proprietary and private—and when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations, and he invokes the application in his favor of the rule established by the decisions of this state, that a municipal corporation is liable for torts of its agents committed in the performance of activities or functions purely private and proprietary in their nature.

Respondent, on the other hand, contends that the pleading shows on its face that the infirmary is maintained as a part of the University of California, operated only in connection with the educational functions thereof, and this being so, it is not liable for the torts of its agents committed in connection therewith. It further contends as a matter of law that the distinction in actions of this character between governmental and proprietary functions is limited in its application to municipal corporations, and does not extend to state agencies, such as counties, school districts, road districts and the Regents of the University of California, and that this distinction between torts committed in the course of the exercise of public and governmental functions on the one hand, and of private and proprietary activities on the other, has never been applied to any but municipal corporations; for which reason it claims that the rule invoked has no application to the instant case.

[1] We will proceed to a consideration and discussion of the first contention, namely, whether the allegations of the complaint establish the fact that defendant, in the operation of the infirmary, conducts a private and proprietary enterprise, or whether it shows that the infirmary was in reality a department of the university conducted by respondent as an educational, and therefore public, activity.

In support of his position appellant claims that it is apparent from the various organic and legislative acts that the Legislature had in contemplation two separate kinds of property which the Board of Regents were entitled to manage and control: First, that which belonged to the state outright and which the regents could not alienate; second, that class of property which the board acquired by gift for investment and reinvestment, and which is separate and distinct from the properties donated by the state for the general purpose of its creation; that as to this class the board acquired such property for business purposes; that it operates the same for such purposes separate and apart from any educational function and derives revenue and profits therefrom, and therefore should, like an individual, become liable to third persons for its torts—partaking in this respect of the dual character of muncipal corporations considered from the point of view of their twofold activities.

[2] That a municipal corporation has a double character and, when acting in a private capacity, its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations, has long since been definitely settled and established. In treating of this subject, Judge Dillon, in his work on Municipal Corporations, lays down the rule that a municipal corporation possesses a double character—the one governmental, legislative or public, the other in a sense proprietary or private—and says that the distinction between these is sometimes, indeed very often, difficult to trace. In its governmental or public character the corporation is made by the state one of its instruments or the local depositary of certain limited and prescribed political powers, to be exercised for the public good. But in its proprietary or private character the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but rather for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers and to property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded as private in character. Dillon on Mun. Cor. (5th Ed.) § 109.

This doctrine has received general recognition in this state. Accordingly, it has been held that a municipal corporation when acting in a private or proprietary capacity is liable for its tort. Chafor v. Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106.

The question, however, as to whether or not the maintenance of a hospital by a municipality is a governmental function is with us one of first impression. Cases dealing with the liability of municipal corporations growing out of the operation and maintenance of different activities, however, are numerous; and they are illuminating as they discuss and determine the difference between governmental and proprietary functions.

In Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151, it was sought to hold a county liable to one who while an inmate of a hospital suffered injuries from unskillful treatment. It was there held that a quasi corporation such as a county is not liable for acts of officers or employees which it appoints in the exercise of a portion of the sovereign power of the state by the requirement of a public law, simply for the public benefit and from which the county as a corporation derives no benefit. This case, however, was decided upon the ground that defendant county exercised exclusively governmental functions.

In Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, the defendant city was operating an electric light plant for the purpose of lighting the city and furnishing electric light to its inhabitants for domestic use. This activity was held not to be a governmental function.

In Chafor v. Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, the question was again presented and discussed. There plaintiff's intestate was killed by the collapse of a platform in an auditorium erected and maintained by the city. The maintenance of the auditorium was by virtue of a permissive statute which contemplated that the hall should be let for profit. It was not devoted to any educational or governmental purpose. Its operation was therefore held to be a private and proprietary activity. In the opinion it is stated that a municipality is protected from liability only while exercising the delegated functions of sovereignty, which consist of those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young. County of Alameda v. Chambers, 35 Cal. App. 537, 170 Pac. 650.

In Kellar v. Los Angeles, 179 Cal. 605, 178 Pac. 505, the complaint demurred to alleged that the municipality maintained a summer camp outside of its corporate limits under authorization of certain provisions of its charter for the purpose of giving the children of the city a vacation, at certain prescribed charges to be paid by them to the city. The demurrer was sustained upon the ground that the city was, in the operation of this activity, engaged purely in the exercise of its governmental function pertaining to the health of the children of the city, and was therefore not liable for injuries suffered by the plaintiff by reason of the negligence of its servants in caring for such plaintiff after he had been accidentally injured while an inmate of such camp. It is there further held that the activities involved were referable to the duty of maintaining the public health, and had nothing of the nature of an ordinary business enterprise.

Direct authority, however, upon the precise question is not wanting in other states. Many cases may be found in the various jurisdictions upon the subject, where it is generally held that in the absence of statutory provision to the contrary a hospital created and existing for purely governmental purposes and under the control of the municipality or state is not liable for injuries to a patient caused by the negligence or misconduct of its employees, although a statute, as here, may declare it to be a corporation which may sue and be sued. The maintenance of such hospitals is held to be for the public welfare and the advancement of public health, and in the operation thereof municipalities or the state exercise governmental or political functions. 30 Cyc. 465. Thus, in Browder v. City of Henderson, 182 Ky. 771, 207 S. W. 479, it is said that the power or even the duty on the part of a municipal corporation to make provision for the public health and for the care of the sick appertains to it in its governmental or public capacity, and that no element of safety is more important than those pertaining to public health; and accordingly it is there held that where a city establishes a hospital it is not responsible to persons injured by reason of the misconduct of its agents or employees. See, also, 19 Ruling Case Law, 1122; 7 Cal. Jur. 518; Tollefson Adm'x v. City of Ottawa, 228 Ill. 134, 81 N. E. 823, 11 L. R. A. (N. S.) 990; Summers v. Board of Commissioners, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; Zummo v. Kansas City, 285 Mo. 222, 225 S. W. 934.

[3] We do not deem an extensive review of the authorities from the other states essential, and it would answer no useful purpose. Suffice it to say that they generally hold that the maintenance of a hospital by a municipality is a governmental function, and that in the conduct thereof the municipality is not liable for the tortious acts of its employees.

Reading the complaint in the present action from its four corners, it conclusively appears therefrom that the infirmary in question is conducted by the defendant corporation for the exclusive use of the students, and that it is so conducted by it for the sole purpose of safeguarding and protecting the health of the student body. This being so, it is in no sense an organization for profit, and the imposition of the small fee does not convert this governmental function into a proprietary one. Melvin v. State, 121 Cal. 16, 53 Pac. 416; Kellar v. City of Los Angeles, 179 Cal. 605, 178 Pac. 505; Manning v. City of Pasadena, 58 Cal. App. 672, 209 Pac. 253. Nor does the further recital that the respondent conducts it separate and apart from its duties as a governing body have this effect, for this is a mere conclusion of the pleader, and it is negatived by the other allegations of the complaint.

This being so, the promotion and welfare of the students in this respect must be held to be the exercise of a duty involving governmental functions in the highest degree.

The reason for the rule that the policy of the law denies liability of a state or municipality for negligence of its servants and physicians is that such an activity being a governmental agency, to permit such liability would result in enormous public burdens. Jenkins v. Charleston Gen. Hospital, 90 W. Va. 230, 110 S. E. 560, 22 A. L. R. 323.

[4] That respondent had the power to establish and maintain the infirmary there can be no question. The Constitution provides:

> The "corporation shall also have all the powers necessary or convenient for the effective administration of its trust." Const. art. 9, § 9.

That the maintenance of the health of the students is an educational activity is indicated not only by the cases cited but also by section 1618a of the Political Code (St. 1919, p. 128), which provides that school trustees and county boards of education may provide for proper health supervision in the public schools.

Our attention is called to the cases of Bloom v. City and County of San Francisco, 64 Cal. 503, 3 Pac. 129, and Lundy v. Delmas, 104 Cal. 655, 38 Pac. 445, 26 L. R. A. 651, as holding contrary to the views herein expressed. The Bloom Case has to do with the maintenance of a nuisance. It therefore presents an exception to the general rule. Where a municipality maintains a nuisance it is liable in damages, and cannot escape such liability on the ground that it is exercising a governmental function. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50. Lundy v. Delmas merely holds that the Regents of the University are not individually liable for the negligence of the corporation in failing to properly maintain a telegraph line belonging to it. It does not hold the corporation to be liable for the torts of its agents.

Other cases cited deal with the personal liability of agents, and when exceeding their powers. A discussion of these cases is unnecessary, for even conceding that certain language used therein must be construed as supporting appellant's contention, we could not follow them in view of the generally accepted doctrine.

The conclusion we have reached renders unnecessary a discussion of the further question presented by respondent, namely, that defendant is a state agency, and therefore immune from liability irrespective of any distinction between the twofold activities of muncipalities.

As above recited, the demurrer interposed was both general and special. The minute order of the trial court was "that the demurrer of the defendant the Regents of the University of California be sustained." Defendant by special demurrer pointed out, among other things, that the complaint was ambiguous and unintelligible for the reason that it failed to state in what manner the infirmary was conducted separate and apart by defendant from its duties as governor of the University of California.

It is manifest, and indeed it is not otherwise contended, that the gravamen of plaintiff's action is that defendant in the operation of the infirmary was conducting a private enterprise. It is here claimed by appellant that any defect in his pleading in this particular cannot here be availed of, for the reason that the action of the trial court was bottomed upon the general demurrer only, for which reason we are restricted in a review of the decision to consideration of the propriety of the action of the trial court in sustaining the general demurrer to the complaint.

[5, 6] We do not so understand the law. In reviewing an order sustaining a demurrer the appellate court is not so limited in its action. If the complaint is insufficient upon any ground properly specified in the demurrer the order must be sustained, though the lower court may have deemed it sufficient in that respect and may in its order have declared it defective only in some particular in which we hold it to be good. Burke v. Maguire, 154 Cal. 456, 98 Pac. 21; Sechrist v. Rialto Irrigation District, 129 Cal. 640, 62 Pac. 261. In other words, this court is free to consider each ground of respondent's demurrer to the complaint; and if the demurrer was well taken on any ground the judgment below must be affirmed. If we are correct in our conclusion that the allegations of the complaint show that the infirmary was conducted by respondent as part of the activities of the educational institution, an amendment would avail plaintiff nothing. However this may be, uncertainties in this particular were pointed out to plaintiff under the demurrer; he elected to stand upon his complaint for obvious reasons. Having done so, the judgment on demurrer will not be reversed merely in order to allow an amendment. 2 Cal. Jur. 995; 4 Corpus Juris, 1195.

In conclusion it may be said that it is indeed unfortunate that plaintiff should suffer through the negligence or misconduct of the physician intrusted with the care of administering the affairs of the infirmary, and the condition of plaintiff brought about through the alleged malpractice of such physician (assuming the allegations to be true) is a great hardship upon plaintiff; but it is one which cannot be remedied by giving him damages at the expense of the institution in question. Whatever our personal inclination might be, we are bound to take the law as we find it. For such damages a claimant is left to his remedy against those through whose fault he was injured. Maia's Adm'r v. Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

For the reasons given we are of the opinion that the demurrer of respondent corporation to the amended complaint was properly sustained, and the judgment rendered thereon should be and it is hereby affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

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66 Cal. App. 689

DAVIE v. REGENTS OF UNIVERSITY OF CALIFORNIA et al. (Civ. 4624.)

(District Court of Appeal, First District, Division 1, California. April 24, 1924. Hearing Denied by Supreme Court June 23, 1924.)

1. Colleges and universities 🔑7—Negligent surgeon in university infirmary liable though university immune.

Immunity of state university from liability for negligence of its servants and agents in its infirmary does not extend to and cover negligent surgeon acting as its agent.

2. States 🔑112—Servants of government liable for negligence.

Where negligent wrongs are done to individuals by those who are servants of government, those injured are not remediless, as servants may be sued same as other persons for torts which they have committed, though government is immune.

3. Parties 🔑92(3)—Complaint not necessarily defective because of joinder with defendant of another against whom no liability is alleged.

A complaint is not necessarily defective in which there is joinder with defendant of another against whom no liability is alleged, even if action is against joint tort-feasors, in view of Code Civ. Proc. § 578.

4. Pleading 🔑18—Complaint held not unintelligible or uncertain.

Complaint for malpractice against surgeon in infirmary of state university *held* not demurrable as unintelligible or uncertain.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Stanley Davie against the Regents of the University of California and another. From an adverse judgment, plaintiff appeals. Reversed.

McGee & Corgiat, J. H. Sapiro, and McGee, Sapiro & Thomson, all of Oakland (Wm. F. Cleary, of San Francisco, of counsel), for appellant.

David C. Dutton, of Oakland, and Hartley F. Peart, of San Francisco (Errol C. Gilkey, of Oakland, of counsel), for respondent Legge.

J. M. Mannon, Jr., of San Francisco, for other respondent.

TYLER, P. J. Appellant instituted an action for damages against the Regents of the University of California, a corporation, and Robert T. Legge, as codefendants, for injuries claimed to have resulted from the negligence of a physician in charge of an infirmary maintained by respondent's codefendant at the University of California in Berkeley. Demurrers were interposed to an amended complaint by defendants separately. They were both sustained with leave to amend. Plaintiff declined to further amend, whereupon separate judgments were entered in favor of both defendants. Separate appeals were thereupon taken. The appeal from the judgment in favor of defendant corporation the Regents of the University of California (Civil No. 4536) 227 Pac. 243, was this day decided. It was there held in substance that the complaint shows that the Regents of the University of California, defendant corporation, operates and maintains the infirmary in question solely as a governmental function, for which reason it is immune from suit on account of the alleged negligence.

[1, 2] In support of the judgment in favor of respondent Legge it is claimed that as no cause of action was stated against his codefendant the Regents of the University of California, by reason of the fact that such corporation was a state agency exercising governmental functions, no cause of action is stated against him as the servant and agent of the corporation for acts done while he was acting within the course of his employment; it being urged that of necessity the immunity of the principal must extend and cover the agent.

There is no merit in this contention. The immunity does not extend to agents. Browder v. City of Hendersen, 182 Ky. 772, 207 S. W. 479.

The principle which protects the regents is inapplicable to him. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50, 30 Am. St. Rep. 402; Maia v. Eastern Hospital, 97 Va. 507, 515, 34 S. E. 617, 47 L. R. A. 577. Where wrongs are done to individuals by those who are the servants of the government those injured are not remediless, as such servants or employees may be sued the same as other persons for torts which they have committed. 25 R. C. L. p. 408.

It is further urged that irrespective of this question the demurrer was correctly sustained for the reason that there is a misjoinder which is prejudicial to defendant, and for the additional reason that the complaint is fatally defective in that it is uncertain, unintelligible, and ambiguous in the respects pointed out by the demurrer.

[3] We see no merit in these contentions. A complaint is not necessarily defective in which there is united with a defendant another against whom no liability is alleged. Asevado v. Orr, 100 Cal. 293, 300, 34 Pac. 777. Nor under such circumstances are the rights of the parties necessarily affected by such misjoinder. Hirshfeld v. Weill, 121 Cal. 13, 53 Pac. 402. True, there is no tie indicated by the allegations of the complaint binding the defendants together such as is required under the law to make out a case of joint liability; nor is there in any one of the single acts complained of a possibility of holding both defendants named in the complaint as joint tort-feasors. The pleading shows clearly that the acts complained of were committed by defendant Legge with complete absence of any community of purpose, concert of action, or general plan as would serve to unite defendants and constitute one cause of action for the damage alleged. But this condition did not justify the action of the lower court in sustaining the demurrer of both defendants. The old common-law rule in relation to the inseverability of actions against joint tort-feasors does not exist in this state, it having been modified by section 578 of the Code of Civil Procedure, which provides in substance that judgment may be given for or against one or more of several plaintiffs or for or against one or more of several defendants where the justice of the case requires it. Zibbell v. Southern Pacific Co., 160 Cal. 239, 248, 116 Pac. 513. Here, as above stated, the complaint shows that the acts done by defendant Legge were done independently, and that there was no concert of action on the part of his codefendant. The defendants were no doubt joined upon the mistaken theory that the doctrine of respondeat superior prevailed against the regents and that they were not immune from suit. Whatever the reason for the joinder may have been, the immunity of the regents did not of itself abate the action against the alleged culpable defendant, or bar a judgment against him if guilty, for when the demurrer of the regents was sustained any objection that might exist by reason of the misjoinder was removed.

[4] Nor do we think, as claimed that the complaint is unintelligible or uncertain. It alleges in unequivocal terms a complete cause of action against defendant Legge. It first charges that for a consideration he personally performed an operation upon plaintiff at the infirmary mentioned for the removal of his tonsils, and that he undertook and agreed to render all medical aid and surgical treatment incident thereto; that he negligently failed to make a thorough examination of plaintiff's neck and throat. It further charges that the operation was performed in a negligent and careless manner without skill in that excessive force was applied to plaintiff's head, jaw, and neck, and as a direct result therefrom plaintiff's jawbone was dislocated and the left side of the atlas vertebræ of his neck was fractured, crushed, and dislocated; and that his physical condition by reason of these injuries became seriously aggravated and painful. Then follow allegations to the effect that plaintiff suffered great pain and anguish, and that in addition thereto and by reason of the treatment plaintiff also suffered inconvenience and annoyance by reason of the unnatural poise or position of his neck and head, which unnatural position is permanent and will continue throughout plaintiff's life. Such allegations we believe to be sufficient to require defendant to plead to the

merits and thus give plaintiff his day in court.

For the reasons stated the judgment of the lower court sustaining the demurrer of defendant Legge is reversed.

We concur: KNIGHT, J.; ST. SURE, J.

193 Cal. 709

FAY IMPROVEMENT CO. v. HANLON et al.
(S. F. 10620.)

(Supreme Court of California. June 3, 1924.)

1. Municipal corporations 🔑475 — Improvement ordinance providing for installment payment of assessment held intelligible and reasonable.

Section of a street improvement ordinance providing that, if any owner desires to pay assessment in installments, he shall make a bond in form set out, *held* reasonable, and not, as claimed, unintelligible.

2. Municipal corporations 🔑475—Assessment at more than half value of property, but permitting installment payments, held valid.

Notwithstanding San Francisco Charter, c. 2, art. 6, § 8, subd. 3, prohibiting assessment for street improvement at more than one-half the value of the property, an assessment by ordinance in excess thereof, but permitting payment in installments, under section 33 of the same chapter, was valid, and when property owner failed to arrange for installment payments the entire amount became due.

3. Municipal corporations 🔑46—Ordinances not conflicting with nor repealed by charter amendments continued in force.

All ordinances existing at the time of adoption of charter amendments, and not in conflict therewith or repealed thereby, are continued in force.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Fay Improvement Company against Charles F. Hanlon and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles F. Hanlon and Tobin & Tobin, all of San Francisco, for appellants.

John R. Daniels, of San Francisco, for respondent.

SEAWELL, J. This is an appeal from a judgment in the plaintiff's favor in an action to foreclose a lien for street improvement work performed for the benefit of lot No. 59, as shown by the assessment and diagram, situate at the southeast corner of Forty-Fourth avenue and Balboa street, in the city and county of San Francisco, and owned by defendant Charles F. Hanlon. The assessment was made under the procedure provided by Ordinance No. 2439 (N. S.) of the city and county of San Francisco, approved September 4, 1913, under and by virtue of the power given to the supervisors of that municipality by section 33, c. 2, of article 6, of its charter. The Hibernia Savings & Loan Society, a corporation, alleged to have held a mortgage interest in said lot, filed a dismissal of its appeal, leaving Charles F. Hanlon as the sole appellant.

The street improvement assessment, aggregated the sum of $993.13, which is in amount greater than 50 per centum of the value of said lot at which it was assessed upon the last preceding assessment book of the city and county of San Francisco. Subdivision 3 of section 8 of chapter 2, art. 6, of the charter of said city and county of San Francisco, has, since 1913, provided, and still does provide, that—

> "No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the next year preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment book of the city and county."

Section 33, of the same chapter (Stats. 1913, p. 1623), which was a part of the 1913 charter, provided:

> "The method of procedure in this article provided for the improvement of streets, * * * and for the assessment of the expense thereof or any portion of such expense upon private property shall not be deemed exclusive, but the board of supervisors by an affirmative vote of not less than two-thirds of the members thereof, may by ordinance substitute therefor any method of procedure in any general law of the state of California now in force and effect, or as the same may be amended or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; or the said board may by a like affirmative vote of the members thereof adopt an ordinance which may from time to time be revised or amended, providing a method of procedure for such improvement and assessment; and in such ordinance if said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in *annual installments* covering a term not to exceed *ten years* upon conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent. per annum. In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in *subdivision 3 of section 8 of this chapter*." (Italics ours.)

Pursuant to this last express authorization of the charter, Ordinance No. 2439 (N. S.) was approved September 4, 1913. Section 29 of said ordinance provides as follows:

> "In case the owner of any lot or parcel of land against which an assessment is imposed desires to avail himself of the privilege of paying such assessment in installments, and for and in consideration of such privilege such owner or person duly authorized by power of attorney (within thirty days from the date of the demand made as required by section 20, or within twenty days from the decision on appeal, if an appeal be taken to the board of supervisors

> as provided in section 21) shall make and execute before an officer authorized by law to take acknowledgments of the conveyances of real property, and file in the office of the board of public works a bond in triplicate,"

—substantially in the form therein provided. The form of the bond is a part of said section 29, and provides by its terms that, if the owner of the lot improved acknowledges the regularity and the validity of the assessment that has been imposed on his property and the amount of the assessment, and promises and agrees to pay the same in installments as fixed by the resolution of intention or by the ordinance ordering the work of improvement, he shall be entitled to pay the assessment in installment payments. This is not an unreasonable or injust requirement. Federal Construction Co. v. Wolfson, 186 Cal. 267, 199 Pac. 512, 29 A. L. R. 1098. Provision is therein made for the payment of interest, and it is provided that, in the event of default in the payment of any installment or of any interest according to the terms of the bond, then all of such installments or principal and interest thereon shall become immediately due and payable and the board of public works shall sell the property described therein to pay the amount due, together with the expenses of such sale.

Section 39 of said street improvement ordinance, adopted by authority of the charter, further provides:

> "This ordinance is intended to and does provide an alternative system for making the improvements herein provided for, and shall not be held to affect any other method or system provided by the charter of the city and county [of San Francisco] or act of the Legislature, and any proceedings heretofore commenced shall not be affected hereby but shall be continued until completion by and under the method provided by the charter, law or ordinance under which they were originally commenced."

[1] Appellant claims that section 29 of said ordinance is unintelligible, and therefore void. That section has received the attention of this court upon numerous occasions, and its effect in relation to the charter considered. Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225; McGinn v. Van Ness, 40 Cal. App. 600, 181 Pac. 70, 183 Pac. 950; Hutton v. Newhouse, 41 Cal. App. 689, 183 Pac. 276; Federal Const. Co. v. Wolfson, supra; City Improvement Co. v. Pearson, 181 Cal. 640, 185 Pac. 962; Flinn v. Shafter Realty Co., 190 Cal. 316, 212 Pac. 194. This is the first time that the specific objection of unintelligibility has been urged against it. While it may not be structurally or grammatically perfect, there can be no doubt as to its meaning. No difficulty, seemingly, has heretofore been experienced in that respect. Read in its entirety, and in connection with other sections of the ordinance, no doubt can exist as to what was meant thereby.

[2] The proceedings taken by the board of public works and the board of supervisors are regular in every respect. The resolution of intention passed by said board of public works on August 4, 1916, recommending the improvement and thereafter adopted by the board of supervisors, in compliance with section 28 of said ordinance, was as follows:

> "The said board of public works, pursuant to the provisions of part 2 of the street improvement ordinance, does hereby determine and declare that the assessment to be imposed for the said contemplated improvements, respectively, may be paid in *five annual installments*, and that the rate of interest to be charged on all deferred payments shall be seven per cent. per annum." (Italics ours.)

On the 25th day of June, 1917, following the due course of procedure, the supervisors authorized the board of public works to enter into a contract for the performance of said improvement work; on April 15, 1918, the contract therefor was awarded to plaintiff herein. Appellant Hanlon did not file a written notice with the secretary of said board of public works within 10 days of the first publication of the notice of award, or at any time thereafter, specifying that any previous act or proceeding relating to said improvement was irregular, defective, erroneous, or faulty. Neither did he at any time request the privilege of paying such assessment in installments or at all. He has not paid or offered to pay any part of said assessment. Under the state of the record as presented and the decisions of this court practically determining the point made by appellant against him there remains but little to be said. Section 33, chapter 2, article 6, of the charter of 1913, fully authorized the passage of the ordinance under which this proceeding is had, and subdivision 3 of section 8 of the same chapter must be read in connection therewith.

Section 33 of the charter specifically provides that the general limitation placed upon the amount of the assessment by subdivision 3 of section 8 thereof shall have no application to street improvement assessments wherein provision is made for the payment of the assessment in annual installments.

To the claim that the assessment should have been made payable in installments the answer is that it was so made payable by the express language of the resolution of intention, but appellant refused or failed to conform to the procedure as prescribed pursuant to the provisions of section 29 of said ordinance, and thereby cut himself loose from the privilege which he now invokes.

[3] The proceedings herein were commenced during the existence of the 1913 charter. The charter amendments approved January 18, 1917, did not affect the proceedings begun under the former charter. The amendments simply expressed in direct terms what it had authorized to be done by ordinance

under the former charter. All ordinances existing at the time of the adoption of the charter amendments, and not in conflict with or repealed thereby, were continued in force. This is a general rule of statutory construction. Whether the question be determined with reference to the charter as it formerly stood or as amended we see no way by which the payment of the assessment may be avoided. Section 33 of the charter as amended is but an amplification of the old section, making, if possible, more clear the evident intention disclosed by the original section. The procedure providing for the payment of a street assessment which exceeded 50 per cent. of the assessed value of the property in installments having been rejected, the entire amount became at once due.

Judgment affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.; SHENK, J.; LANGDON, Justice pro tem.

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193 Cal. 715

EATON v. HANLON et al. (S. F. 10596.)

(Supreme Court of California. June 3, 1924.)

1. Municipal corporations ⚷293(1)—"Resolution of expediency" distinguished from "resolution of intention."

A "resolution of expediency," required by ordinance when the board of public works contemplates street improvements, *held* merely a procedural preliminary declaration of contemplated proceedings, while the "resolution of intention," required after plans and specifications are prepared, is jurisdictional.

2. Municipal corporations ⚷293(2)—Resolution of expediency held sufficient.

Under ordinance requiring board of public works to adopt resolution of expediency describing proposed street improvement, resolution specifying location, and stating that sidewalks were to be of modified artificial stone, curbs of concrete, and roadway of vitrified brick, *held* sufficient.

3. Municipal corporations ⚷522—Payment by installments for street improvement is at owner's option.

San Francisco Charter, art. 6, c. 2, § 33, providing that assessment for street improvement shall be payable in installments, when they exceed one-half the assessed value, means that they shall be so payable at the owner's option, not that he must so pay them, whether he elects to do so or not.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Clarence B. Eaton against C. F. Hanlon and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles F. Hanlon, of San Francisco, in pro. per.

Grover O'Connor, of San Francisco, for respondent.

SEAWELL, J. This appeal is from a judgment in favor of plaintiff in an action brought to foreclose a street improvement lien upon the property of defendant Hanlon, situate on Mariposa street, between Potrero avenue and Utah street, city and county of San Francisco. It presents substantially the same questions that were decided in Fay Improvement Co. v. Charles F. Hanlon et al. (S. F. No. 10620) 227 Pac. 482, this day filed. The assessment was made under the same procedure referred to in that case, with the exception that the amended charter of 1917 was in effect at the time the proceedings in this case were commenced, instead of the charter of 1913, as in the other case. The interest of the Hibernia Savings & Loan Society, a corporation, is that of a mortgagee.

The amount of the street improvement assessment against said property amounted to the sum of $1,334.075, which was an amount greater than 50 per centum of the value at which said property was assessed for municipal purposes, exclusive of improvements thereon, upon the assessment book of the city and county current at the time of the inception of the improvement proceedings.

That the charter conferred upon the board of supervisors authority to adopt section 29 of the street improvement act is made plain by a perusal of its provisions. Section 33, c. 2, of article 6 of the charter, to the effect that the above limitation shall not apply to any assessments made payable in installments, is about as clear as language can make it. The argument that it is mandatory under the charter of 1917 to require the owner of the property to pay in installments, whether he so desires or not, is not in harmony with the provisions of the charter or the general rules of law. Both the charter and city's improvement ordinance provided that, if the assessment exceeds one-half of the assessed value of the property, provision must be made by the board of supervisors that the owner of the property be permitted to pay in installments if he so desires. The right to impose an assessment greater in amount than 50 per cent. of the actual value of the property is dependent upon whether the board of supervisors has made provision for its payment in installments. If the owner does not choose to accept the benefit extended he surely reserves the right to discharge the debt at once. If the owner declines to accept the privilege guaranteed him, and refuses to pay at all, the court, if suit be brought to foreclose a lien, must give judgment for the whole amount. Defendant Hanlon did not desire to exercise his option. He was given the opportunity to do all that he now contends for. This question, as well as the contention that section 29 of the street improvement ordinance is invalid on the ground that it is unintelligible, is disposed of upon the authority of Fay Improvement Co. v. Hanlon et al., supra, and the cases therein cited.

[1] The only question raised by this appeal that was not decided in the Fay Case, supra, is as to the sufficiency of the expediency resolution. We think the resolution meets every statutory requirement. Section 3 of Street Improvement Ordinance No. 2439 (N. S.) provides:

> "When, in the judgment of the board of public works of said city and county, the public interest or convenience requires that any such improvement be made, the expense of which or any part thereof is to be assessed upon private property and said board deems the same expedient, it shall by resolution declare such expediency and briefly describe such improvement. Thereupon, said board shall cause specifications or plans and specifications for the proposed improvement to be prepared.
>
> "Section 4. After the specifications or plans and specifications for said contemplated improvement shall have been prepared, as in section 3 provided, the said board shall pass a resolution of its intention to recommend to the supervisors that said improvements be ordered to be made as the same is described in its resolution declaring the expediency thereof. Said resolution of intention shall contain a reference to the specifications or plans and specifications prepared for the contemplated improvement," etc.

[2, 3] The resolution of expediency is nothing more than a preliminary declaration of contemplated proceedings. It has not the importance or force of the resolution of intention. The latter is a jurisdictional requisite, the former procedural. Federal Construction Co. v. Wolfson, 186 Cal. 267, 199 Pac. 512, 29 A. L. R. 1098. The expediency resolution was as full in its description of the work to be performed as the ordinance required, and in this respect it provided for "the improvement of Mariposa street between Potrero avenue and Utah street to official line and grade, by the construction of a 6-foot central strip of modified artificial stone sidewalk in accordance with the plan attached to the specifications, and by the construction of concrete curbs and a vitrified brick pavement on the roadway thereof." The reference made by the resolution of expediency to the plan as being attached to the specifications was not required to be inserted therein, and if it should be regarded as mere surplusage the resolution would still contain a sufficient description of the work. It is clear that the sidewalk was to be constructed of modified artificial stone, the curbs were to be concrete, and the roadway was to be of vitrified brick. This meets every requirement of the ordinance. The plans and specifications were approved and adopted on the same day that the preliminary resolution was passed, and were connected therewith by express reference. The ordinance does not require that the description of the work be as minute in descriptive detail as plans and specifications are required to be. It is the resolution of intention which the ordinance requires shall contain a reference to the plans and specifications prepared for the contemplated improvement. Appellant was in no wise prejudiced or misled by the resolution of expediency. The resolution of intention and the plans and specifications, upon inspection, would have given appellants all the information contemplated by the street improvement ordinance. The resolution of intention adopted by the board of supervisors provided that the assessment imposed upon the property might be paid in 10 annual installments. The language of the statute is that the assessment is "payable" in installments, and, of course, this means at the option of the owner, and not that it must be paid in installments whether the owner elects to so pay or not. Aside from the question just discussed we find nothing in this case that is not decided by the case of Fay Improvement Co. v. Hanlon et al., supra, and the cases therein cited.

Judgment affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.; SHENK, J.; LANGDON, Justice pro tem.

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193 Cal. 719

PEOPLE v. STAFFORD PACKING CO.
(L. A. 7669.)

(Supreme Court of California. June 5, 1924.)

1. Fish ⟹6—Fish packers limited to use of fish in reduction plant authorized by permit.

Fish packers are limited in use of fish in reduction plant by permit from Board of Fish and Game Commissioners, under St. 1919, p. 1204, §§ 4, 6, and section 5, as amended by St. 1921, p. 459, § 1, and when permit allowed use of 25 per cent. of fish received, use was restricted accordingly, even though statute authorized permit for 25 per cent. of capacity of plant.

2. Injunction ⟹144—Complaint to enjoin use of fish in reduction plant held to show right to preliminary injunction.

Complaint to enjoin packing company from using more fish than it should in its reduction plant, *held* to show prima facie that irreparable injury was threatened, and that remedy at law was inadequate so as to warrant preliminary injunction, under St. 1919, p. 1204, § 5, as amended by St. 1921, p. 459, § 1, conceding that allegations as to threats and remedy at law were conclusions.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Fish 🔑6—State may maintain action to enjoin violation of law by packing company.

State may maintain action in equity to enjoin violation of law by packing company using more fish in its reduction plant than authorized by its permit, on theory that use of such fish is an invasion of property rights held by state in trust for people, in view of Const. art. 1, § 25; Id. art. 4, § 25½; Civ. Code, § 3479; Pen. Code, § 370.

4. Nuisance 🔑1—"Nuisance" defined.

Under Civ. Code, § 3479, Pen. Code, § 370, a nuisance is anything which is injurious to health, or indecent or offensive to senses, or an obstruction to free use of property, so as to interfere with comfortable enjoyment of life or property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

5. Injunction 🔑152—Whether remedy at law adequate, in first instance question of fact for trial court.

Question whether or not a given remedy at law is adequate is, in first instance, question of fact for trial court, even where evidence is conflicting, if opposing inferences may be reasonably drawn therefrom.

6. Appeal and error 🔑954(1)—Finding that remedy at law inadequate not disturbed unless evidence is legally insufficient to support.

Finding and conclusion of trial court that remedy at law is inadequate, so that injunction should issue, will not be disturbed upon appeal unless it is shown that evidence is legally insufficient to support same.

7. Appeal and error 🔑954(1)—Finding that remedy at law inadequate held not to be disturbed.

On appeal in suit by state for injunction to restrain use of too many fish in reduction plant of packing company, in violation of St. 1919, p. 1204, § 5, as amended by St. 1921, p. 459, § 1, trial court's conclusion that remedies at law, provided by St. 1917, p. 1275, making it misdemeanor to pack fish without license, and provision in former giving commission power to suspend license, were inadequate will not be disturbed.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the People of the State of California against the Stafford Packing Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

W. A. Alderson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Robert D. Duke, Attorney for Fish and Game Commission, of San Francisco, for the People.

MYERS, C. J. The defendant corporation, which is engaged in the business of canning, packing, and preserving fish, appeals herein from an order granting an injunction pendente lite, restraining the defendant from using, in a reduction plant for the manufacture of fish meal, fish oil, and fertilizer, more than 25 per cent. of all sardines received by it while actually engaged in the canning, packing, and preserving of sardines for human consumption. Sections 4 and 6 of an act to conserve the fish supply in California, etc. (Stats. 1919, pp. 1204, 1205), provide in effect that no person or firm engaged in the business of packing fish shall suffer or permit any preventable deterioration or waste of any fish caught or taken within or without the waters of this state, and brought into this state, or shall divert fish or other fishery products for reduction purposes without first having written permission from the fish and game commission, and that no reduction plant shall receive any fish without such written permission. It is further provided that, if such person or firm is found guilty of violating such permit, the board of fish and game commissioners may, after a hearing, suspend for a period, not to exceed 90 days, any such license which shall have been so issued by it. Section 5 of said act as amended (Stats. 1921, p. 459) provides that no such person or firm shall receive or accept more food fish than its plant can pack or preserve fit for human consumption. It also forbids the use of fish fit for human consumption for reduction purposes, provided that the fish and game commission may, after a hearing, upon application therefor, issue a permit granting the privilege to use in a reduction plant, during a calendar month, an amount of said fish not to exceed 25 per cent. of the amount any such person or firm can pack or preserve for human food during a calendar month.

It is alleged in the complaint herein that the defendant, upon its application and after a hearing, was granted such a permit to use sardines for the manufacture of fish oil, fish meal, or fertilizer during the time it is packing sardines for human food purposes only, provided that the amount so used must not exceed 25 per cent. of the total amount of sardines received at the packing or canning plant of defendant during a calendar month. It is also alleged that continuously during the month of January, 1923, the defendant used fresh sardines fit for canning and preserving purposes, for human consumption, in its reduction plant in excess of the amount allowable under its permit, and in violation of the provisions of law above referred to. It is further alleged that said defendant threatens to continue the use of sardines fit for human consumption in its reduction plant in violation of said order of the commission, and in violation of said laws, "thereby causing great and irrevocable loss and damage to the people of the state of California," and "that there is no speedy and adequate remedy at law." "That said defendant has used said sardines in its reduction plant in the manufacture of fish meal, fish oil, and fertilizer in violation of the laws of the state of California and said orders of the board of fish and game commissioners referred to herein, and threatens to continue to commit said wrongful act unless restrained by this honorable court." The defendant in its answer admits, by failing to deny them, all of the facts alleged in the complaint, except that it denied "that it threatens or ever threatened to continue to use fresh sardines" in its reduction plant as alleged in the complaint. There is no allegation, however, that it does not intend to continue such use of sardines, and it does not allege that it will not continue such use if not restrained by injunction.

Plaintiff supported its application for a provisional injunction by affidavits showing that during the month of January defendant had converted 88.6 per cent. of all the sardines received by it into fish meal and fish oil. Defendant filed counter affidavits in opposition thereto, the allegations of which amount to nothing more than this: That the defendant "has never in any way or by any act threatened, and does not now threaten, to violate any law of the state of California or any order or permit made or issued to it by the fish and game commission of California," and that no "officer, employee or person connected with said corporation has ever made any such threat."

[1] Appellant contends that the order appealed from is in excess of the equity jurisdiction of the court, and that, conceding such jurisdiction, the complaint and evidence were both insufficient to justify its exercise herein. In support of the latter contention, appellant argues that neither the complaint nor the evidence shows a violation on its part of the state law for the reason that the limitation placed thereby upon the quantity of fish which may be used for reduction purposes is "25 per cent. of the amount any such applicant, person, firm, or corporation can can or pack or preserve for human food during a calendar month." Appellant contends that this means 25 per cent. of the maximum capacity of its packing plant. It is not necessary to here determine whether the quoted phrase means that the percentage is to be based upon the theoretical capacity of the packing plant or upon the quantity of fish actually canned, packed, or preserved by it during the month in question. Assuming the correctness of appellant's interpretation of this phrase, the fact still remains that the allegations of the complaint and affidavits do charge facts amounting to a violation both of the law and of the permit issued by the commission. The statute makes it unlawful to use any food fish except fish offal for reduction purposes, except pursuant to and within the limits of a permit issued by the commission. The 25 per cent. mentioned in the statute is the maximum which governs the commission in the issuance of its permit. The maximum which governs the packer is the quantity named in the permit granted by the commission, which may not in any event exceed the maximum set by the statute, but which may be fixed at any less quantity which the commission may prescribe. It is immaterial that the law as interpreted by petitioner would have authorized the commission to issue a permit to the appellant for the use of a larger percentage of fish in its reduction plant. The commission did not do so, and under the law the use of any food fish in a reduction plant is unlawful, except to the extent that it is authorized within the terms of such a permit.

[2] Appellant asserts that an injunction will not issue to prevent the doing of an act which has already been committed, and that the allegation that defendant threatens to continue the doing of the act complained of is a mere conclusion of the pleader, and insufficient as an allegation of fact. These propositions may be conceded. The complaint was filed herein February 14, 1923, and it is alleged therein, and nowhere denied, that throughout the preceding month, January, the defendant used in its reduction plant 88.6 per cent. of all the sardines received by it during that month. This evidences a willful and deliberate violation of the law on the part of the defendant, and justifies the conclusion that it was done pursuant to a policy adopted by the defendant, which the latter would continue to follow unless restrained. It may be conceded, also, that the allegation that "there is no speedy and adequate remedy at law" is a mere conclusion insufficient to entitle plaintiff to the interposition of equity in the absence of the allegation of facts from which such a conclusion would reasonably follow. The necessity and importance of conserving the wild game and fish of this state, for the benefit of the people of the state, have been recognized by this court for the past 30 years (Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129). This is the expressed purpose of the statute hereinabove cited. It was shown herein and is not denied by appellant that it received, during that month of January, 681,623 pounds of fresh sardines fit for canning and preserving purposes, and that it preserved for human consumption less than 12 per cent. thereof. It requires no argument to show that the millions of fish thus destroyed are no longer available to furnish a food supply to the people of the state, or to replenish their own species. If this defendant may thus violate the law with impunity, every other packer may do likewise and would naturally be tempted to do so. Appellant asks us to take judicial notice of the fact that the supply of fish in the Pacific ocean is inexhaustible. If we are authorized to take judicial cognizance upon this subject,

we should have to conclude that experience has proven that the available supply of food fish in the ocean in waters readily accessible to the packing plants of the state may be seriously depleted, if not practically exhausted, within a period of a few years, by unrestricted fishing. We are satisfied that the facts alleged and proved herein sufficiently support, prima facie, the conclusions that irreparable injury is threatened, and that the remedy at law is inadequate. Another point bearing upon this latter conclusion will be hereinafter discussed.

[3, 4] Appellant's principal contention is that the state cannot maintain an action in equity for the purpose of obtaining an injunction to prevent the violation of law, except when expressly authorized thereto by statute, and that the sole exception to this rule is where an act sought to be abated or prevented is a public nuisance which affects the health, morals, or safety of the people. Appellant cites a large number of decisions from the courts of other states in support of this contention, but it is not necessary to review them here for the reason that our own courts have spoken definitely upon this question. Appellant concedes that the general right and ownership of fish is in the people of the state, and that the state has the right to regulate and control the taking and disposition thereof. Const. art. 1, § 25; Id. art. 4, § 25½; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Ex parte Bailey, 155 Cal. 472, 101 Pac. 441, 31 L. R. A. (N. S.) 534, 132 Am. St. Rep. 95; Ex parte Phœdovius, 177 Cal. 238, 170 Pac. 412; In re Parra, 24 Cal. App. 339, 141 Pac. 393. Appellant also concedes that an action to abate a nuisance will not be defeated merely because the act sought to be enjoined is a crime, but appellant insists that an action will not lie to abate or prevent what is charged or alleged to be a niusance "unless it be a nuisance in itself—as the books put it, a nuisance per se."

Appellant defines a nuisance per se as "an act which in itself is not only a violation of law, but which produces results affecting the health, morals, comfort, or peace of the people." The use of fresh fish for conversion into necessary commodities, such as fish meal, fish oil, and fertilizer, not being such a nuisance per se, the conclusion follows that this action will not lie. The fallacy in this argument rests in the restricted definition adopted by appellant. A nuisance is "anything which is injurious to health, or is indecent or offensive to the senses, *or an obstruction to the free use of property,* so as to interfere with the comfortable enjoyment of life or property. * * *" Civ. Code, § 3479; Pen. Code, § 370. (Italics added.) This point was determined adversely to appellant's contention in People v. Truckee Lumber Co., supra. That was an action in the name of the people on the information of the Attorney General to restrain the commission of an alleged nuisance, which consisted in the deposit in the waters of said river of large quantites of refuse matter consisting of sawdust and other deleterious substances, the effect of which was to pollute said stream and the waters thereof and render the same unfit for use, and to kill and destroy the fish therein. The trial court granted the injunction and this court affirmed its action, and in so doing rejected all of the contentions made by appellant herein upon this point. Appellant insists that the decision rested upon the circumstance that the alleged nuisance there complained of was a nuisance per se in that it polluted the waters and rendered them unfit for use. A careful reading of that opinion makes it clear that this is not so. That decision was rested not upon the circumstances that the pollution of the waters created a condition which was "injurious to health" or "offensive to the senses," but upon the fact that it was an invasion of the property rights which were held by the state in trust for the people of the state. In other words, it was "an obstruction to the free use of property." The court there said:

> "The first point made against the complaint is that the facts alleged do not constitute a public nuisance within the definition of our Code. But this objection would seem to overlook the most material feature of the complaint. It is alleged that the acts of defendant have the effect of polluting and poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance. Pen. Code, § 370; Civ. Code, §§ 3479, 3480. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (Ex parte Maier, 103 Cal. 476, 483, 42 Am. St. Rep. 129), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired, and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. People v. Elk River, etc., Co., 107 Cal. 219, 48 Am. St. Rep. 121."

The court there quoted with approval from State v. Roberts, 59 N. H. 256, 484, 47 Am. Rep. 199, as follows:

"It is a well-established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a similar right, upon their lands upon the stream above and below."

And, in summing up its conclusion, the court said:

"The mere fact, then, that the interference or obstruction complained of may in fact be in a stream where the right of fishery is exclusively in private riparian owners, does not make the acts here complained of any less an invasion of the public right, nor prevent the state from protecting its general interest in the property."

It is thus made plain that the basis of equitable interposition in that case was the threatened injury to the property rights of the people which are held in trust by the state for the people. Appellant suggests that the court there rested its action upon the circumstance that the act there complained of "unlawfully obstructed the free use" of the Truckee river, but the court in its opinion expressly recognized that the case did not come within that definition of a nuisance for the reason that the Truckee river was not a navigable stream.

[5-7] Appellant argues that the injunction should not issue herein for the reason that there is an adequate remedy at law. It refers in this connection to the power of the commission, after a hearing, to suspend for a period not exceeding 90 days the license of a packer found guilty of violating its permit. It asserts that this power in conjunction with the provisions of another statute (Stats. 1917, p. 1275), making it a misdemeanor to engage in the business of packing fish without first procuring a license therefor, furnishes a complete and adequate remedy at law. Appellant does not believe that the act providing for the suspension of a license, because of the violation of a permit, is constitutional or valid, but says:

"However, it is not necessary, for the consideration and determination of the pending controversy, to discuss and determine whether this statutory provision is constitutional. That the law provides a speedy, ample, and effective remedy for committing the offense charged in the operation of a reduction plant is obvious."

If the remedy thus afforded is unconstitutional and therefore nugatory, we cannot quite see how it can be adequate, but for the purposes hereof we shall assume the validity of the statute and the power of the commission thereunder to revoke appellant's license. The question whether or not a given remedy at law is adequate is in the first instance a question of fact for the trial court, and even where the evidence is unconflicting, if opposing inferences may be reasonably drawn therefrom, it still remains a question of fact in the first instance. The finding and conclusion of the trial court thereon will not be disturbed upon appeal, therefore, unless it is shown that the evidence is legally insufficient to support the same. The power of the commission to suspend a license can be exercised only after a hearing had upon written charges filed with the commission and served upon the alleged offender, and upon due notice to the latter. The commission is given the right to issue subpœnas, but has no power to compel obedience to them. If, when the date which has been fixed for the hearing arrives, a witness who has been subpœnaed fails to appear, or appears and refuses to testify, the commission may then file a petition in the superior court setting up these facts, whereupon the latter may issue an order to show cause, and have the same served upon the delinquent witness, requiring him to appear before the court, at a day fixed, to show cause why he should not appear or testify before the commission. Upon such hearing, if it shall appear to the court that said subpœna was regularly issued by the commission, the court shall thereupon enter an order that the witness appear before the commission at a time and place to be fixed by the court. It is thus apparent that a resourceful defendant may delay the proceedings of a hearing before the commission, indefinitely. In the meantime, the defendant may continue the wasteful destruction of fish at the rate of millions per month. If it is finally found guilty by the commission, the utmost penalty which the latter can impose is a suspension of license for a period not exceeding 90 days. In the meantime the fishing season for that particular year will probably have ended, and the 90 days' suspension of license would be inconsequential. If not, as suggested by counsel for the commission, the defendant may then lease his plant to some other person who may continue the operation thereof. We are satisfied that the conclusion of the trial judge that the remedy thus afforded is not adequate cannot and should not be disturbed by us. We do not understand appellant to seriously contend that the criminal prosecution of defendant, upon a misdemeanor charge for violating the terms of its permit, would afford an adequate remedy herein.

It is suggested that the court in issuing this injunction was assuming to exercise the police power of the state, and in so doing invaded the exclusive province of the Legislature. It is said that, if the court had the authority to issue this injunction under the circumstances existing, it might have done so equally in the absence of any act of the Legislature regulating the taking and use of fish, or limiting the quantity thereof to be used for reduction purposes. In other words, that it could have established by judicial fiat a rule that no more than 25 per cent. of the sardines may be so used, and that in so doing it would have been, in effect, enacting a statutory rule, and so usurping the province of the Legislature. This involves an erroneous conception of the nature and effect of the court's action. In the first place, the court acted only upon the facts of the particular case and with reference only to the parties thereto. The decree issued by it did not have, and could not have had, the binding effect of law as a rule governing the action of any one other than the parties to that action. The Legislature in enacting the regulations here involved was exercising the police power of the state. The effect of those regulations was to make the use of fish for reduction purposes in excess of the limits there prescribed both wrongful and unlawful, but the court in the action herein was not at all concerned with the unlawfulness of those acts, but only with their wrongfulness as an invasion of the property rights of the people. Having determined that the acts complained of constituted a wrongful invasion of those property rights, and having further determined that the threatened continuance thereof would work irreparable injury for which there was no adequate remedy at law, there was a complete foundation for equitable interposition and equitable relief.

The order appealed from is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; SHENK, J.

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67 Cal. App. 135

MEIER v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR STANISLAUS COUNTY et al. (Civ. 2820.)

(District Court of Appeal, Third District, California. May 3, 1924. Hearing Denied by Supreme Court June 30, 1924.)

1. Justices of the peace 🔑166(2)—Statute requires dismissal of appeals not brought to trial within year and not actions as expressed in act.

Code Civ. Proc. § 981a, as added by St. 1923, p. 755, requires dismissal of "appeals" from justice to superior courts, if not brought to trial within year, rather than of "actions," as therein expressed.

2. Statutes 🔑189—Harmful results of literal interpretation considered.

It is not legitimate function of courts to legislate, in view of Code Civ. Proc. § 1858, but in construing laws they are not always governed by literal phraseology, if application of law, so construed, would produce harmful results.

3. Statutes 🔑201—Courts may substitute correct word.

If context or other considerations show erroneous use of one word for another, substitution of which will make statute harmonious, courts may correct error.

4. Statutes 🔑117(1)—Act referring solely to dismissal of appeals in title void as to requirement of dismissal of actions.

Code Civ. Proc. § 981a, as added by St. 1923, p. 755, if construed as requiring dismissal of both action and appeal from justice to superior court, if appeal is not brought to trial within year from filing, would be void as to provision for dismissal of action, as not expressing subject-matter in title, in violation of Const. art. 4, § 24.

5. Justices of the peace 🔑166(2)—Appeal from justice to superior court must be dismissed, if not brought to trial within year, in absence of stipulation.

Code Civ. Proc. § 981a, as added by St. 1923, p. 755, is mandatory, and, in absence of showing that time within which appeals from justice court to superior court must be brought to trial has been extended by stipulation, trial court must order appeal dismissed.

6. Mandamus 🔑43—Refusal to produce account book for inspection by defendant held immaterial in mandamus to compel dismissal of appeal from justice's judgment for plaintiff.

Whether plaintiff's counsel represented to defendant's counsel that book containing account sued on had been mislaid and could not be produced for inspection on defendant's demand, under Code Civ. Proc. § 1000, *held* immaterial on plaintiff's application for writ of mandate to compel superior court to dismiss appeal from justice's court for failure to bring it to trial within year, as required by section 981a; penalty for not complying with demand, being exclusion of entries of account as evidence.

Application by H. C. Meier for writ of mandate to Superior Court of Stanislaus County, L. W. Fulkerth, Judge. Writ granted.

Albert L. Johnson, of Modesto, for petitioner.

L. J. Maddux, of Modesto, for respondents.

HART, J. This is an original application for a writ of mandate to compel the respondent court and the judge thereof, on a motion to that end, made in said court, to make and enter an order dismissing the appeal in a certain action appealed to said court from the justice's court of Newman township, in the county of Stanislaus.

The motion to dismiss was based upon section 981a of the Code of Civil Procedure, which was added to said Code by an act of the Legislature of 1923, the title of which reads as follows:

"An act to add a new section to the Code of Civil Procedure, to be numbered 981a relating to dismissal of appeal." Stats. 1923, p. 755.

Said section reads as follows:

"No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken; provided, however, that in any appeal pending when this section takes effect, a judgment or dismissal shall not be entered under the direction hereof sooner than January first, 1924; and provided, further, that any superior court may, by existing rule or by rule hereafter to be enacted, provide for dismissal of such appeal within a time less than one year."

The petition for the writ of mandate shows: That the petitioner, on the 21st day of February, 1922, commenced an action in the justice's court of said Newman township against one John H. Elfers and his brother, Louis Elfers, to obtain a judgment for moneys alleged to be due petitioner for materials furnished and labor performed at the special instance and request of said Elfers Bros.; that said Louis Elfers did not answer the complaint, but that within due time said John H. Elfers answered the complaint and as to him the case came to issue, was subsequently tried and judgment rendered and entered in favor of the petitioner against both defendants in the sum of $297.10, with interest, all amounting to the sum of $356.11; that on the 22d day of December, 1922, the said John H. Elfers appealed the case to the respondent court, upon questions of both law and fact; that on the 2d day of January, 1923, attorney for defendant and appellant caused the case to be set for trial on the 8th day of May, 1923, at 10 o'clock a. m., in department 1 of the respondent court, presided over by the respondent judge; that several days prior to and on the 8th day of May, 1923, the respondent judge informed the respective attorneys of the appellant in the court below and the petitioner (respondent in the case on appeal) that it would not be possible to try said case upon that day (May 8, 1923), and that the trial thereof would have to be postponed to a later date, "because of the precedence of another trial upon the calendar" of said court; that thereafter "neither the appellant nor his attorney ever made any effort to set the said case for trial and to determine the appeal herein until after the lawful period for setting said cause had expired; that said appeal was not brought to trial within one year from the date of filing such appeal in said superior court."

The petition further states that, on the 10th day of January, 1924, the petitioner filed with the clerk of respondent court and served a written notice, dated January 5, 1924, that he would, on the 14th day of January, 1924, move the said court for an order dismissing the appeal of said John H. Elfers in said case "upon the ground that the said appeal had not been brought to trial within one year from the date of filing such appeal in said superior court," it being further alleged that the time within which the statute requires such action on appeal to be brought to trial was not extended by stipulation of the parties filed with the clerk of the superior court. The written notice of motion followed the language of section 981a of the Code of Civil Procedure and not only called for a dismissal of the appeal but also a dismissal of the action.

On the 14th day of January, 1924, said motion to dismiss was heard upon the papers in the case and affidavits by the respective parties and their respective attorneys, and, the matter having been on that day submitted for decision, the respondents took the same under advisement, and later made and caused to be entered an order denying said motion, and at the same time set the case down for trial for the 25th day of February, 1924.

To the petition here the respondents, as a return to the order to show cause, have filed an answer setting forth a brief history of the case from its inception in the justice's court to the date of the hearing of the motion to dismiss, including the pleadings in said case and affidavits filed in the respondent court by the appellant there in support of his resistance to the motion and counter affidavits likewise filed by the petitioner. The salient facts stated in the petition are not denied nor controverted.

[1] The court in its written decision denying the motion, which is embodied in the return to the application for the writ herein sought, found that no written stipulation entered into by the parties extending the time for bringing the action to trial beyond the time prescribed by section 981a had ever been filed with the clerk of the said court, nor was there an oral stipulation made in open court extending the time, "but the court denies the motion to dismiss on the ground that the section relied on, to wit, section 981a of the Code of Civil Procedure, provides for the dismissal of the action as well as the appeal from the judgment, and that, as the motion to dismiss follows the exact language of the section, and is as broad as the section itself a granting of the motion to dismiss would have the effect of putting respondent (petitioner here) out of court on his own motion. The motion to dismiss," proceeds the

decision, "is also denied on the ground that section 981a is void for uncertainty."

The language of the section seems plain enough, but, literally viewed, involves the very quintessence of absurdity. The section seems to place solely upon the appealing party the duty of bringing the action to trial within the year limit prescribed thereby, and if he defaults in that particular, there is, viewing strictly the language of the section, no alternative left to him or some other interested party, or the court on its own motion, but to dismiss the action. In other words, the section affords no choice as between dismissing the appeal, if such a course be authorized thereby and dismissing the action, but, in mandatory language, declares that the action must, in any event, be dismissed. Thus the respondent in the court below would be compelled, without fault or negligence on his part, to suffer the loss of the fruits or benefit of the judgment he obtained in the inferior court.

Doubtless, if the section as it now reads could be upheld as a reasonable legal enactment in all its terms, the respondent below, on failure of the appealing party to press the trial of the action within the specified time, would himself be entitled to force the action to trial within said time. At any rate, such respondent would be required to do this, in case the appealing party failed to bring the action to trial within the period prescribed or lose the benefit of his judgment.

It appears very clear, however, that the Legislature must have inadvertently and unintentionally used the word "actions" in the section in the place of the word "appeals." This proposition would seem to be supportable, not alone upon a consideration of the unreasonableness of the section or the preposterous consequences following literally the application thereof as it now stands, but also by a consideration of the section in its entirety and also the title of the act adding it to the Code. The first part of the section, it will be noted, does not expressly refer to the dismissal of appeals. It will further be perceived that the latter part of the section contains two provisos, at least one, if not both, of which refer to the dismissal of appeals and not to the dismissal of actions. It would seem to be obviously true that, if the Legislature in enacting the section had intended, ex industria, thus to authorize the dismissal of the actions because of default on the part of the appealing party to bring the same to trial within the prescribed time limit, it would have carried that intention through the entire section in language so clear as not to leave the matter in doubt. This it failed to do, as the two provisos referred to plainly demonstrate. Again, when we look to the title of the act adding section 981a to the Code to ascertain the subject-matter thereof, we find that it refers solely to the dismissal of appeals in such actions, and does not refer to or mention "dismissal of actions." We may assume that the Legislature, in the making of laws, always purposes to follow the mandates of the Constitution as to the manner of the enactment thereof, and that, had it intended to include in the section under review a provision that such actions should be dismissed for failure to bring them to trial within the specified time, it would have expressed that intention in the title thereof. From all these considerations it would seem there could follow no other rational conclusion than that the Legislature, rather than intending to say in the section that "all such actions heretofore or hereafter appealed must be dismissed," meant to say that the appeals in all such actions shall be dismissed. In brief, it is clear that, considering the section as a whole, together with the title of the action adding it to the Code, the true index of the legislative intent as to the penalty to be imposed for the failure to bring the action to trial within the prescribed time is contained in the second proviso of the section.

[2, 3] It is the established rule that, in the construction of statutes or written instruments, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted" (section 1858, Code Civ. Proc.), which means, of course, that it is not within the legitimate function of courts to legislate or to make contracts for parties; yet it is the duty of the courts to give enforcement to all laws enacted by the Legislature which are, in their provisions and purposes, harmonious with the provisions of the federal and state Constitutions, but in construing such laws they are not required in all cases to be governed by the literal phraseology thereof or bound to the acceptance and approval of every word they contain, if, by so doing, such laws, when applied, would produce harmful rather than beneficial results. If the use of a single word in a statute would render it an unreasonable exercise of the legislative power, when applied to given cases, then it would be the bounden duty of the courts to so declare. In such case, however, if the context of the statute or other considerations therefrom arising show that the word has been by the Legislature erroneously used for another word which, when substituted for the mischievous one, will make the statute harmonious in all its parts and with the obvious purpose and intent of the statute so that its enforcement will be in full accord with such purpose and intent, then the courts may correct the error. This proposition is well stated, and the text sustained by many cases cited in the footnotes thereof, in 25 Ruling Case Law, § 227, p. 978, as follows:

> "Legislative enactments are not more than any other writings to be defeated on account

of mistakes, errors or omissions, provided the intention of the Legislature can be collected from the whole statute. Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent."

See, also, Swinnerton v. Monterey County, 76 Cal. 113, 115, 18 Pac. 135; Davis v. Hart, 123 Cal. 384, 387, 55 Pac. 1060.

[4] It may be suggested that, if the section may be viewed as providing both for the dismissal of appeals and the dismissal of actions, the results here would be the same. If the language of the section, "and all such actions heretofore or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on the motion of any party interested therein," etc., had been omitted from the section, the language immediately preceding it, "no action heretofore or hereafter appealed from the justice court to the superior, court shall be further prosecuted, and no further proceedings had therein," would necessarily imply, and, indeed, carry with it the right to have the appeal dismissed. Hence it might be argued that the intention of the Legislature was to provide both for the dismissal of the appeals in such actions and the dismissal of such actions. Thus construing the section, the provision authorizing the dismissal of such actions would have to be eliminated, for the reason that, since the dismissal of appeals and the dismissal of actions involve two different and wholly unrelated or dissimilar subjects, and the matter of the dismissal of such actions is not expressed in the title of the act adding said section to the Code, the enactment, in so far as it purports to provide for the dismissal of such actions, is unconstitutional and void. Article 4, § 24, Const. That section of the Constitution provides, in part:

"Every act shall embrace but one subject, which subject shall be expressed in its title. But if any such subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

Thus it will be perceived that upon that theory of the act incorporating said section into the Code of Civil Procedure the provision of the section purporting to authorize the dismissal of such action would have to be expunged from the section, leaving it merely as the authority for the dismissal of appeals in such actions.

We will rest our conclusion herein, however, on the interpertation of the section first above given, viz.: That the phrase, "all such actions must be dismissed," was erroneously used by the Legislature; it being the intention of the lawmaking body, as the same is gathered from the context of the act and the title thereof, to use in place of said phrase the language, "all such appeals must be dismissed." And upon this construction of the section, and the showing made by the petitioner, it is clear that the prayer of the petition should be granted and the respondents directed to grant petitioner's motion to dismiss the appeal but not the action.

[5] Section 981a of the Code of Civil Procedure is mandatory in its terms, and, in the absence of a showing that the time within which the section requires actions appealed from a justice court to a superior court must be brought to trial has been extended by stipulation of the parties entered into prior to the expiration of the time limit and duly filed, then there is nothing left for the trial court to do but to order the appeal dismissed. Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670, Perrin v. Miller, 35 Cal. App. 129, 169 Pac. 426; Ravn v. Planz, 37 Cal. App. 735, 174 Pac. 690; Boyd v. S. P. R. R. Co., 185 Cal. 344, 346, 197 Pac. 58. These cases involve motions to dismiss actions as authorized by sections 581a (for failure to cause summons to be issued within a year) and section 583 (for failure to bring the action to trial within five years after the defendant has filed his answer) of the Code of Civil Procedure. The language and the general purpose of those sections, though, are the same as those of section 981a, and all said sections, the last named as well as the former, are, in their application, governed by the same principle. In fact, all three are analogous, if indeed, they may not strictly be so denominated, to statutes of limitations.

[6] As the trial court stated in its written decision, there was no stipulation, either in writing or orally made in open court, between the parties, extending the time for the trial of the action beyond the period fixed by the statute. The affidavits of the attorney for the respondent below and his client contained statements that they had made a demand on the attorney for the petitioner for an inspection of the book containing the account upon which the action was predicated and for a copy of said account (section 1000, Code Civ. Proc.); that counsel for the petitioner here represented to said counsel that said book had been mislaid or could not be found, and that he was unable to furnish the respondent in the court below a copy of the account or produce the book itself for inspection by him. The affidavit of the attorney for the petitioner declares that he had no recollection of stating that the book had been lost; that the same was in his office at the time the demand was made, and was there at the time of the making of his affidavit, and that he was ready to produce the same at any time the action might have been seasonably brought to trial. This matter, however, is wholly immaterial to the inquiry here. If the action had been brought to trial

within time, and counsel had failed to comply with the demand of the defendant in the action below for an inspection of the book containing the account upon which the action was brought, or had failed to furnish said party a copy of said account, the penalty as imposed by the statute would be, in the absence of a legal excuse for not complying with the demand, that the entries of the account in the books would be excluded as evidence in the case. See section 1000, Code Civ. Proc. Obviously, this proposition has no bearing upon the question before us in this proceeding.

Let a peremptory writ of mandamus issue requiring the respondents here to make and enter an order dismissing the appeal referred to herein.

We concur: FINCH, P. J.; PLUMMER, J.

(67 Cal. App. 210)

PEOPLE v. DAVIS. (Cr. 775.)

(District Court of Appeal, Third District, California. May 10, 1924. Hearing Denied by Supreme Court July 7, 1924.)

1. Rape 🔑60—Jury held not required to fix place of imprisonment.

In prosecution for rape committed on female under 16, before 1923 amendment (St. 1923, p. 271) of Pen. Code, § 264, became effective, jury was not required to make finding in verdict as to whether defendant should be confined in county jail or state prison; latter being place fixed by section 261, subd. 1.

2. Criminal law 🔑14—Amendment of law as to punishment held not bar to punishment for act already committed in violation of amended law.

Act May 8, 1923 (St. 1923, p. 271), amending Pen. Code, § 264, to provide for punishment of rape on female under 18 in violation of section 261, subd. 1, by imprisonment in county jail or state prison, as recommended by jury, does not bar punishment of act already committed in violation of amended law, in view of Pol. Code, § 329.

3. Rape 🔑6—Question of force immaterial in prosecution for rape on female under age of consent.

Question of force is immaterial in prosecution for rape on female under age of consent.

4. Rape 🔑59(9)—Instruction held not prejudicial to defendant, as depriving jury of right to fix place of punishment.

In prosecution for rape on female 15 years old, instruction as to defendant's guilt, if female was under 18, *held* not prejudicial to defendant, as depriving jury of right to fix place of punishment, under Pen. Code, § 264 (before amendment of 1923 [St. 1923, p. 271]), in absence of any testimony that prosecutrix was over 16.

5. Rape 🔑59(14)—Instruction that element of force was inapplicable held proper, in absence of evidence thereof, in statutory rape case.

In prosecution for rape on female under age of consent, instruction that neither element of force nor question of consent was applicable *held* proper, in absence of testimony showing any element of force.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Felty Hersie Davis was convicted of rape, and appeals. Affirmed.

A. L. Wessels, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 30th day of August, 1923, an information was filed in the superior court of the county of Mendocino charging the defendant with the commission of rape, a felony, as follows, to wit:

"The said Felty Hersie Davis, on or about the 23d day of June, A. D. 1923, at the said Mendocino county, state of California, and before the filing of this information, then and there willfully, unlawfully, and feloniously had and accomplished an act of sexual intercourse with and upon one Wilda Finley, a female person, then and there under the age of 18 years, to wit, of the age of 15 years, and not the wife of the said defendant, Felty Hersie Davis, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

Trial was had on January 2 and 3, 1924. The defendant was found guilty, the verdict reading as follows:

"We, the jury, find the said defendant guilty as charged in the information."

Thereafter, and on the 7th day of January, 1924, judgment was rendered and sentence pronounced, as provided by section 264, Penal Code, as it existed prior to the amendment, approved May 8, 1923 (St. 1923, p. 271). The defendant's motion for a new trial being denied, defendant appeals therefrom, and from the judgment entered as aforesaid.

[1] It is urgently contended by the appellant that the verdict rendered by the jury is void, and that the court had no jurisdiction to pronounce judgment upon the defendant by reason of the fact that the amendment to section 264 of the Penal Code, as it existed at the date of the trial, required the jury to return in its verdict a finding as to whether the defendant should be confined in the county jail or in the state prison. At the time of the commission of the offense the amendment to section 264, enacted by the Legislature in 1923, had not yet become effective. Section 264, Penal Code, at that date read as follows:

"Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision 1 of section 261 of the Penal Code and the female is over the age of sixteen years and under the age of eighteen years in which case the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall determine by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison."

Subdivision 1 of section 261 of the Penal Code reads as follows:

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years."

It will thus be seen that, at the time the offense in question was committed, the jury was required to fix the place of punishment only when the female in question was between the ages of 16 and 18 years. The information upon which the defendant was arraigned, tried, and found guilty charged the defendant with the offense of rape committed upon a female of the age of 15 years; hence there was no law requiring the jury to make any finding in its verdict as to the place of incarceration, the law fixing that place as the state penitentiary. Neither the court nor the jury was given any discretion in the matter.

[2] By the act approved May 8, 1923, section 264 of the Penal Code was amended to read as follows:

"Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision 1 of section 261 of the Penal Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison: Provided, that when the defendant pleads guilty of an offense under subdivision 1 of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."

The evident intention of the Legislature was to correct the omission in the section as it originally stood, to empower the court upon plea of guilty to exercise the discretion which had theretofore been vested in the jury upon trial, when the female outraged was between the ages of 16 and 18 years; but the unhappy wording of the section makes the amendment apply to all cases coming under subdivision 1 of section 261 of the Penal Code, when the female is under the age of 18 years. The amended section did not become effective until some little time after the commission of the offense for which the defendant was tried and convicted, but was in full force and effect at the date of the trial. Upon this state of facts the appellant devotes a large portion of his brief to an exposition and setting forth of the cases having to do with ex post facto laws. With these cases and the definition of what constitutes an ex post facto law we agree, but not with their applicability to the case at bar.

In the presentation of this case section 329 of the Political Code appears to have been overlooked. That section reads as follows:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

There is nothing in the section, as amended by the act of the Legislature of May 8, 1923, indicating any intention to interfere in any manner whatever with any offense previously committed, the mode of procedure, or the punishment affixed thereto. It has been held by the Supreme Court of this state in the case of People v. McNulty, 93 Cal. 427, 26 Pac. 597, 26 Pac. 61, that this section applies to a section changed by amendment, and also to instances where the punishment is changed by an amendment to the section. This case contains a full exposition of the applicability of section 329, and we do not need to add anything thereto further than to state that it fully and definitely decides the questions presented to this court adversely to the appellant.

[3] It is next contended by the appellant that the trial court erred in its instructions to the jury. The instructions assailed are as follows:

"In the present case, neither the element of force or the question of consent has any application at all."

The information charges the defendant with the commission of rape upon a female of the age of 15 years. Being under the age of consent, the offense would be the same whether force were or were not used.

[4] The court further instructed the jury:

"It is not essential to a conviction in this action that the testimony of the prosecutrix, Wilda Finley, should be corroborated by other evidence. It is sufficient if you believe beyond a reasonable doubt, from all the evidence in the case, that the crime charged, has in fact been committed as alleged,"

and then gave the following instruction:

"You are instructed that if you believe from the evidence, beyond and to the exclusion of all reasonable doubt, that on the date mentioned, to wit, June 23, 1923, at the said county of Mendocino, state of California, this defendant did then and there willfully, unlawfully, and feloniously carnally know and have and accomplish an act of sexual intercourse with and upon one Wilda Finley, a female person, who was not then and there the wife of the said defendant, and that she, the said Wilda Finley, was then and there under the age of 18 years, then you should find the defendant guilty as charged."

The only objection which could be urged to this instruction would be that, if the female was between the ages of 16 and 18 years, it would be incumbent upon the jury to fix the place of punishment, in the event they found the defendant guilty. No testimony has been called to our attention showing that the age of Wilda Finley was other than that alleged in the information, from which it follows that the defendant was not in any wise prejudiced, because, unless there is some testimony to that effect, it was not a matter for the jury to consider. It was simply a question of whether they believed beyond a reasonable doubt from the testimony introduced that the defendant was guilty of the crime charged in the information. The verdict of the jury so found. This eliminates everything that might be founded upon the assumption of the female being between the ages of 16 and 18 years, as the law relating to such offenses then stood.

[5] The instructions did not charge upon questions of fact but simply stated the law in ordinary language which we think the jury could very well understand. We may also add that our attention has not been called to any testimony showing any element of force, one way or the other, or any reason why the first instruction quoted was not applicable to the case as presented to the jury. Without any setting forth herein, we will add that we have read the instructions given by the court to the jury as a whole, and when so taken, we find nothing objectionable therein, or anything upon which an order of reversal might be predicated. The record discloses that the defendant had a fair trial, according to the law applicable to his case.

It therefore follows that the order of the trial court denying a new trial and the judgment entered herein should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

67 Cal. App. 220

PEOPLE v. DEWINDT. (Cr. 1084.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1924.)

1. Criminal law 🔑1167(1)—Error in description of person injured held not cause for reversal.

Possible error in indictment in describing irrigation district from which defendant was alleged to have embezzled money, as municipal corporation, *held* not cause for reversal; no injury to defendant being shown.

2. Embezzlement 🔑11(1)—Demand for money in defendant's possession and his refusal to return it not essential to conviction.

It is not necessary to conviction to show demand upon defendant for funds in his possession and alleged to have been embezzled and his refusal to comply with demand.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Harry Dewindt was convicted of embezzlement, and he appeals. Affirmed.

John A. Berry, of El Centro, for appellant.
U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CURTIS, J. Appellant was charged with the embezzlement of $942 from the Imperial irrigation district. The jury returned a verdict against the defendant, and he appeals from the judgment of conviction and from the order of the court denying his motion for a new trial.

The defendant was employed as assistant cashier of the Calipatria division of the Imperial irrigation district from the 26th day of July, 1923, to and including the 18th day of August, 1923. On August 9, 1923, Mr. Hewitt, the cashier of this division of the district, went on a vacation, and the defendant was left in charge of the office of the district during the absence of the cashier. The defendant was arrested on Saturday, the 16th day of August, 1923, at about 7 o'clock in the evening. At the time of his arrest he had on his person $792, money belonging to the Imperial irrigation district. He had previously made arrangements with one Pelfey to drive him from Calipatria to Calexico, and he was arrested just as he was leaving his room on his way to Pelfey's machine, in which he was to ride from Calipatria to Calexico. A few days before his arrest he had made several trips to Mexicali, which is just across the international boundary line, between California and Mexico, from the city of Calexico. On one of these trips he had been observed by Mr. Guest, the superintendent of the Calipatria division of the irrigation district, who testified that he saw the defendant gambling. Immediately after his arrest he said to the arresting officer:

"Well, there is no use, I had just as well be a good sport. I am only short about $100, and I will fix that up all right."

Mr. Guest, the superintendent, testified that he had a conversation with the defendant at the city jail at Calipatria shortly after his arrest, and the following is Mr. Guest's testimony:

"He said he spent some of the money in Mexicali, and he intended to repay it back, but that he had spent so much he didn't see how he could pay it back. I asked him how much he had spent, and he said $150 or $200 at the outside.

"Q. Did he say how he had spent the money in Mexicali? A. Yes, sir; gambling.

"Q. State anything else he said. A. He said, after thinking he had spent so much he couldn't pay it back, he might as well get all he could and get away before they caught him."

On August 20, 1923, an audit of the books of the company showed a total shortage in defendant's account with the district of $1,005.45. The testimony further showed that the defendant, at 11 o'clock on the morning of the day of his arrest, drew from the bank, on a check drawn by him to "Cash," the sum of $250. When asked by an officer of the bank if it was not out of the ordinary to draw such a check at such a time, the defendant replied that he was drawing the check to pay some bills. The testimony further shows that the defendant in his conversation with Mr. Guest, the superintendent, shortly after his arrest, admitted that, besides the $792 which was taken from him, he still owed the district something like $150 to $200, and that, if given time, he could get the amount due from him, and he would pay it to the district, and that, after the audit of the books of the district had been made, he did pay to the district the sum of $213.45, to cover the balance due from him.

The information charges that the defendant was the agent and servant of the Imperial irrigation district, "a municipal corporation," and that, by virtue of his employment, the money belonging to the said district, and which he was accused of embezzling, came into his hands as such agent and servant, and that thereafter he embezzled and appropriated this money to his own use.

[1] Appellant contends that there was no evidence introduced at the trial which tended to prove that the Imperial irrigation district was a municipal corporation, but that the only evidence upon this point was to the effect that the Imperial irrigation district was a quasi public or a quasi municipal corporation. He further contends that he was charged with embezzling the money of a municipal corporation, and that the prosecution could not substitute any other corporation in the place of the one designated in the information. By reference to the information it would appear that appellant was charged with embezzling the money of the Imperial irrigation district, a municipal corporation. The status of the Imperial irrigation district, and whether it was or was not a municipal corporation, was to be determined from the statute which provided for its formation, and not from any evidence that might have been introduced at the trial. The designation of the Imperial irrigation district, in the information, as a municipal corporation was not a material part of the information. At most it was simply a description of the person injured, and, even conceding that this was an erroneous description, yet it does not appear from anything that has been brought to our attention that the defendant was in any way injured by this misdescription. The Imperial irrigation district, we assume, was a well-known institution in the community where the defendant resided. It was evidently well known to the defendant, who was, at the time of his arrest, an employee thereof. Defendant does not claim to have been misled by any failure to properly describe in the information the Imperial irrigation district, or to have sustained any injury by any such mistake. If, therefore, there was any error in the description of the Imperial irrigation district, as long as this error worked no injury to the defendant, it is not such an error as would justify this court in disturbing the judgment rendered against the defendant.

[2] It is next contended by the appellant that before he could be found guilty of the crime of embezzlement it was necessary for the prosecution to prove that a demand had been made upon him for the money in his possession, belonging to the district, and that he had refused to return the money after such demand. The only authority cited by appellant in support of this contention is People v. Crane, 34 Cal. App. 599, 168 Pac. 377. This case, in our opinion, not only fails to sustain appellant's position, but holds directly to the contrary. On page 610 (168 Pac. 381) of the opinion of this case we find the following statement of the law upon this subject:

> "The contention that no embezzlement of the money could take place without a demand by the owner for its return having been previously made upon the defendant is untenable. A demand for the return of property or money intrusted to a bailee or trustee, followed by a refusal to return the property or money, is not itself an element of the crime of embezzlement, but constitutes mere evidence of embezzlement. It is true that a demand, followed by a refusal, is sometimes indispensable evidence of embezzlement, but it is the fraudulent and felonious conversion of the money or other property that constitutes the offense, and that may often be proved without a demand [citing cases]."

We have found no authority in conflict with this case of People v. Crane, and in our opinion it completely disposes of this contention of appellant.

There was no error on the part of the court in refusing to give two instructions requested by the appellant. These proposed instructions were offered upon the theory that in order to prove that defendant was guilty of embezzlement it was necessary for the prosecution to prove a demand for the return of the money in the possession of defendant, and a refusal on the latter's part to comply with such demand. We have already considered that subject, and have held adversely to appellant's contention that such proof of demand and refusal were necessary in a prosecution for embezzlement. These proposed instructions, therefore, in our opinion, fail to correctly state the law, and the court committed no error in refusing to give them.

In a general way appellant raises the point that the evidence was insufficient to sustain the verdict. The point, however, was not argued to any extent by appellant. We conclude, therefore, that this point has been practically abandoned by the appellant. We have, however, reviewed the evidence in the case, and in our opinion it was clearly sufficient to warrant the jury in rendering a verdict of guilty against the defendant.

The judgment and order denying motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J

(67 Cal. App. 217)

PEOPLE v. VANDERBURG. (Cr. 750.)

(District Court of Appeal, Third District, California. May 10, 1924.)

1. Criminal law 🔑108(1)—Escape 🔑1—Person escaping from guards outside walls escapes from "prison," and trial may be had in any county; "prisoner."

A person serving a sentence in state prison is, in contemplation of law, a "prisoner" therein when at work outside prison under surveillance of prison guards, and if he escapes when outside he escapes from "prison," within meaning of Pen. Code, § 787, permitting charge of escape from state prison to be tried in any county of state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prison; Prisoner.]

2. Escape 🔑1—Escape from employee paid by highway commission, acting under prison captain of guard, constituted "escape from prison."

Escape by convict from employee paid by highway commission, but acting directly under prison captain of guard, constituted offense of "escape from prison" under Pen. Code, § 106.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escape.]

3. Criminal law 🔑786(2)—Instruction as to impeachment of witness held not prejudicial.

Where defendant in prosecution for escape testified, an instruction that a witness may be impeached by party against whom he or she is called by contradictory evidence, or by evidence that he or she has been convicted of a felony, or by evidence that he or she has at other times made inconsistent statements, *held* not prejudicial, in view of Code Civ. Proc. §§ 2051, 2052.

4. Statutes 🔑74(1)—Statute penalizing escape held to operate uniformly.

Pen. Code, § 106, relating to escape, is not unconstitutional, as not operating uniformly with other penal provisions.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Lawrence Vanderburg was convicted of escaping from state prison, and appeals. Affirmed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WEYAND, Justice pro tem. The defendant, a prisoner regularly confined within the state prison, at Folsom, Cal., was, while serving his term of imprisonment, taken from said prison to the county of Trinity, to work in road construction in that county, and while there he escaped from the surveillance of the prison guards. He was convicted of the offense and prosecutes this appeal.

The notice of appeal states that the appeal is taken from the final judgment of conviction and from the order denying defendant's motion for a new trial.

The grounds of the motion for a new trial do not appear. However, in the written application for a transcript of the testimony, the "grounds of said appeal" as therein set forth are the usual grounds of motion for a new trial. However that may be, the case will be dealt with as if a proper motion for a new trial was embodied in the record.

Appellant appears in his own behalf, and by a lengthy brief urges four main points wherein error was committed to his prejudice: First, it is claimed that, as the offense was committed in Trinity county, the superior court of Sacramento county had no jurisdiction; secondly, that no proper proof was given as to the fact that he was under surveillance of a prison guard when he escaped; thirdly, that a certain instruction as to impeachment was erroneous; fourthly, that the section of the law under which this conviction was had is unconstitutional, in that it does not operate uniformly.

[1] 1. The superior court of Sacramento county had jurisdiction. In the case of Bradford v. Glenn, as Judge of the Superior Court of Sacramento County, 188 Cal. 350, 205 Pac. 449, this question was before the Supreme Court of the state, under proceedings in mandamus, and it was there held that—

> "A person serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein, as well when at work outside under the surveillance of prison guards as when confined within its walls, so that if he escapes when outside he escapes from a prison, within the meaning of section 787 [Pen. Code]."

Section 787 of the Penal Code provides that a charge of escaping from a prison may be tried in any county of the state.

[2] 2. At the trial proof was offered, without objection, of the fact that one Kaiser was a regular guard of the state prison at Folsom; that he was detailed from that prison, to act as a guard at the road camp in Trinity county. He was at all times subject to the authorities of the prison, and was directly under a prison captain of the guard. By cross-examination it did appear that while acting as such guard his salary was paid by the California highway commission from state highway funds. As far as his duties were concerned, the guarding of prisoners while at road camps, he took orders from prison officials only. He was in no sense under the jurisdiction of the highway commission. The proof was sufficient and was admitted without objection.

[3] 3. The proof on the part of the people in part consisted of the original record of conviction of the defendant. At the time of

its introduction it should have been limited to the single issue then before the trial court as to the issue: "Was this defendant a lawfully confined prisoner?" Later, if defendant became a witness, it should have been reoffered for all purposes, including impeachment. The very charge on trial of necessity demanded proof of prior conviction of a felony. The trial court gave the following instruction, proposed by the people:

> "A witness may be impeached by the party against whom he or she is called by contradictory evidence, or by evidence that he or she has been convicted of a felony, or by evidence that he or she has at other times made statements inconsistent with his or her present testimony."

This is but a statement of a portion of sections 2051 and 2052 of the Code of Civil Procedure. The same instruction in general terms is given in most criminal cases. Under the circumstances I cannot see that any substantial right of the defendant was interfered with, or taken away, or that he could have suffered any prejudice by reason of this instruction. In this connection it is proper to remark that the defendant offered no instructions.

[4] 4. As to the claim that section 106 of the Penal Code is unconstitutional, in that it does not operate uniformly with other penal provisions, we cannot agree. The section does affect any and all persons convicted under it in the same manner.

Failing to find any reversible error in the record, and there being sufficient evidence to sustain the verdict of the jury, the judgment of conviction and the order denying a new trial are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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67 Cal. App. 199

PHILLIPS v. HOBBS–PARSON CO.
(Civ. 2759.)

(District Court of Appeal, Third District, California. May 10, 1924.)

1. Municipal corporations ⟹706(6)—Failure to carry light on truck held not negligence per se.

Court could not say that defendant's failure to carry lighted lamps on its truck at time of collision with plaintiff's automobile was negligence per se, under Motor Vehicle Act, § 13, as amended by St. 1919, p. 206, § 10, where evidence was in conflict whether accident occurred within or after one-half hour after sunset.

2. Evidence ⟹588—Jury not bound to accept testimony of any witness as conclusive.

A jury is not bound to accept testimony of any witness as conclusive, since they are exclusive judges of a witness' credibility, and, while it is presumed that witness intends to and does speak the truth, such presumption may be overcome by manner in which he has testified, character of his testimony, or evidence impeaching his character or by contradictory evidence, under Code Civ. Proc. § 1847.

3. Municipal corporations ⟹706(6, 7)—Negligence and contributory negligence held for jury on evidence as to collision.

Evidence that plaintiff had defective eyesight, that the evening was dark and rain falling, making streets slippery, and that impact with defendant's heavy truck demolished plaintiff's Ford, and thrust truck around, *held* not to show as a matter of law that direct cause of accident was defendant's negligence, or that plaintiff was free from contributory negligence.

4. Evidence ⟹7—Common knowledge that water on glass obscures vision.

It is a matter of common knowledge that the vision of one attempting to look through glass becomes obscured when water is falling upon and trickling down and over it.

5. Negligence ⟹82—Contributory negligence defense.

Plaintiff's negligence, amounting to a want of ordinary care which, operating concurrently with defendant's negligence, contributes proximately to plaintiff's injuries, will prevent a recovery, whether or not defendant by exercise of ordinary care could have guarded against it.

6. Trial ⟹296(4, 5) — Error in instruction cured by other instructions.

In action for injuries due to automobile collision, error in instruction on contributory negligence *held* cured by other instructions.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by C. F. Phillips against the Hobbs-Parson Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

M. K. Harris and Harris & Hayhurst, all of Fresno, for appellant.

George Cosgrave and George R. Lovejoy, both of Fresno, for respondent.

HART, J. This is an action for damages for personal injuries. The cause was tried by a jury and a verdict returned for the defendant. A motion for a new trial was made and denied. The plaintiff appeals from the judgment entered upon the verdict.

On the 15th day of November, 1920, near the hour of 5 o'clock p. m., the plaintiff, while driving a Ford roadster in a southerly direction along the west side of J street, a public thoroughfare in the city of Fresno, an auto truck, owned by the defendant, and driven by one Ray Summers, an employee of the defendant, was, so the complaint alleges, "suddenly and carelessly driven backwards from the westerly curbing of J street, where the car had been parked, and struck the automobile which plaintiff was, as aforesaid, driving." At the time of the collision, so the complaint alleges, it was "more than a half an hour after sunset," and "it was dark, cloudy, and raining, and the atmospheric conditions rendered the operation of vehicles dangerous to the traffic on and use of highways." The result of the collision, so the complaint avers, was that the windshield of plaintiff's automobile was broken, and a piece of the glass from said windshield was, by the impact, thrown against and struck the right eye of plaintiff, "and greatly damaged and injured the same"; that the injury so received to his said eye was of such a character as that "plaintiff is compelled to wear glasses, and is not able, and will not be able, to engage in such remunerative occupations as he would otherwise be able to engage in were it not for the injuries so received to his said eye; that the plaintiff, on account of said injury so received by him to his said eye, has been damaged in the sum of $25,000." It is alleged that at the time of the collision the said auto truck of the defendant "had no lights either in front or in the rear, as required by law, or at all, and said auto truck was then and there driven by said Ray Summers in a careless and reckless manner and without fault or negligence on the part of plaintiff."

The answer, while admitting that the windshield of plaintiff's automobile was broken by a collision between the latter's car and the defendant's truck, on the occasion mentioned in the complaint, denies all the other averments of the last-named pleading, and, as a special defense, sets up the plea of contributory negligence on the part of the plaintiff, which negligence, so the answer charges, was the proximate cause of the collision and the resulting injuries to plaintiff.

The plaintiff contends here that the evidence addressed to the issues shows, as a matter of law, that the plaintiff's injuries were directly or proximately and solely caused by or through the negligence of the defendant or its employee, without any fault or negligence whatsoever on the part of the plaintiff. It is further insisted that the evidence upon its face shows that plaintiff was not guilty of contributory negligence, and that but for two erroneous instructions given by the court upon the question of contributory negligence the verdict would probably have been for the plaintiff.

The evidence shows that at the time of the accident plaintiff was 24 years of age and was in the employ of the Standard Oil Company in the city of Fresno as its advertising manager, his duties as such requiring him to travel through some four or five different counties adjacent to and in the neighborhood of Fresno county, at various intervals of time. He had, prior to the accident in question, met with another accident in which he suffered the loss or use of his left eye or, as he described the condition of the left eye, "I had no vision in my left eye at all—I could barely tell night from day, and my right eye was perfect." He had never, prior to the accident in question, in which his right eye was injured, used eyeglasses.

The evidence without conflict shows that it was dark at the hour at which the accident happened—between 5 and 6 o'clock p. m. —that it was raining, and had been prior to the happening of the collision, and that the streets, due to the rain, were "slippery." The evidence, without conflict, further shows that the street in the block in which the accident occurred was lighted—that is, the street lights, four on each side of the street in said block, were on and reflected their usual light along and over the street.

The plaintiff testified that, within a brief time after 5 o'clock p. m. on the day of the accident, he started from the office of the Standard Oil Company and went to a point on the street near said company's office where he had parked his Ford automobile or roadster, intending, accompanied by a Mr. Beebe, also employed by said company, to drive to the place of business in Fresno of a Mr. Mugniani; that he and Beebe entered the machine and proceeded on their way south on the right-hand side of J street, at the rate of about twelve miles per hour; that, as driver of the machine, he sat on the left-hand side thereof; that the lights of his car were on; that he was "driving cautiously, the streets were wet and raining, and just as I got in front of Neilsen's why, a truck backed right out into my car—at least we got together right there in front of Neilsen's and broke the car up, and smashed it all to pieces, in fact, and the windshield broke. Part of it went to my right eye, piece of glass into my right eye and cut it, and I went to the Emergency Hospital and later to the Burnett Sanitarium." He stated that he was at the time driving "astraddle of the right-hand tracks of the street car, with my left wheel near the left-hand side of the right-hand tracks"; that the truck "backed out from the curb, I guess, at an angle of 45 degrees towards me"; that there were no lights on the truck. The roadster came in collision with the "corner of the bed of the truck." the plaintiff's car being struck "practically in the center of the radiator." He stated that he was within six feet of the truck before he saw it moving into the street from the curbing; that "it came right out within the scope of the lights on my car." He further stated that as he was driving he was looking "straight through" the windshield of his car, and could discern objects before him, although, he admitted, the windshield was wet from the rain, the roadster having been parked and having remained in the street while it was raining before he started out with it, and that at the time he was driving there was rain still running down the windshield.

The injury to his right eye was of a serious nature, and the vision thereof materially impaired permanently, so the doctor who attended him testified.

C. H. Beebe, the party riding with the plaintiff when the accident occurred, was thrown against the windshield by the force of the collision and received a few minor bruises and lacerations of the flesh. His testimony corroborated in all substantial particulars that of the plaintiff. He stated that at the time that the plaintiff was driving down J street and just before the accident happened the rain was running over and down the windshield of plaintiff's car. He declared, though, that his vision through the windshield was perfectly clear.

There were a few other witnesses who were in the immediate vicinity of where the accident occurred at the time of the happening thereof, and who testified, for the plaintiff, as to the fact of the collision, but whose testimony, except that of the witness Hopwood, furnished meager information as to the manner in which the collision happened to be brought about. The witness Hopwood described the manner in which the collision occurred about as the plaintiff and Beebe did. He said the truck was moving and backing into the street from the curbing when the Ford roadster struck it.

Ray Summers, the driver of the defendant's truck, testified that about five or ten minutes after 5 o'clock p. m. he left the defendant's store, went to where the truck had been left standing by him, and "turned on the Presto for my lights—tried to light them and they wouldn't light, so I turned my Presto out and cranked the machine and got in the machine and started to back out"; that, in backing, an auto truck has "but one speed" which is lower than the low speed going forward; that on the occasion of the accident he backed out "very slow" for a short distance, when he observed the plaintiff's car traveling toward him, and that he thereupon stopped his truck. He testified that, when he stopped the truck, plaintiff was at a distance of 25 feet from him or where his truck was standing. He testified, as did other witnesses, that the effect of the striking of the truck by the Ford car "straightened my truck out, as if I had been backing straight forward from the curb, * * * I mean at right angles to the curb. It was turned by the impact at an angle to the curb about 45 degrees." In other words, he explained that "the impact threw it (the truck) so it was straight toward the curb."

John De Camp witnessed the collision and saw the truck back out from the curbing immediately prior thereto. He stated that the truck was stopped before the collision occurred.

Milo L. Rowell, manager of the defendant's business in Fresno, testified that the auto truck, with which the plaintiff's car collided, measured fifteen feet and six inches in length, that the width of the rear of the bed was six feet and two inches, and that the weight of the machine was 4,370 pounds. He also stated that the weight of plaintiff's roadster was 1,600 pounds. This witness further testified that he had ascertained that the sun set on the day of the accident at the hour of 4:49 o'clock p. m.

The foregoing comprehends a fair statement of the evidence introduced before the jury by both parties.

It will be in order first to consider the point made by the plaintiff that the defendant was guilty of negligence per se by reason of its failure or omission to have the lights of its truck on at the time the accident occurred.

Section 13 of the State Motor Vehicle Act, as amended by the Legislature of 1919 (Stats. 1919, pp. 191, 206), which governed at the time the accident in question occurred, provided, among other things, that:

> "All times during the period from a half hour after sunset to a half hour before sunrise, every automobile while on the public highway shall carry at the front at least two lighted lamps, and every such automobile * * * at the times and under the conditions in this section hereinbefore specified, shall carry at the rear a lighted lamp exhibiting a red light plainly visible, under normal atmospheric conditions, for a distance of five hundred feet toward the rear and so constructed and placed that the number plate carried on the rear of such automobile or trailer shall be illuminated by a white light in such manner that the number thereon can be plainly distinguished under normal atmospheric conditions at a distance of not less than fifty feet toward the rear," etc.

Subdivision d of the same section requires that at the time and under the conditions specified by said section every motor truck of two tons carrying capacity or over, "which is so governed or mechanically constructed or controlled that it cannot exceed a speed of fifteen miles per hour, shall carry at the front at least two lighted lamps which shall be visible at least two hundred feet in the direction in which the motor truck is proceeding, and when the vehicle is proceeding on a street or highway not so lighted as to reveal any person, vehicle or substantial object on the street or highway straight ahead of such motor truck for a distance of at least two hundred feet, such front light shall be sufficient to reveal any person, vehicle or substantial object on the road straight ahead for a distance of seventy-five feet or over, and shall be equipped with a tail light such as is required on other motor vehicles."

It is admitted that the accident happened after the sun had set and that the defendant had no lights on his truck, either in front or the rear thereof, at the time he started to back it from the curbing into the street. The evidence is not clear as to the precise time at which the accident occurred. The plaintiff, as seen, stated that he left the office of the Standard Oil Company at about 5 o'clock p. m., went to where his car was parked, a short distance from the company's office, entered the car and "shortly after 5 o'clock" was proceeding down J street, being stopped for a moment by a traffic officer before reaching the point at which he ran into the truck. Summers, driver of the truck, did not attempt definitely to fix the time the accident happened, but did state that his working hours were from 7 o'clock a. m. to 5 o'clock p. m. each day, and that he invariably quit working at the latter hour. The witness, De Camp, fixed the time at between 5 and 5:15 p. m.

[1] It will be observed from a reading of the above excerpts from section 13 of the Motor Vehicle Act of 1919 that, if the accident occurred after the lapse of half an hour after the sun set on the day of the mishap, the omission of the defendant to carry lighted lamps, both in front and in the rear of the truck, at the time of the accident, constituted on its part negligence per se, or as a matter of law. If, on the other hand, the accident occurred before the lapse of half an hour after the sun set, then the question whether the defendant was guilty of negligence at all was one of fact for the determination of the jury. As to this matter, however—that is, as to the precise time at which the accident occurred—the evidence appears to be rather indefinite and uncertain. One of the witnesses for the defendant, it is true, fixed the time at between 5 and 5:15 o'clock p. m. This would bring the time of the ascident within the half hour after sunset, the sun having gone down at 4:49 p. m. But the testimony of the plaintiff and the witness Beebe on this point that they left the Standard Oil Company's office at 5 p. m., walked a short distance to the plaintiff's car, entered and started the car, and proceeded at the rate of 12 miles per hour until the crash came, would give the jury some foundation for calculating the time it took them to reach the point where the collision occurred, and the jury could thus have felt justified in concluding that the accident occurred after the expiration of half an hour after the sun had set. Thus there may be some ground for the theory that, upon the question as to the time of the accident, there was and is some conflict in the evidence. In this state of the evidence upon that proposition it was for the jury to determine the time, either with some degree of exactness or at least approximately. It follows that it cannot be said that the defendant, in so far as is concerned its failure to carry lighted lamps on its truck at the time of the accident, was guilty of negligence per se. This is not to say, however, that it was not within the province of the jury to decide whether the defendant was guilty of negligence by reason of the fact that it moved its truck from the curbing into the street without having a lighted lamp in the rear visible a sufficient distance from where it stood or was moving to enable the driver of an automobile proceeding toward it, by the exercise of ordinary care and caution, to see it in ample time to avoid colliding with it. But, conceding the negligence of the defendant, the question arises whether or not the plaintiff himself, in driving his car, while approaching the place where the truck was, was guilty of negligence without which the accident would not have occurred. In other words, the question is whether, as the answer charges and the defendant here contends, the plaintiff was guilty of negligence which proximately contributed to the accident.

[2] It may be granted that the question whether or not the accident was proximately caused by the alleged contributory negligence of the plaintiff is a close one. It is for this reason peculiarly one the determination of which was for the jury. Indeed, carefully considering all the evidence and the inferences reasonably deducible therefrom—inferences which, it must be assumed from the verdict, the jury did draw—we cannot reconcile ourselves to the conclusion that, as to the effect of the evidence, a court of review would be authorized to substitute its judgment for that of the jury. A jury is not bound or compelled to accept the testimony of any witness as conclusive upon the fact or facts to which he testifies. The triers of fact are always the exclusive judges of the credibility of any witness testifying before them, and, while they must start out with the presumption that the witness intends to and does speak the truth, still such presumption may be overcome by the manner in which he has testified, by the character of his testimony, or by evidence impeaching his character for truth, honesty, and integrity, etc. (the latter test not involved herein), or by contradictory evidence Code Civ. Proc., § 1847. The manner in which the plaintiff and the witness Beebe testified was before the jury. It is not here, and in the very nature of the situation could not be. There was no affirmative contradiction of their testimony. But may not the manner in which a witness testifies often operate as effectually as in impeachment of the verity of his story as proof of a positive character tending to contradict him? See Clark v. Tulare Dredging Co., 14 Cal. App. 414, 431, 112 Pac. 564 et seq., for an answer to this question. Then there may exist in the case certain physical facts (indeed, there are such facts in this case) which are irreconcilable with the testimony of the witness, or, at least, so a jury might justly find.

[3, 4] In the instant case the plaintiff, who

was driving the machine, was much handicapped in such employment from the fact that he had the use of but one eye, and this under weather and atmospheric conditions which greatly augmented the inconvenience and the danger of driving a car after the sun had passed to the other side. The streets were more or less slippery, making it a difficult undertaking to stop an automobile in one of those dangerous emergencies which only too often arise in automotive traffic, and there was the added peril ordinarily incident to the blurring of the windshield of a car as the result of rainwater flowing down and over it. And in this connection it may be suggested that the jury might well have given little weight to the testimony of the plaintiff and the witness Beebe to the effect that, although the windshield of the Ford was wet, and rain still running down and over it, they were able to see through it with perfect clearness and so observe objects before them; for it is a matter of common knowledge that, when there is water on glass, the vision of one attempting to look through it becomes so obscured as to make it very difficult, even to those having normal eyesight, to discern distinctly an object even a short distance before him, and the vision naturally will become the more obscured when the water is falling upon and trickling down and over the glass. This must be particularly true as to the windshield of an automobile while the machine is moving at the rate of twelve or fifteen miles an hour. But equally as important as are the foregoing considerations, in the determination of the weight to which the testimony of the plaintiff and Beebe was entitled, and also as bearing upon the question whether the plaintiff, under the conditions shown to exist at the time referred to, exercised that care—at least ordinary care—which the law requires of a driver of an automobile operating the same on the public highways, is the circumstance that the collision was of such force as not only to have practically demolished the Ford machine, but to have caused the large, heavy truck to be moved or thrown from its original position, at an angle to the curb of about 45 degrees, to a position in which it stood at right angles to or in a straight line toward the curb. This circumstance was important in the matter of the determination by the jury of the rate of speed at which the plaintiff was driving. At all events, it is clear that upon this record it does not lie in the mouth of a court of review either to hold that the evidence, as a matter of law, discloses that the direct cause of the accident was the negligence of the defendant, or likewise to hold that, even conceding that the defendant was guilty of negligence which was, in a measure, responsible for the injuries of the plaintiff, the plaintiff himself was wholly free from blame or not guilty of negligence without which the accident and its consequences would not have occurred.

[5, 6] The law is, as the trial court in clear language stated it to the jury, that "negligence on the part of the plaintiff amounting to a want of ordinary care which, operating concurrently with the negligence of the defendant, contributes proximately to plaintiff's injuries, will prevent a recovery in this action by plaintiff, whether or not defendant, by the exercise of ordinary care, could have guarded against it."

After reading to the jury certain provisions of the Motor Vehicle Act, setting forth certain rules as to the care with which and the speed at which the driver of any vehicle shall operate the same upon any public highway, and also as to the character of the headlights of motor vehicles and how such lights shall be "arranged, adjusted, and constructed where the car is fully loaded," the court instructed the jury, in two different instructions, that, if they "find from the evidence that the plaintiff violated any of these rules, and that such violation contributed to the injuries complained of by plaintiff you must find for the defendant."

Those instructions do not accurately state the rule, because of omitting the word "proximately," so that they would have read in part, if said word had been used: "Such violation proximately contributed to the injuries complained of," etc. But the error in giving said instructions was fully cured by a correct statement of the rule in several other instructions embodied in the court's charge, and particularly by the following given instruction: "Contributory negligence is defined as that negligence of plaintiff which contributes to his injuries and without which said injuries would not have occurred."

In view of the foregoing, and the other instructions in which the rule was properly and clearly stated, we do not see how the jury could have been misled to the prejudice of plaintiff by the instructions complained of.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

67 Cal. App. 458

INGLE MFG. CO. v. SAN DIEGO OIL PRODUCTS CORPORATION.
(Civ. 4191.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1924. Hearing Denied by Supreme Court July 17, 1924.)

1. Sales ⚿441(3)—Evidence held to sustain findings for seller in action for price of iron tanks.

In action to recover contract price of iron tanks, evidence *held* to sustain findings that the tanks did comply with plaintiff's written guaranty and Civ. Code, § 1770, requiring reasonable fitness for purpose for which manufactured, and that leakages were caused by defendant's defective platform.

2. Appeal and error ⚿1010(1)—Judgment not disturbed, where findings are supported by the evidence.

Where the findings are supported by the evidence, judgment based thereon will not be disturbed.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by the Ingle Manufacturing Company against the San Diego Oil Products Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright & McKee, of San Diego, for appellant.

Joseph S. Campbell, of San Diego, for respondent.

HOUSER, J. The defendant appeals from a judgment rendered in favor of the plaintiff in an action brought to recover the agreed purchase price of $2,396 for twelve galvanized iron tanks, each of the capacity of 8,189 gallons.

The contract was evidenced by certain letters passing between the parties. Of such letters those which are considered of material consequence in determining this controversy specified that the tanks be guaranteed against leaks before leaving plaintiff's factory, and that the tanks be placed on platforms not exceeding twelve inches in height. The construction of the tanks was commenced at the plaintiff's factory, but was completed on the property of the defendant. The platforms on which the tanks were to rest were furnished and constructed by the defendant, and, while used for the purpose for which they were intended, the trial court found that they were not "accepted by the plaintiff," and "that the plaintiff assumed no obligations in regard to the foundations furnished by the defendant." The court further found:

> "That said tanks did comply with plaintiff's written guarantee and did comply with the express warranty found in Civil Code, § 1770, and were reasonably fit for the purpose for which they were manufactured; that four of said tanks leaked to the extent of 295¾ gallons, but that the plaintiff was not responsible for the leaks for the reason that the foundation upon which said tanks were placed, and which foundation was furnished by the defendant, was not substantial, and presented an uneven and yielding surface, and that the leakages were caused by the defective platform furnished by the defendant, and that the plaintiff is not responsible therefor; that the said tanks were not defective in workmanship."

If it be determined with reference to the tanks which leaked that all the warranties, express as well as implied, were fulfilled by the plaintiff, or that such tanks leaked because of the fault of the defendant, the plaintiff was entitled to judgment; on the other hand, if the leaks were caused by the fault of the plaintiff, the judgment should be reversed. That part of the contract which provided that the tanks should be guaranteed against leaks before leaving the factory of the plaintiff was modified by implied consent of the parties, in that the tanks were only partially constructed at the factory of the plaintiff and the tanks were completed at the plant of the defendant. It must therefore have been within the contemplation of the parties as a part of such modification that, whether constructed at the plaintiff's factory or at the defendant's plant (without reference to the foundation on which the tanks rested), the tanks would be free from leaks on their completion. The warranty contained in section 1770 of the Civil Code, covering the manufacture of articles in the class in which the subject-matter of this action falls, is to the effect that these tanks were guaranteed by the manufacturer to be reasonably fit for the purpose for which they were made. As shown by the findings, considering the fact that the tanks leaked only to the extent of 295¾ gallons, which was less than one-tenth of 1 per cent. of the aggregate of 342,627 gallons of oil contained in the tanks during their use of about four months; or, to put the matter more concretely, about 1 drop out of 16,000 drops in a one week's storage of oil—the conclusion by the lower court that the tanks did comply with the terms of the contract between the parties, as well as with the warranty as contained in and required by the provisions of section 1770 of the Civil Code, does not seem entirely unreasonable. But, assuming that the aggregate capacity of the tanks was about 98,000 gallons, the week's leakage, instead of being represented by 1 drop out of 16,000 drops, would be shown by a loss of 3 drops out of 16,000 drops, or slightly less than ½ a drop per day. The contract was uncertain in its terms as to who was obligated to construct the foundation; but, in view of the construction placed upon the language of the contract by the parties thereto, and

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the consequent assumption by the defendant of that part of the contract, it must be presumed that the intention was that such duty was to devolve upon the defendant. The testimony of the plaintiff's superintendent, as taken from the transcript on appeal, is as follows:

"When I first went out to the defendant's plant, I wanted to know where the tanks were going to be placed. Mr. Peacock showed me where the tanks were to be located, and asked me about the foundation. He asked me if a base of scrap lumber he had there, of various lengths, breadths, and thicknesses, would do. I said 'No.' He asked if the tanks could be set right on the ground—I said they could, but the chemical action that would result would cause holes and leaks. Then he asked me if a base made of some three inch by eight inch planks about ten feet long would do. I replied if they were placed on the ground, properly leveled, they would, in my judgment, serve the purpose all right. The defendant's men then leveled off the ground and placed boards for us to put the tanks on. I should say these planks were laid from two to three inches apart. The first supply of planks were of uniform length, of about sixteen feet long, but they were exhausted before they had enough foundation. After that defendant got some other planks which were mostly two by twelve, and of various lengths to complete the foundation. I should judge five or six tanks were placed on the planks of uniform length and thickness. Some of the planks were so placed that the ends of the planks were beneath tanks. I should judge every other tank had plank ends beneath it. The tanks were eleven feet in diameter, and were set from a foot to eighteen inches apart. * * * We had heavy rain fall after the first day or two we were on the job, which prevented our completing the tanks right away. * * * The eaves of the shed covering the tanks containing the crude oil emptied just about on the edge of the platforms which were beneath the tanks we built. * * * The water that flowed off this roof flowed right on the ground in and around these tanks. * * * The ground around and about the platform upon which the tanks were placed was soaked with water."

With reference to the effect upon the tanks produced by the manner of construction of the platforms and their surroundings, the same witness stated:

"The tanks were leaking because the seams had cracked in one or two places, causing leaks. * * * I concluded these cracks were caused by the settling of the foundation. I found some planks had settled more than others, and that the planks were not even on a level. In some places planks had settled so much that they no longer touched or supported the tank. I found a leak at one such place where one plank was high and the planks on either side had settled so they were three-fourths of an inch below the bottom of the tank. Such an unevenness of the foundation would cause the bottom of the tank to bulge and put an unnecessary strain on the seams. This would tend to crack open the solder and cause a leak. A full tank of oil would weigh approximately 56,000 pounds; that would make a weight of about 580 pounds per square foot all over the surface of the bottom of the tank. That weight would be sufficient to draw and open the seams at the bottom of the tank if it was resting upon an uneven surface. I called the attention of defendant's men to the fact that the foundation was not level, in several instances, when they were laying the planks; then, later, when I went down to the plant to repair leaks, I called to Mr. Peacock's attention the fact that the foundation was not level in places. He said he would fix it, but he did not do so. * * * If the foundations of the tanks were not level that would cause strains on the sides of the tanks. That strain might appear anywhere on the body of the tanks, and it would cause the tank to draw at the joints. * * * Where I put the stove bolts in the bottom, the tanks were leaking where the solder had cracked on the seam. I believe it was the strain caused by the unevenness of the foundation that made the solder crack."

Another witness stated:

"I suggested that to remedy the faulty foundation the planks should be brought up together, that the ends be matched up, not left staggered, and that they be braced underneath. The foundation consisted of loose planks laid on the ground. These planks were not of uniform thickness and the ends of the planks were so arranged that some joints were beneath the tank. In some places the ground had settled so that the tanks were not resting on the planks as they should have been. The bottoms of the tanks were in places suspended between the planks."

A third witness testified that:

"The foundations were not even, that is, the surface of the planks was not even. Some of the planks had settled away from the bottom of the tank. I should say that in one place there was approximately three-fourths of an inch between the plank and the tank. * * * From what I have observed I can tell the effect on galvanized tanks of the character of those I saw in this case. If they were filled with oil and the foundations on which they were setting was unlevel I know the unlevelness at the joints would cause a drawing and stretching of the metal which would pull a seam apart on a joint where it was soldered."

[1] The contract, as far as the warranty against leaks was concerned, originally contemplated that the tanks would not leak before leaving the factory. Consequently any question of the tanks being placed either on the bare ground, or on a plank foundation, or on a cement foundation, was not considered by the parties as having anything to do with the subject of whether on their completion the tanks would leak or not. If immediately upon completion of their manufacture, and assuming that they might have been tested while resting temporarily on the bare ground or elsewhere, it had been found that the tanks were free from leaks, they would have met the condition of the contract that they were guaranteed against leaks before

leaving the factory. Where or in what position the tanks were ordered to be placed by the defendant (other than that plaintiff should not be compelled to install them on foundations over twelve inches in height) was of no concern of the plaintiff, and had nothing to do with the requirement that they be free from leaks on the completion of their manufacture. The location of the tanks and the conditions which were to surround them rested entirely within the control of the defendant. As the findings of the lower court show were the actual conditions, "the foundation upon which said tanks were placed, and which foundation was furnished by the defendant corporation, was not substantial, and presented an uneven and yielding surface and that the leakages were caused by the defective platform furnished by the defendant."

[2] The statement made by respondent's superintendent that in his judgment the planks would "serve the purpose all right" for the foundation, if the ground were properly leveled, even though coupled with the use by plaintiff of such foundations, cannot be taken as a modification of the guaranty of the tanks against leaks before leaving the factory, especially in view of the testimony that attention was repeatedly called to the fact that the foundation was not level, and that defendant's superintendent said "he would fix it," but that he did not do so. The evidence shows that after the tanks were completed, and during the time that the parties were considering the leaky condition of the four tanks, the cause of the leaks was entirely attributed to the faulty foundations upon which the tanks rested. The judge of the trial court made a personal examination of the tanks, and presumably based his conclusions as to their fitness partly upon his observations and partly upon the testimony of witnesses. It very satisfactorily appears from the evidence that the defendant assumed the responsibility of constructing the foundations for the tanks, and that the leaks were entirely due to the faulty construction of such foundations. Plaintiff did not undertake to build and deliver unleakable tanks on the platforms furnished by the defendant. Its engagement was that the tanks would not leak at the time they were ready for delivery at its factory, which place was later changed as of the defendant's plant. The fact that, after the tanks were completed and were resting upon the foundations constructed by the defendant, the plaintiff attempted to make them tight and assured defendant that they would be made tight, does not affect the original contract, but rather goes to a matter of business policy or expediency. Even at considerable cost and annoyance the plaintiff may have wished to entirely please defendant, not only for the purpose of influencing possible future business with the defendant, but for the sake of sustaining the business reputation of the plaintiff in the community in which it was transacting business. The whole question here involved depends primarily on the facts. According to the findings by the lower court, those facts are all against defendant's contentions. At any rate, the court found that the platforms "were not accepted by the plaintiff; that the plaintiff assumed no obligations in regard to the foundations furnished by the defendant; that said tanks did comply with plaintiff's written guaranty, and did comply with the express warranty found in Civil Code, § 1770, and were reasonably fit for the purpose for which they were manufactured, and that the leakages were caused by the defective platform furnished by the defendant." The findings are supported by the evidence, and the rule is unquestioned that in such circumstances the appellate court will not interfere with the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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67 Cal. App. 442

PEOPLE v. MORI. (Cr. 748.)

(District Court of Appeal, Third District, California. May 23, 1924. Hearing Denied by Supreme Court July 17, 1924.)

Criminal law ⚿1169(5)—Admitting testimony of similar offense held prejudicial error.

In prosecution for unlawful sale of liquor, admission of testimony as to defendant's sale on date other than alleged or proved was prejudicial error, and not cured by instructions that the sole object of its admission was to show the character of defendant's place, and not to prove a separate offense.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

John Mori was convicted of unlawfully selling intoxicating liquor, and he appeals. Reversed.

George E. Foote and H. W. Zagoren, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WEYAND, Justice pro tem. From a judgment of the superior court of the county of Sacramento, adjudging defendant guilty of a violation of the statute relating to the unlawful sale of intoxicating liquors, defendant prosecutes this appeal.

The defendant was charged with an illegal sale of intoxicating liquor on the —— day of July, 1923. The proof disclosed a sale to one Robbins, a deputy sheriff, on July 28, 1923. As a part of the proof adduced by the district attorney, one Donald Cox, also a deputy sheriff, testified, under objection by the defendant, as to purchasing liquor, on

August 19, at the place of business of the defendant, and at the same place where the alleged first sale of liquor was made, the purchase being from a bartender of the defendant, but in the presence of the defendant Mori. Before the introduction of this evidence in relation to a sale of liquor on August 19 the attorneys for the defendant moved the court to restrict the district attorney from offering testimony of the August sale of liquor. The trial judge refused to so do. Upon the offer being made of such testimony, objection was again made to its introduction, and, after it had been given before the jury, motion was made to strike it from the record. It was admitted as part of the case in chief, and was allowed to remain in the record.

During the trial, and before giving the regular instructions, the trial court gave the jury a special instruction as to this testimony relating to the August sale, in part in the following language.

> "Testimony introduced this morning by Mr. Cox, in which he is alleged to have made certain purchases * * * is admissible, not for the purpose of proving another distinct offense upon that charge, but showing the character of the place and purpose of the defendant; now that is the sole object for which that testimony was admitted, but not for the purpose of showing any distinct or particular crime at that particular time, merely for the purpose of showing character of the place and the purpose of the defendant."

Special objection was made to this instruction, and the same was assigned as error.

The evidence was clearly inadmissible, and it has been repeatedly so held, as may be seen by the following cases: People v. Morales, 45 Cal. App. 553, 188 Pac. 58, and People v. Smith (Cal. App.) 221 Pac. 405. In the last-named case the facts were substantially the same as in the present action. To say this did not result in a miscarriage of justice is to assume that the jury only considered the testimony of the witness Robbins as to the sale made to him. What was said by Justice Houser of Division 1 of the Second appellate district in the case of People v. Smith, above cited, is applicable here. It was there said:

> "The 'saving grace' of the constitutional provision cannot be here invoked. Defendant used every means within his power in the way of objections to the admission of the evidence regarding other offenses, as well as by making a motion to strike the evidence, which was followed, not only by his own denial of the alleged transactions, but also by independent evidence tending to establish his innocence thereof. Neither did the instructions given by the court to the jury remove the prejudice against defendant which must have been created by the reception of the objectionable evidence of such former sales of liquor by defendant. While it may be that without such evidence of other sales the case made out against defendant is strong enough to support the judgment, the great probabilities are that the evidence of other violations of the statute contributed to the verdict, if such evidence was not the controlling factor in its inducement. It is a dangerous practice, and one which is not in keeping with American ideals, to charge a man with one offense and on his trial therefor either to prove, or offer to prove, that he has at other times and places committed offenses of a nature similar to the one of which he is accused."

In several recent cases proof of another offense was permitted, but in each case there were some special circumstances which clearly showed that no special harm could have come to defendant by reason of such evidence.

The judgment and the order denying a new trial are reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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67 Cal. App. 225

MOUNTAIN CLUB v. PINNEY.

(Civ. 4461; L. A. 7164.)

(District Court of Appeal, Second District, Division 2, California. May 12, 1924. Hearing Denied by Supreme Court July 10, 1924.)

1. **Reformation of instruments ⚷45(5)—Evidence held to sustain finding of mistake in description in deed.**

In action to reform deed on ground of mutual mistake in inserting in instrument property description which it contained, evidence *held* to sustain finding of mistake.

2. **Vendor and purchaser ⚷239(1)—Innocent purchaser for value without notice not affected by mistake in prior deed by grantor to another.**

Under Civ. Code, § 3399, an innocent purchaser for value without notice is not affected by mistake in description of land in prior deed by his grantor to third person.

3. **Vendor and purchaser ⚷232(2)—Possession, which will operate to impart notice to purchaser for value, stated.**

Possession of real property, which will operate to impart notice to the world and to a purchaser for value who claims to rely upon record title, must be open, visible, unambiguous, exclusive, uninterrupted, and notorious, and must indicate occupant.

4. **Vendor and purchaser ⚷244—Evidence held to sustain finding of such possession as to constitute constructive notice.**

Evidence *held* to sustain finding that possession by plaintiffs and their predecessors not consistent with record title was of such character as to give constructive notice of plaintiff's rights to defendant relying upon record title.

5. Reformation of instruments 🔑32—Plaintiff, seeking reformation of description in deed, held not guilty of laches.

Plaintiff, seeking reformation of description in deed, and predecessors, *held* not guilty of laches.

6. Reformation of instruments 🔑23, 32—Plaintiff held not estopped by acquiescence or conduct to claim right as against purchaser for value to reformation of deed.

Plaintiff, suing for reformation of description in deed, *held* not estopped on account of laches and conduct as against purchaser for value.

7. Adverse possession 🔑27—Evidence held to sustain finding of title by adverse possession.

Evidence *held* sufficient to support finding of title by adverse possession, under Code Civ. Proc. § 325, against contention there was no sufficient inclosure.

8. Adverse possession 🔑27—Evidence held to sustain finding that land was sufficiently cultivated.

Evidence *held* sufficient to sustain finding that land claimed adversely was sufficiently cultivated or improved.

9. Adverse possession 🔑95—Finding that claimant complied with requirement as to payment of taxes sustained by facts.

Evidence *held* to sustain finding that plaintiff complied with requirements as to payment of taxes, or that land in question was not assessed for taxes.

Appeal from Superior Court, San Bernardino County; Rex. B. Goodcell, Judge.

Action by the Mountain Club against Harry J. Pinney. Judgment for plaintiff, and defendant appeals. Affirmed in District Court of Appeals, and hearing denied in Supreme Court.

Ticknor, Carter & Webster, of Pasadena, for appellant.

Leonard, Surr & Hellyer, of San Bernardino, for respondent.

WORKS, J. This action concerns a certain parcel of real property in the San Bernardino mountains, to which we shall in this opinion refer as lot 5. The complaint is in two counts. The first of these alleges the execution of a certain deed to plaintiff's predecessors by one Schneider, and pleads with great particularity facts constituting a cause of action upon the ground of mistake, the alleged mistake consisting of the insertion in the deed of a property description which is not a description of the land intended to be conveyed by the grantor and to be received by the grantee. The second count is a complaint to quiet title in the ordinary form. The prayer is for a reformation of the deed and other documents, and for a decree quieting title to the property conveyed by the deed as reformed. The trial court found for plaintiff upon both counts of the complaint, and rendered judgment accordingly. Defendant appeals.

The first point made by appellant is that the evidence in the record is insufficient to support the finding of the trial court that the parties to the deed were laboring under a mutual mistake in inserting in the instrument the property description which it contained, and a consideration of the question presented requires a statement of various portions of the evidence material not alone to the point itself, but to others which will be examined later. Schneider, before the execution of the deed in question, was the owner also of a certain lot 8, which lay immediately to the south of lot 5. Each of the lots, it is to be understood, was so designated and numbered upon the government plats and according to government surveys, and they were taken up by Schneider and patented to him as government lands. The two lots together contain 101.24 acres, and 50.82 acres of this area lie in lot 5. Some years prior to the execution of the deed in question here Schneider, desiring to take up other government lands in lieu of a part of his holdings, executed to the government his deed attempting to convey the south 30 acres of lot 5 and all of lot 8. This deed was executed in 1901, and was recorded in the county recorder's office in the same year. It was, however, never accepted by the government, although nothing appeared of record indicating that fact until the year 1920, when a disclaimer by the government was placed of record. It is to be observed here, for it is an important point in the litigation, that beyond a doubt Schneider believed that his deed to the government, conceding that it was to become effective, left him as the owner, in lots 5 and 8, of only the north 20.82 acres of the former. That acreage, however, is unfit for cultivation and for human habitation, being rugged and mountainous, and Schneider, for a long time before he executed the deed to the government, had lived in a log house on the south 30 acres of lot 5. Not only so, but he resided there for a long time thereafter, possibly, in fact, until a short time after the making of the deed to respondent's predecessors which is in question here. During a period commencing prior to the deed to the government and running until the date of the deed to respondent's predecessors Schneider cultivated and maintained in the neighborhood of the house an apple orchard and a small alfalfa field. All of his improvements were surrounded by what we shall for the present term an inclosure, leaving the real nature of the structure so called to be discussed later. The ground thus surrounded was irregular in shape, but was so conformed as to have what may be termed its northerly, easterly, southerly and westerly sides. It was all within the boundaries of the south 30 acres of lot 5. To this inclosure, together with all that it contained, we shall hereafter refer as the Schneider homestead. The northerly side of the homestead was at or about the foot of the rise which extended northward into the north 20.82 acres of the lot, while its southerly side was bounded by the northerly bank of the Santa Ana river. This stream meanders across the south 30 acres of lot 5 in a course which, at least where it passes the Schneider homestead, is not greatly divergent from the rectilinear, and which runs westerly, but with a southerly trend. Although Schneider understood that his deed to the government left him as the record owner of the north 20.82 acres of lot 5, it is certain that he believed that the homestead lay within that acreage. A forest ranger in the employ of the government testified thus concerning a conversation he had with Schneider about the year 1907:

> "We were standing in front of his ranch house there, near the creek, and he pointed to me across the creek about 50 or 60 feet and he said, 'I have traded to the government all of the land except this piece that we are on; I have reserved the place where the apples and orchard and alfalfa patch were'—and where his houses were."

Not only is this testimony in the record, but the situation is apparent without it. There was no reason whatever for Schneider having retained the worthless mountainous land which actually lay within the limits of the 20.82 acres. There was every reason for his retaining the only land of value in his entire holding, the land which he had cultivated, upon which he had built, and upon which he had dwelt. It is perfectly evident, if we may express the idea of lineal extent in terms relating to surface, that he believed that his entire property lay 20.82 acres south of its actual location under the government surveys.

Leaving these basic features of the evidence bearing upon the question of mistake, we come now to a mention of those portions of the record which disclose the negotiations leading up to the execution of the deed from Schneider to respondent's predecessors. Respondent was organized for the purpose of providing a summer hunting and fishing location for its members, consisting, during the history of the organization, of from five to twelve men. One Cave, a member of the club, entered into negotiations with Schneider for the purchase of a site convenient for the purposes of himself and the other members. This was in the year 1907. Cave testified that his first conversation with Scheider was on the premises at the homestead. He says:

> "I asked him where the land laid, and he designated the east line about where his fence was, the west line where his fence was, and the south line the Santa Ana river, and the north line taking in all the tillable land up to the hill, and it covered all the land under cultivation and under fence."

One De Hart, also a member of respondent, was present at the conversation between Cave and Schneider. De Hart testified:

> "Schneider said that he had turned back part of his land for scrip to the government, and that all he had retained was what he lived on. * * * He said there was perhaps 60 or 40 acres of land that he had retained, and that this part where he lived was all that was any account anyhow of the land."

One Allen, a lawyer, was employed by the members of respondent for the purpose of formulating an agreement for the purchase of Schneider's property. He and Schneider had a conversation concerning the proposed transfer. Upon being asked what Schneider said "respecting the property that he proposed or intended to describe in this agreement," Allen testified, "He said that he wished to convey all the property that he owned in Santa Ana Canyon, in San Bernardino County." According to Allen, further, Schneider told him that "he had no papers showing his title." Allen then got from a title company a description of the property apparently intended to be conveyed and inserted it in the agreement. The same description was incorporated in the deed later executed by Schneider to the members of respondent, who were its predecessors in interest. The property thus described is the north 20.82 acres of lot 5. The mistake of which respondent's first cause of action is predicated, and which was found by the trial court to exist, is the alleged mistake in reproducing in the deed this description of a mountainous tract of land instead of a description of the Schneider homestead.

[1] It is vigorously contended by appellant that neither Schneider nor the members of respondent could have been laboring under such a mistake. It is pointed out that the description actually inserted in the deed calls for a tract inclosed within right lines, and especially that it calls for a southern boundary consisting of a right east and west line. In contrast with these indubitably correct assertions we are reminded that the inclosure surrounding the Schneider homestead was irregular and was meandering in part, and, particularly, that the southerly line of that inclosure, marked by the banks of the river, is not straight, and that it departs from a true east and west direction. We are convinced not only that these circumstances did not require the trial court to find that there was no mistake, but that they are not even inconsistent with the parts of the record, either referred to or quoted above, from which the inference that there was a mistake could readily be drawn, if,

indeed, that inference were not necessarily to be drawn therefrom. It was, of course, apparent to the members of respondent that the homestead, as pointed out to them by Schneider, was not inclosed within right lines, but there is nothing in the record as noted up to this point which is inconsistent with the idea that they believed they were buying and Schneider believed he was selling a larger tract the exterior boundaries of which were outside the inclosure surrounding the homestead and of which the latter was but a part. In truth, certain portions of the record which we have reserved for present mention show affirmatively that the idea just expressed was in the minds of all the parties to the negotiations. Upon this point we refer to a part of Cave's testimony:

> "Q. He [Schneider] wasn't exactly certain as to the north boundary? A. Well, he didn't tell me anything about any corner; he said it ran back on the hill. It ran far enough north to take in all his tillable land.
>
> "Q. He didn't tell you it stopped with the tillable land? He gave you to understand it took in the tillable land and might take in even more? A. Yes; that was the idea I got. * * *
>
> "Q. Was the entire 20.82 acres approximately all practically in cultivation? A. No.
>
> "Q. And what portion of it would you say was in cultivation? A. In orchard and alfalfa I should say approximately six acres. * * *
>
> "Q. And the rest of it you feel was susceptible of cultivation? A. No; the rest of it was in river wash and in the hills on the north."

As an answer to one of a series of questions concerning the lines of the inclosure round the Schneider homestead, the particular question relating to the northerly boundary, Cave testified:

> "I was not particularly interested in the line as long as it covered all the land of any value. As long as it went back in the hills, I didn't care how far."

A further examination proceeded:

> "Q. How far, as long as it didn't stop short of that land, you designate as tillable land? A. That is all I was concerned with.
>
> "Q. You at that time made no effort to find out the exact location. A. No, sir.
>
> "Q. And made no survey? A. Made no survey. * * *
>
> "Q. At the time you talked with Mr. Schneider, * * * was there anything said about the number of acres embraced in this tract? A. I don't remember that there was. I think the first knowledge we had of the acreage was when we got the search from the record."

It is to be observed that the testimony of De Hart, already quoted, bears directly upon the particular question now under discussion, and he further testified even more explicitly on the point. He said:

> "[Schneider] led me to believe that the property we were supposed to purchase was the land that the apple grove and the alfalfa patch —in fact all of the land that was under the fence, and running over on the other side of the river, on the south side of the river, in other words; and all of the land which was up on the hill, and the buckthorn which he could not penetrate at all—that is, unless you cut your way in."

Taking all the testimony together, the fact that the property actually described in the deed is bounded by right lines does not show that the alleged mistake did not occur. There is in the record, it is true, some slight evidence tending to indicate that the members of respondent believed that Schnieder, in pointing out the inclosure surrounding the homestead, was showing them the exterior boundaries of the entire property about to be conveyed, but the portions of the testimony to which we have referred more than justified the trial court in adopting the view that they believed, and that Schneider believed and intended them to believe, that the homestead was but a part of the entire property still owned by him. If we consider specially the point most strongly urged by appellant that the act of Schneider in pointing to the river bank as his southern boundary could not have deceived the members of respondent, for the reason that the deed showed that boundary to be a right line, we are prompted to observe that the location of the river was such that they might reasonably have understood that Schneider was pointing to a natural boundary which he had employed on the ground roughly to approximate the southern conventional boundary of his land. We remark this, of course, in addition to what we have already said upon the point to which we now address ourselves. On the whole, we are satisfied that the finding as to mistake is supported by the evidence.

[2] A treatment of the next question presented by appellant requires an additional statement of the facts. Schneider died in 1911. It was first shown of record in 1920, as we have already observed, that his deed attempting to convey lot 8 and the south 30 acres of lot 5 to the government had been rejected. With this showing it at once appeared of record that the estate of Schneider was the owner of the two lots in their entirety, with the exception of the north 20.82 acres of lot 5, title to which appeared of record in respondent. Already, however, in 1919, the public administrator of San Bernardino county had taken out letters of administration upon the estate, and such proceedings were had in the probate court that appellant, Pinney, purchased at an administrator's sale, for a valuable consideration, in 1920, all of the real property standing of record in Schneider's name. After this event, the present action was commenced. We are now brought to the second point made by appellant. He contends that he is an innocent purchaser for value without notice, and

that, as such, he is neither affected nor bound by any mistake which Schneider and the members of respondent may have made in inserting the description in the deed executed by him to them. It is a well-established rule of law, carried into the Code in this state, that an innocent purchaser for value without notice is not affected by a mistake such as the trial court found was made between Schneider and his grantees (Civ. Code, § 3399); but respondent insists that appellant is not a purchaser without notice, and the trial court so found. We are thus presented with the real question to be determined by us upon the branch of the case now under consideration. The point made by respondent is that its possession of the Schneider homestead during a long period of time was such, when accompanied by the dominion it exercised over the property while in possession, that constructive notice that it claimed the premises was thereby conveyed to the world. In disposing of this contention we shall first deal with the facts upon which it is made and shall thereafter consider the authorities bearing upon the law of constructive notice under the facts disclosed. The deed from Schneider to the members of respondent was executed in August, 1907, and the grantees under that instrument in turn executed their deed to respondent in February, 1908. Under an arrangement incorporated in the agreement above mentioned, and which preceded the first of these deeds, Schneider reserved the right to live on the homestead described, however, as was the case in all the instruments relating to the property, as the north 20.82 acres of lot 5. Schneider's right to occupy the premises was exercised for but a brief period, if at all, as the record shows that he was taken ill, and that in August, 1907, the month in which he executed his deed to the members of respondent, he was removed to a hospital in Redlands. He never again was upon the homestead.

It now becomes necessary, as a basis upon which to indicate the nature of the possession of respondent, and its acts connected therewith, to point out the character of the inclosure surrounding the homestead, together with other physical features of the place, at the time of the deed from Schneider to the members of respondent. The testimony on these questions relates to the occasion, already mentioned, upon which Cave, accompanied by De Hart, had his conversation with Schneider on the premises. Cave testified that the east and west boundaries were marked by fences consisting of some brush and some wire, the brush having been cut from the land and thrown up along the fence line; that the south line was the bank of the river, although there was a little piece of rock fence and some rail fence along the top of the bank, running in a meandering line near the edge; that the east fence contained brush and rails and poles which had been cut from along the river; that the west fence was of the same kind, some rail and some brush and some wire; that the north end of the east fence ran into the buckthorn brush at the bottom of the mountainside, and that the same was true of the north end of the west fence; that the south end of the west fence ended at the river, where there was quite a bank and that along the bank, where it was necessary to keep cattle out, there had been brush piled and poles put across; and that the south end of the east fence did not come to the river bank, but that there was an old trail between the end of the fence and the bank. De Hart testified that there were several cabins and outhouses or smokehouses on the homestead; that the entire north boundary of the premises was marked by the growing buckthorn of the mountains, so dense that cattle would not go through it, except for a short distance at the east end, where there was a little wire; that the west fence was of wire and rail, and that the south fence was wire and the river; that where the brush on the north was used as a boundary it was so thick that it would turn cattle; that the east fence was wire and partially rails or partially poles; that the fence was sufficient to protect the ranch, there being alfalfa in the barn at the time; and that the wire fence was composed of three strands.

Coming now to the possession and acts of respondent, made evident through the activities of its members, De Hart testified that his connection with the club was maintained for eight or ten years after 1907; that during the period of his membership the fences around the homestead were kept in repair; that the fence on all sides around the place was not continuous, but it was a fence that would turn cattle; that it was not continuous on the north side; that the irrigating ditch went along there; that during his membership an outshed or woodshed was torn down; that along a part of the way on the north side of the homestead no barrier existed except buckthorn brush, which was so thick that cattle would not go through it; that this buckthorn was the barrier along the entire north side, except a short distance at the easterly end where a little wire was employed; that on the west side the members of the club put in wire all the way through the brush; that the property was entirely closed by these obstructions and fences, so much so that it kept the cattle out which were pastured on the ranch, and that there was a growing alfalfa patch there which would naturally invite them; that the alfalfa patch was maintained by the club for several years; that the obstructions and fences were maintained all the time he was a member, and that the stock driven in by members was kept pastured inside the inclosure; that for the first three or four years of his membership in the club he made frequent visits to the homestead during the summer, but that the other members made infrequent visits; that about September, 1907, or a little later, he put a new roof over the kitchen of one of the cabins and put in a new floor and that on the occasion when this work was done he remained on the homestead about six weeks with a Captain Cox, a carpenter employed by respondent; that during that time different members of the club were also there at times, including Cave and one Sucher and one Biggin, and that Biggin remained about two weeks, the others not so long; that De Hart was again at the place early in April, 1908, and remained perhaps a week, perhaps four or five days, for the opening of the fishing season; that he was there for occasional fishing trips and vacations during the summer of 1908, and that on those trips he saw other members of the club there, and that they remained there for periods ranging from a day or two to a week or two; that during his membership in the club he should not say that the property was unoccupied the greater portion of the year; that it was then occupied more than half of each year, but that it was occupied more than it is now; that one year he was there continuously for about five months; that after three or four years he discontinued going to the homestead to the extent that he had been going, but that until his membership ended he went there a couple or three times in the spring or summer; that these were short trips, but that once during the season he perhaps stayed a week; that frequently when he went in during the first three or four years of his membership he would find the place unoccupied; that such was the general situation, but that he tried to go in when no one else was there; that members of the club went in to the homestead at times during the winter, whenever the roads were open, but that there was no continuous occupation during the winter; that the east fence twisted around on the north side until it got to the thick brush and from that on the brush was so thick that it turned the cattle; that the fence on the east side is now all wire, but Schneider had on that side partially rails or partially poles; that the bluff of the Santa Ana river at the south of the homestead is a bluff which is straight enough up and down—perhaps five or six feet— so that cattle could not come in there; that the fence is not a continuous fence, but it makes a continuous fence with the nature of the land; that the property was kept in better condition than it was by Schneider; that the club pruned the apple trees every three years, which was sufficient, but that Schneider did not prune them at all; that the club had to keep a fence there that would keep stock out and keep the stock of the members in, and that the club did; that he was on the homestead three times after his membership ended; that the last time he was there was a year ago last fall (which was the fall of 1919, as the action was tried in June, 1921); that the property was in as good condition as when Schneider had it, and, with the exception of the alfalfa patch, it was in better condition; that he made no change in the physical appearance of the property in any way while he was a member of respondent other than to make the necessary repairs from time to time; that the club refenced the place, you might say; that there were three spools of wire that went in, outside of the wire that Schneider had there, and that the fence was supposed to have been made cattle tight; that it seemed to him that while he was a member of respondent the Santa Ana side of the fence was carried all the way along; that the apples from the orchard were harvested every year when they were not frozen and were sold; that the club planted some garden on the place; that at one time there was a hand-printed sign on the place which read "Private Property"; that it was at the gate at the east end where people would be coming in, and that it was put up by members of respondent; that the letters on the sign were an inch and a half, perhaps larger; that the sign was a foot and a half long by a foot wide, the color of wood and with black letters; and that it was up during all the time that he was a member of the club, having been placed in 1907 or 1908. Biggin, the president of respondent and a member since its organization, testified that he first went to the Schneider homestead to make use of it as a member of respondent in the summer of 1908; that, starting in that year, he has spent thirty days on the property in each year; that he has taken his family there a great deal, and that he has taken visitors or friends there with him; that he has been on the property many times each year, at various times during the year, running from May 1 to January 1; that after January 1 that country is sometimes open and sometimes snowed in; that at the time he has been going to the property other members have been doing the same, and that others have been there considerably at times when he was there; that, as an instance, two years ago Cave and certain of his relatives were there over Sunday, and some of them remained three or four days afterward; that there were many such cases, and that, as another instance, three years ago, beginning July 1, Biggin's family and one of his office women spent two and a half months at the homestead, during which time he himself was there quite a good deal; that all the members of the club resorted to the property after it was acquired in 1907, some more than others; that while De Hart was a member he was on the place more than any one else, but that, since that time Biggin has been there most, and that Cave, who was deceased at the time of the trial, spent a lot of time there, whenever he could get there; that about five years ago Biggin and a friend of his took off the old roof and put on a new roof on the west cabin and cleaned up the trash; that he has built a good deal of fence in there, too, which was necessary to keep stock out; that he did not think that there was one fence post on the property which was there in 1907, and that he did not think that any of the same wire was left; that the fences have always been kept in sufficient repair to keep the stock out, and that, where there was no fence, there was a natural barrier; that fence was built along the entire river bank, but that part of it, along with part of the bank, was washed out by storms in 1916, and that the part of the fence thus destroyed was replaced by the club the next spring; that the stand of alfalfa which was on the property during Schneider's time was not kept up after 1916, for the reason that the flood of that year washed out the irrigating ditch; that the apple orchard was not plowed or harrowed by respondent, but that the trees were irrigated until 1916, when the ditch was washed out, and pruned five times after 1907; that he never penetrated north from the orchard to a line marked by a surveyor as the south line of the 20.82 acres on a map introduced in evidence and that the country there is impassable; that last fall there was a sign on an oak tree on the southeast corner of the homestead, which was the place of entrance to it; that the sign was placed by Biggin himself; that it has been on the tree most of the time during possession of respondent and that it read "Private Property—Keep Out"; that there was also a sign on the south side of the west cabin, near the entrance to it; that this sign had remained in place for five to seven years up to last fall, when it was still there; that he himself placed this sign, and that it read: "Private Property of Mountain Club —Please Keep Out"; that this sign was about twelve inches by sixteen, with letters an inch and a half high; that there was also formerly on the premises a sign which was posted shortly after respondent took possession and which remained in place for ten years, but which was not in place after the expiration of that time; that this sign read "Private Property, Keep Out"; that there was also a sign, made on about two and a half feet of a six-inch board, placed by the gateway where the members went to get water from the river; that this sign was put up by some member, and read "Mountain Club"; that it was placed some time within the last ten years, but that he could not tell how long it remained; that three of the five prunings of the apple trees occurred in winter; that for two months at a time, seven or eight years ago, an employee of respondent pruned trees and cut wood on the homestead, living in a tent on the premises during the period; and that in the spring of 1920, soon after the probate sale to appellant, the homestead was furnished to the extent that it had been all along, that is, in the kitchen there was a range, table, sideboard, cupboard and sink, in the west room there were mattresses and covers for two beds, blankets and sheets and pillow cases, and two large chests, one a tin and zinc-lined chest that contained the bedding. This complex array of testimony covers the main features of the evidence bearing upon the question whether notice of respondent's claim to the homestead was constructively conveyed to appellant, and we have stated it with a reasonable degree of fullness, because it relates not alone to that point but as well to the question of respondent's alleged title by adverse possession, later to be considered.

Disposition must be made of a specific point presented by appellant concerning the evidence just recited before we come to the general question of the effect of that evidence as imparting constructive notice to him. Appellant says that in order to produce the result which, according to respondent, flows from the testimony in the case, the showing of change of possession from Schneider to respondent must have been of such a nature as to convey to any person examining the property some visible evidence of the fact that Schneider had transferred his right to a third person. It is also said that there must have been something in the evidence to indicate that some one other than Schneider was claiming title to the homestead, and that, after Schneider's death, some one other than his personal representatives was in possession of it. In making these suggestions appellant temporarily loses sight of the comedy of errors out of which arises this most interesting litigation. Appellant, claiming never to have seen the homestead before the probate sale, had, together with the remainder of the world, only such constructive notice as was imparted by the records of San Bernardino county, if we for the moment forget the claim of respondent concerning the alleged constructive notice conveyed by its possession. In fact, appellant contends that the only notice he ever had was that furnished by the record. And yet—and this is the fact which appellant temporarily forgets—the county records showed title in the government to the parcel within which lies the homestead, from the recording of Schneider's deed to the government, in 1901, to the recording of the government's disclaimer, in 1920. Schneider's occupation from 1901 to 1907 and respondent's occupation from the latter year to 1920 are referable to the same mistake—the belief on the part of Schneider that he had omitted from his deed to the government the portion of lot 5 within which lay his little homestead. Considering this just view, it made no difference whether, as time rolled on for nearly twenty years, the possession of the property was that of Schneider, that of his personal representatives, that of the predecessors of respondent, or that of respondent itself. No matter what persons were in possession among all these, their possession was in opposition to the record title. At least, it was apparently in opposition to the record title, for there is no claim made that the evidence of possession, in any of its factors or elements, that is, the possessio pedis, or actual possession, pointed in any way to the government as the occupant. The world, then, including appellant, was put upon such notice, from 1901 to 1920, as the evidence of possession imparted, and was during the same period put upon corresponding inquiry. What the nature or effect of that notice was we shall presently inquire.

If, however, we forget the very evident situation outlined in the paragraph just closed, and meet appellant on the ground chosen by him, we must remark that there was in August, 1907, a change in the possession of the homestead which must have been evident even to the casual observer. For a long time prior to that month Schneider had lived alone upon the property. After that month he was never again to be seen upon it, and in his place there at once appeared the various members of respondent, and particularly, at first, the diligent De Hart. We need not here repeat the recital of the activities of this member of the Mountain Club during the weeks that he occupied the homestead immediately upon the departure of the aged Schneider. It is enough to say that his movements about the place were such that they must have at once struck an observer as indicating a complete control and dominion over it. If we attend to appellant's contention that the change of possession must have been such as to give notice that persons other than Schneider's personal representatives were in control of the property, a ready answer is at once apparent. Schneider lived for four years after his departure from the homestead and the entry of respondent's predecessors upon it. He could have had no personal representatives during that period. In fact, he actually had none until when in 1919, twelve years after he gave up his residence on the homestead, the public administrator was granted letters upon his estate. Whether appellant, a purchaser at a sale under probate proceeding, is bound to take notice of this fact, we need not pause to inquire, as during the four years preceding Schneider's death the change of possession had not only occurred, but respondent and its predecessors had exercised a marked and notorious dominion over the property, unembarrassed by the presence of Schneider for a single moment. From these observations it is apparent that appellant's point that there was no striking evidence of change of possession must fall.

[3, 4] The nature of the possession of real property which will operate to impart notice to the world, and, therefore, to a purchaser for value who claims to rely upon the record title, is pointed out in cases cited in appellant's brief: (1) The possession must be open, visible, unambiguous, exclusive, uninterrupted, and notorious. Hellman v. Levy, 55 Cal. 117; Randall v. Allen, 180 Cal. 298, 180 Pac. 941. (2) It must indicate the occupant. Randall v. Allen, supra. The last of these requisites is, in particular cases, to be found as a resultant from those enumerated in the first list. This is shown in one of the cases cited, the opinion in which also points out the general character of the possession which will convey constructive notice of the claim of the occupant. The court in that case refers to "Cox v. Devinney, 65 N. J. L. 389 (47 Atl. 569), wherein it was held the record purchaser was not charged with notice by a possession of the character indicated [in an earlier part of the opinion]. The court states [in Cox v. Devinney] the reasons for the decision as follows: 'While the general rule is that possession of land is notice to a purchaser of the possessor's right therein, nevertheless such possession, to be effectual, as notice, must be not only exclusive and uninterrupted, it must also be open, notorious and visible, i. e., it must indicate the occupant. The fact that lands are under cultivation does not, of itself, suggest that anyone other than the reputed owner of the premises is in possession of them. In order to charge a purchaser with notice, the occupation must be of a character which would put a prudent person upon inquiry; it must indicate that someone other than he who appears by the record to be the owner has rights in the premises. * * *' With the general principle of Cox v. Devinney (putting upon the statement that the possession 'must indicate the occupant', the meaning which was undoubtedly intended, that it must indicate an occupant other than the record owner, not that it must indicate who such occupant is) the decisions of this state are in accord. * * * They may be summed up as holding that possession in order to be sufficient to establish notice must be open, notorious, exclusive and visible, and not consistent with the record title. This is likewise the general rule in this country upon the point. * * * Underlying these requirements is the idea that the circumstances relied on to establish constructive notice, whether they be possession or something else, must be such that a prudent man would be put upon inquiry." Randall v. Allen, supra. The rule governing such cases is also pointed out in Bessho v. General Petroleum Corporation, 186 Cal. 133, 199 Pac. 22. To indicate how fully the facts in the present litigation satisfy the requirements of the decisions upon the point now under examination we have only to direct

attention to the testimony which we have so fully stated. The evidence shows a possession not consistent with the record title, whether that title be viewed in its aspect as resting in the government, from 1901 to 1920, or as resting in the estate of Schneider, during the brief period in 1920, between the date of the recording of the government's disclaimer and the date upon which appellant purchased at the probate sale. Further, the possession was surely of a character calculated to put a prudent man on inquiry. To our minds the evidence plainly supports the finding of the trial court to the effect that appellant was not a purchaser without notice.

[5] The next point made by appellant is that respondent and its predecessors have been guilty of laches in the commencement of the action and are therefore not entitled to equitable relief. The disposition of this question is largely affected by what we have said in discussing another point, for the present question is based upon the fact that the description in the deed from Schneider to the predecessors of respondent called for a tract of land bounded by right lines. It is said that this circumstance should have apprised respondent at once of the fact that the Schneider homestead was not the property intended to be conveyed by the deed. We need not here repeat and are content merely to refer to what we have already said upon this specific point in disposing of the question whether there was a mutual mistake at the time of the execution of the deed, concurred in by Schneider and respondent's predecessors. We may add, however, a few brief observations tending even more strikingly to show the utter futility of the contention that respondent has been guilty of laches. Having entered upon the homestead under the apparently well-founded conviction that the irregularly shaped tract lay within the exterior boundaries of the regularly bounded 20.82 acres of lot 5, respondent was confirmed in its mistake, rather than disabused of it, with the passing years. The possession of the club was kept intact from 1907 to 1920 without even the hint of molestation. During the first four years of this time Schneider was alive and was content, at least as far as the fate of the homestead was concerned. There is not a breath in the record to indicate that he did not end his days in the belief that he had conveyed the inclosure to the predecessors of respondent. To show how all circumstances conspired to perpetuate the original mistake, most natural, certainly, to the extent that the members of respondent participated in it, we are to observe that the assessor of San Bernardino county labored under it as well, for it will appear when we come to consider another point made by appellant that the assessor, in assessing the taxes against respondent upon the 20.82 acres, included an assessment for the improvements on the homestead as being within that acreage. This course he pursued year after year. It is difficult to perceive how appellant, under such an array of circumstances, can seriously make the claim that respondent has been guilty of laches. The real situation is most simple. Respondent had no hint until after appellant bought at the probate sale that the mistake of the long ago had actually occurred, and under all the circumstances the lateness of its disillusionment was both natural and excusable. This action was commenced a little more than fifteen months after the probate sale was confirmed by the superior court, taking even the date of the filing of the amended complaint as our guide, the date of the filing of the complaint not being shown by the record. Under all the circumstances respondent was sufficiently diligent in the commencement of the suit.

[6] It is insisted that respondent is estopped to claim against appellant the relief which was awarded by the trial court, and appellant, in making the point, states that it is closely allied to two questions of which we have already made disposition, that is to say, first, that there was no mistake in either the execution or acceptance of the deed from Schneider to respondent's predecessors, and, second, that respondent was guilty of laches in the commencement of the action. To our minds the relationship between the questions is so close that the present point is determined by what we have said as to the other two. In our opinion the asserted estoppel does not exist.

[7] Another point made by appellant is that the evidence is insufficient to support a finding of the trial court that respondent acquired title to the Schneider homestead by adverse possession. The solution of this question depends upon the terms of section 325 of the Code of Civil Procedure, which provides, in part:

> "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial inclosure. 2. Where it has been usually cultivated or improved."

The section also requires that, in order to establish a title by adverse possession, it must be shown that land "has been occupied and claimed for the period of five years continuously," and that the occupant has "paid all taxes, state, county, or municipal, which have been levied and assessed" upon the land. Respondent claims and the trial court found that title by adverse possession was acquired because of an occupancy of the homestead during the years 1911 to 1915, inclusive. Appellant's first assault on the finding is upon the contention that the property was not protected by a substantial inclosure during the period. In view of the evidence we may dismiss with a mere mention all question as to the nature of the inclosure on the easterly and westerly sides. The record amply shows that a substantial fence was maintained on both of these sides. The only reason for reserving questions as to the northerly and southerly boundaries for separate treatment is that, on the north and at least partially on the south, natural obstructions are relied upon as constituting the inclosure on those sides. The subdivision of section 325 which is numbered 1 is satisfied by the employment of natural barriers for the purpose of completing an inclosure, provided only that they be effective as part of an actual inclosure, the usual measure as to their effectiveness being found in the answer to the question whether they will turn cattle. Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Smith v. Hicks, 139 Cal. 217, 73 Pac. 144. The record here presents an answer to that question which shows a substantial support for the finding of the trial court. We consider first the northerly boundary. De Hart refers to the buckthorn which Schneider could not penetrate at all—that is "unless you cut your way in," and he further characterizes it as so dense that cattle would not go through it, so thick that it would turn cattle, and so thick that cattle would not go through it. Biggin says, of the north side, that the country there is impassable. Turning now to the question of the southerly boundary line: Cave testifies concerning Schneider's time that along the bank, where it was necessary to keep cattle out, there had been brush piled and poles put across. De Hart says that the bluff of the Santa Ana river * * * is a bluff which is straight enough up and down—perhaps five or six feet—so that cattle could not come in there, and that it seemed to him that while he was a member of respondent the Santa Ana side of the fence was carried all the way along. Biggin testifies that fence was built along the entire river bank, but that part of it, along with part of the bank, was washed out by storms in 1916, and that the part of the fence thus destroyed was replaced by the club the next spring. There can be little doubt as to the nature of the "fence" on the northerly and southerly sides from this separate consideration of those sides, but its effectiveness as a whole, still, however, keeping more particularly in mind the northerly and southerly sections of the barrier, is shown decisively by some of the testimony. De Hart testifies that at the time Cave and he talked first with Schneider the fence was sufficient to protect the ranch; there being alfalfa in the barn at the time. Speaking of the time during which he was a member, which ran for eight or ten years after 1907, De Hart says that the property was entirely closed by these obstructions and fences, so much so that it kept the cattle out which were pastured on the ranch, evidently referring to nearby property, and that there was a growing alfalfa patch on the homestead which would naturally attract them. He also says that the stock driven in by members was kept pastured inside the inclosure, that, while the fence was not continuous, it made a continuous "fence" with the nature of the land, and that the club maintained a fence that would keep stock out and keep the stock of the members in. Biggin testifies that the fences have always been kept in sufficient repair to keep the stock out, and that where there was no fence there was a natural barrier. We have no doubt, after a consideration of all this evidence, that the trial court was eminently justified in finding that the homestead was protected by a substantial inclosure during the years 1911 to 1915, inclusive.

[8] It is contended that the finding as to adverse possession is unsupported by the evidence, for the reason that, to quote from the statute, the homestead was not shown to have been "usually cultivated or improved" during the period covered by the finding. We are satisfied that this contention is not well founded, but, having gone so fully into the question of inclosure, we do not find it necessary to be at equal pains upon the present point. We merely refer, as a sufficient support for the finding in the respect mentioned, to the testimony in the record concerning the manner in which the alfalfa and apple trees were irrigated and cared for and the crops harvested from 1907 until the irrigation ditch was washed out in 1916.

[9] Appellant's final contention is that the finding as to adverse possession is not supported by the evidence because the record fails to show that respondent complied with the provisions of the statute concerning the payment of taxes. It has been said that in order to meet the requirement a claimant of title by adverse possession "must prove either that no taxes were levied and assessed upon the land, or that he had paid all taxes which were levied thereon." Allen v. Allen, 159 Cal. 197, 113 Pac. 160. In the present case the evidence shows that no taxes were levied or assessed upon any land which embraced the Schneider homestead during the years 1911 to 1915, inclusive, except in a single instance presently to be noticed, although in each year an assessment was made upon the north 20.82 acres of lot 5, or upon 20.82 acres in lot 5, the tax so levied having been paid in each instance by respondent. We have observed in another place, as illustrating the contretemps which runs through the entire record here, that the several assessments of taxes on the 20.82 acres included an assessment for the improvements on the homestead. Respondent therefore actually paid taxes annually upon those improvements, in connection with the payments

made upon a tract of land on which they were not situated, although that fact appears not to affect the present question. We have mentioned one instance in the period 1911–1915 in which a tax was assessed against land on which the Schneider homestead is located, although the sequel will show that a considerable portion of the homestead lies outside the boundaries of the tract against which that assessment was levied. In 1912 an assessment was made in the name of Schneider against the north 30.62 acres of lot 5. This assessment, the tax not having been paid, was carried on the delinquent rolls until in 1916, when, upon the application of respondent to the board of supervisors, it was canceled as a double assessment. While it was double as to the north 20.82 acres of the lot, it was not double as to 9.80 acres lying south of the former area. Appellant says that it was the duty of respondent under the law as to adverse possession to pay the tax upon the 9.80 acres, and this is the sole ground upon which he contends that, in the matter of the payment of taxes, the finding as to adverse possession is not supported by the evidence. He says that the order canceling the assessment, made in 1916, cannot reach back and excuse a failure to pay, as, so he says, the tax as to the last-mentioned acreage was valid. No authority is presented to sustain this contention, and respondent cites none which is in point, to our minds, to dispute it. As we regard the question now under consideration as the only doubtful one in the case, and as it appears, as far as we can discover, to be one of first impression, we shall proceed, with care, to analyze a little more circumspectly the point made, and shall then, with an equal degree of circumspection, endeavor to ascertain the facts to which it is to be applied. We shall assume, without deciding, that appellant is correct in his postulate that the order of the board of supervisors made in 1916 does not of itself excuse respondent's failure to pay the tax based upon the questioned assessment. In other words, we shall determine the question as if the order of the board had never been made and upon the assessment itself.

There is yet another circumstance to be noted in stating the question. We do not perceive how, as appellant contends, respondent was liable to pay or how he could have paid any tax on the 9.80 acres, and this for the simple reason that the amount of that tax could not have been ascertained. It certainly, so it seems to us, could not be reckoned upon the employment for purposes of computation of a fraction the numerator and denominator of which are, respectively, 9.80 and 30.62. It appears to us that, if respondent, in order to satisfy the statute as to adverse possession, must have paid any tax under the questioned assessment, he must have paid the entire tax for two reasons: (1) Regarding respondent as the claimant to the homestead the assessment was not double even as to the 20.82 acres, as respondent's ownership of record of that tract is a fortuitous condition. Considering respondent as the occupant of the homestead, the present question must be treated as if some other person were the record owner of the 20.82 acres. (2) It apparently matters not if the assessment were double as to 20.82 acres. Still viewing the situation from the standpoint of respondent as the occupant of the homestead, the board of supervisors should have canceled the assessment on the 20.82 acres, which does not include the homestead, and not the assessment on the 30.62 acres, which does include about two-thirds of it, as the facts now to be outlined will show. There is in the record a plat which delineates lot 5, and which shows the location within it of the homestead. The southerly boundary of the 20.82 acres is also shown. The homestead lies wholly south of that boundary. We have measured, as nearly correctly as we may, half the distance from the northerly boundary of lot 5 to the southerly boundary of the 20.82 acres, and at an equal distance south of the last-mentioned boundary we have drawn across the lot as shown on the plat a line parallel to that boundary. We have by that process inclosed a tract approximately one-half the size of the 20.82 acres, or 10.41 acres. When we add the acreage of the two pieces we have a tract approximately 31.23 acres in extent, near enough in size to the assessed tract of 30.62 acres to answer our present purpose. The adoption of this process is made necessary, it will be observed, because of our inability to draw from the record before us a line which will exactly exhibit a smaller tract of 9.80 acres or a larger tract of 30.62 acres. The surveyor who made the survey from which the plat in the record is produced testified that the Schneider homestead contains approximately five or six acres. The plat shows that more than one-third of the homestead lies south of the line we have drawn, and therefore outside the 31.23 acre tract. If we take the extreme acreage of the homestead as stated by the engineer, that is, six acres, we are able to say that less than four acres of it lie within the 31.23-acre tract. This four acres, approximately, also lies, as we have already indicated, within the tract of about 10.41 acres confined on the plat by the line which we have projected. Moreover, the homestead is entirely surrounded by the superficies of the 10.41 acres, except on its southerly side. If we attempt to depict the situation more graphically we may liken the 31.23-acre tract to a rectangular sheet of paper, whereupon it will appear that 4 acres minus may be represented by an irregularly shaped fragment torn from about the middle of the lower side of the sheet. The relationship of this fragment to the paper from which it is taken will stand in the proportion of 4 to approximately 31.23. Keeping in mind the facts thus stated, and returning from our approximate acreages to the exact figures which result from the assessment, we may state in several forms the question to be solved by us: (1) Was respondent bound to pay the entire tax on the 30.62 acres? (2) Was it bound to pay a tax, computed in whatever manner, upon the 9.80 acres? (3) Was it bound to pay a tax computed in whatever manner, on the less than 4 acres of the homestead included within the 9.80 acres? (4) Stating the problem negatively, respondent surely was not bound to pay a tax upon the entire homestead, for more than one-third of its area lies outside the 30.62 acres, and was unassessed in any sense.

We have found no authority which fits the peculiar conditions shown by the record, but we are able to discover analogies between certain propositions of law and the question before us, and from them we are enabled to determine the point. In a standard work the very general proposition is laid down that "to establish a lien for taxes on realty and sustain proceedings for the forfeiture or sale of the land for nonpayment of the tax, it is necessary that the assessment shall contain such a description as will identify the particular parcel of land assessed with certainty and beyond any reasonable possibility of doubt or mistake." 37 Cyc. 1052. It is said in another work that "A sufficient description of the property intended to be assessed is inherently essential to a valid tax on real estate, and if the property is not described in the assessment list with sufficient accuracy and particularity to render it capable of ready identification, the tax thereon is void." 26 R. C. L., tit. Taxation, par. 314. A well-known author writes:

> "In listing the land [for taxation] it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him." Cooley, Taxation (3d Ed.) p. 740.

See, also, Best v. Wohlford, 144 Cal. 733, 78 Pac. 293.

Several California cases may be mentioned as having some bearing upon the point now under consideration, although it is to be understood that in none of them were the facts closely akin to those now before us. They are cited merely as instances showing specific application of the general principle embraced in the quotations above set forth. It is said in one case that "the statute requires that the description, either by common designation, or name, or by metes and bounds, shall appear on the face of the assessment roll; so that by inspecting it the owner and all other persons may know what particular land is assessed." People v. Cone, 48 Cal. 427. It is also said that "the description should be sufficient in itself to identify the land," Miller v. Williams, 135 Cal. 183, 67 Pac. 788, and that an assessment must contain something "which would establish the identity of the tract or parcel of land sought to be assessed. * * * A necessary thing in proceedings to enforce the collection of a tax." Smith v. City of Los Angeles, 158 Cal. 702, 112 Pac. 307. Other decisions of the Supreme Court might be cited in support of the general principle which we have in mind, but we need not take the time nor the space to list them. In relying on the principle we are not unmindful of the fact that the assessment here in question is perfectly plain on its face. It describes the north 30.62 acres of lot 5, a parcel of land to be located with consummate ease, but the tract to which appellant seeks to fasten the assessment is the Schneider homestead, and under that contention it appears to us that respondent as the occupant of the homestead, is the "owner" who is to be enabled under the law to identify its land as the land assessed. The question which we are to decide is not whether the assessment is sufficient to stand as the levy of a tax on the north 30.62 acres of lot 5, but whether under it respondent must have paid a tax on the homestead, situated partly within and partly without the acreage mentioned, in order to satisfy the statute requiring the payment of taxes to establish a title by adverse possession. We cannot avoid the conclusion that respondent was not required so to pay and that the trial court was justified in making the implied finding, embraced within its finding as to adverse possession, that the homestead was not assessed for taxes in the year 1912.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. The application for a transfer and hearing by this court after decision by the District Court of Appeal is denied. We are of the opinion that the evidence is sufficient to sustain all of the findings of fact which were necessary to support the judgment in favor of the plaintiff upon the first cause of action, which was for reformation of the deed, and we are satisfied with the conclusion of that portion of the opinion of the District Court of Appeal which deals with the questions arising under said first cause of action. This conclusion renders it unnecessary to determine whether or not the evidence is sufficient to support the finding and conclusion of the trial court that plaintiff acquired title by adverse possession. We therefore neither approve nor disapprove the portion of the opinion of the District Court of Appeal which deals with that question.

67 Cal. App. 270

PEOPLE v. RALPH. (Cr. 767.)

(District Court of Appeal, Third District, California. May 13, 1924. Hearing Denied by Supreme Court July 10, 1924.)

1. Indictment and information 🔑61—Judicial notice that city board of education is school board authorized to allow claim against district.

Indictment alleging presentation of fraudulent claim to school board of Sacramento city school district sufficiently stated offense of presenting fraudulent claim to city board, authorized to allow or pay it, if genuine (Pen. Code, § 72); court taking judicial notice that city board of education, in which government and control of public schools of such district is vested by Sacramento Charter, §§ 53, 55, is school board of, and only official body authorized to allow claim against, such district.

2. False pretenses 🔑18—Board of education of chartered city is "city board" within statute defining felony of presenting fraudulent claim for allowance or payment.

Board of education of chartered city is "city board" within Pen. Code, § 72, declaring presentation of fraudulent claim to "city board" for allowance or payment a felony.

3. False pretenses 🔑37—Indictment for presenting fraudulent claim held not defective, in not alleging presentation for allowance or payment.

Indictment, alleging presentation of fraudulent claim and demand for payment of specified sum to city school board authorized to allow claims, *held* not defective in not alleging presentation for allowance or payment.

4. Criminal law 🔑590(2)—Refusal of request for continuance by counsel appointed for defendant falsely representing himself as without means held not unreasonable.

Refusal of request for continuance by counsel, appointed day before that set for trial, on vacation of order appointing other counsel for defendant on latter's representation that he was without means, *held* not unreasonable, in view of evidence of defendant's substantial means and his bad faith in requesting appointment of counsel.

5. Criminal law 🔑898—Refusal of continuance held cured by subsequent continuances.

Error, if any, in refusing request for continuance by counsel appointed for defendant day before trial, *held* cured by subsequent continuances allowing counsel time requested in which to prepare for trial of issues in real controversy.

6. Criminal law 🔑1170½(1)—Sustaining objection to question to impeaching witness as to statement substantially admitted by witness sought to be impeached held not prejudicial.

Sustaining objection to question asked for purpose of impeaching witness, from whom no direct answer to question put to him had been elicited, *held* not prejudicial error, where natural inference from his answer was that he had at least substantially made statement sought to be proved by impeaching witness.

7. False pretenses 🔑18—School board's determination of validity of claim and order for payment constitutes "allowance."

School board's determination of validity of claim against district and order for payment, as authorized by Pol. Code, §§ 1543, 1608, constitutes "allowance" within Pen. Code, § 72, declaring presentation of fraudulent claim for allowance to city board, authorized to allow it, if genuine, a felony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Allowance.]

8. Criminal law 🔑1173(2)—Refusal of instruction to find state's witnesses accomplices in case of reasonable doubt held not prejudicial.

Refusal of requested instruction to find that state's witnesses were accomplices, if jury entertained reasonable doubt, *held* not prejudicial to defendant, in view of such witnesses' uncontradicted testimony that they participated in offense charged.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Charles S. Ralph was convicted of fraudulently presenting bill or claim to public officer for allowance and payment, and appeals. Affirmed.

Mark L. Burns and R. Platnauer, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the "crime of fraudulently presenting a bill or claim to a public officer for allowance and payment, a felony, as charged in the indictment." This appeal is from the judgment of conviction and the order denying his motion for a new trial.

The indictment charges:

> That the defendant agreed to sell and deliver to the Sacramento city school district 30 tons of coal at the price of $12.30 a ton; that he delivered 25 tons and 256 pounds thereof and no more; that thereafter he "did willfully, unlawfully, knowingly and feloniously, and with the intent to defraud said Sacramento city school district, present and caused to be presented to the officers of said Sacramento city school district, to wit, to the school board of said school district, a certain false and fraudulent claim and demand for the payment to him, said defendant, of the sum of $369, the said claim or demand being for 30 full tons of said coal at the price of $12.30 per ton, which defendant falsely claimed he had delivered to said school district on said contract, which said claim and demand the officials of said school district were authorized then and there to pay and allow if said claim and demand were genuine, which said claim was by said officials of said Sacramento city school district

allowed in full and thereafter paid in due course to said defendant."

It is not claimed that the evidence is insufficient to show defendant's guilt. The defendant was in the wood and coal business. His salesman and office manager, A. S. Kennedy, testified that the defendant said "the coal was sold very cheap" and directed the witness to "short weight it"; that pursuant to such directions the witness instructed the man who made delivery of the coal, Barney Brooks, "to put on a few sacks of coal in sacks and use it as a tail board, when they backed up to the car; to throw the coal on and take the load over to the public scales and weigh the load and, on the way back, to drop off the loaded sacks, then make his delivery to the school, and when he made his delivery to the school, to come back and pick up the loaded sacks and use them as a tail gate"; and that the man "went ahead and followed instructions." The foreman of the grand jury which returned the indictment testified: That the defendant voluntarily stated before that body: "I don't want Kennedy to take all the blame * * * for the short delivery of this coal." That when asked if Kennedy had told him of his plan for the short delivery the defendant answered: "He had told me of it. * * * I didn't answer 'Yes' or 'No.'" That a grand juror asked him if he thought it was right to make the short delivery, and defendant replied: "As I look back over it now, I don't think it was." The foreman further testified in part as follows:

> "I remember myself of asking Mr. Ralph if these men who worked for him informed him of this shortage, why he did not make the delivery at that time, and his answer was that, 'I knew this thing was coming up, and I was waiting to see what was going to happen; I expected to make good when the matter was brought up.' But he had waited a month and a half and hadn't made good, and the matter was brought up; that is, he waited a month and a half after the coal was delivered before he presented his bill to the city for the coal.
>
> "Q. And did he state anything as to whether he knew of the short delivery before he presented the claim to the city? A. Well, the men had gone to him and told him about it, and he admitted that they did tell him about it. * * *
>
> "Q. He told you that the men had told him about the shortage * * * before the bill was presented? A. Yes, sir."

Several other members of the grand jury gave similar testimony. The defendant testified:

> That in the grand jury room "there were many questions asked, and sometimes they were asked two or three at a time, and * * * there was quite a bit of confusion, as would be amongst 15 or 16 people trying to interrogate one witness. Some of the questions I may have misunderstood; some of them I didn't."

He denied having directed Kennedy to give short weight in delivering the coal or of having any knowledge that short weights were given, and testified:

> That before the coal was delivered "Mr. Kennedy said: 'For the rotten way in which the school department has treated us in this deal, we should short weight it.' * * * I said: 'Kennedy are you crazy?' * * * That was all there was of it."

While there is other testimony favorable to defendant and tending to discredit some of that produced by the prosecution, a very strong case was made against him.

Section 72 of the Penal Code provides:

> "Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony."

[1] It is contended that the indictment does not state a public offense; that the allegation therein that the alleged fraudulent claim was presented to "the officers of said Sacramento city school district, to wit, to the school board of said school district" does not constitute an averment that such claim was presented to the city board of education, the only body authorized to allow the claim. Article 9 of the charter of Sacramento provides:

> "Sec. 53. The government of the Sacramento city school district and the Sacramento city high school district shall be vested in a board of education consisting of five members. * * *
>
> "Sec. 55. The board of education shall have the entire control and management of the public schools of the city in accordance with the Constitution and the general laws of the state." Stats. 1921, p. 1939.

The courts take judicial notice that the city board of education is the "school board" of Sacramento city school district, and the only official body authorized by law to allow a claim against the district. The term "school board" is in common use to designate either the board of school trustees or the city board of education, depending upon the character of the district, and no one could be in doubt as to the meaning of the term. The defendant did not demur to the indictment. To hold that the indictment does not state an offense would be to reverse the maxim that "the law respects form less than substance."

[2] It is urged that the board of education of a chartered city is not a city board. The contrary has been held. Stern v. City Council of Berkeley, 25 Cal. App. 685, 689, 145 Pac. 167.

[3] It is next urged that the indictment is defective in failing to allege that the fraudulent claim was presented "for allowance or payment." It is alleged that the defendant presented to the board the "fraudulent claim and demand for the payment to him * * *

of the sum of $369." For one to present to a board, authorized to allow claims, a claim and demand for payment of the same to him, is certainly to present the claim for allowance, the only way in which it could be paid to him.

[4, 5] Appellant contends that the court abused its discretion in refusing to grant him a reasonable time to prepare for trial. Two previous trials had resulted in disagreements of the juries. October 19, 1923, defendant's counsel withdrew from the case. November 13th was the day set for the third trial. On that day the defendant informed the court that he was without counsel and stated that he "was without means to employ counsel, and desired the court to appoint counsel to defend him." The court thereupon appointed Charles A. Bliss as counsel for defendant and continued the trial for two days. November 14th, at 11:55 o'clock a. m., the court vacated the order appointing Bliss and made an order appointing Mark L. Burns as counsel for defendant. November 15th Burns presented affidavits to the effect that the reporter's transcript of the testimony taken at the first trial consisted of 306 typewritten pages, and a portion of that at the second trial covered 194 pages, and that of the proceedings before the grand jury consisted of 69 pages, that he had no information as to any of the facts in the case prior to his appointment, and that it had been physically impossible for him to prepare for the trial within the time given him, and requested a continuance of five days. If nothing further appeared than the foregoing, it would appear that the action of the court in forcing the case to trial was clearly unreasonable. The district attorney, however, presented a writing dated August 9, 1923, addressed to the corporation commissioner of this state, and signed by defendant, in which appears the following: "My statement shows that I have fixed assets to the extent of $13,415.84." From this and other evidence of a similar character the court would have been justified in vacating the order appointing counsel for defendant, on the ground that his statement to the effect that he was without means to employ counsel was false, and that his request for the appointment of counsel to defend him was made in bad faith. It further appears that the selection of the jury was completed on the 16th of November. Evidence concerning which there seems to have been no controversy or dispute was introduced on that day, and the trial was then continued to November 19th, and on the latter day, without taking any testimony, the case was adjourned to November 21st. It thus appears that counsel for defendant had five clear days in which to prepare for the trial of issues in real controversy, the length of time he had originally requested. If it was error to refuse the requested continuance in the first instance the subsequent continuances cured the error.

[6] Kennedy testified on direct examination:

"I was called to appear before the grand jury, * * * and I wanted to get some legal advice * * * because I made up my mind what I intended to do, * * * so I went to Mr. Ralph's attorney, Mr. Bliss, and * * * I explained it, the case, to Mr. Bliss, that I * * * wanted to take the whole thing upon any own shoulders. * * * Took the whole blame myself, * * * in order to make Mr. Bliss understand * * * what I wanted to know from him, that, if I took the entire blame upon my own shoulders, and things went against me, what was the penalty. So, after Mr. Bliss heard my statement, story, in which I acknowledged everything, why then he told me what the penalty would be."

What the purpose of the prosecution was in introducing this testimony does not appear. It seems to have been wholly immaterial and inadmissible, but defendant made no objection thereto. On cross-examination by counsel for defendant the following occurred:

"Q. I will ask you if you made this statement to Mr. Bliss: 'That Mr. Ralph did not know anything about the shortage, and the whole thing was worked out and carried out by myself, and that Mr. Ralph had nothing to do with it?' A. I don't remember just what statement that I made to Mr. Bliss, but what I explained this morning was that * * * if I took this thing on my own shoulders, what would the penalty be. * * * I only had five minutes to talk with Mr. Bliss, and, in order to get this thing right, the only way I could get it in was to take the whole blame upon my own shoulders and ask Mr. Bliss what would the penalty be."

The inference to be drawn from the answer is that in the conversation referred to Kennedy stated that he alone committed the offense, and it would follow that the defendant "had nothing to do with it." Counsel for defendant then dropped the subject, as if satisfied, and did not insist upon a categorical answer to the question. He thereafter called Mr. Bliss as a witness for defendant, and asked him whether Kennedy had made the statement contained in the question. The court sustained the prosecution's objection to the question, apparently upon the ground that Kennedy had admitted making the statement. The question was permissible only for the purpose of impeaching the witness Kennedy, and counsel should have laid the foundation therefor by eliciting from such witness a direct answer to the question put to him. Had the witness testified that he did not remember whether he had made the statement to Bliss, the answer would have furnished a sufficient foundation for the impeaching question. Ehat v. Scheidt, 17 Cal. App. 430, 436, 120 Pac. 49. The natural inference from his answer, however, is that he had, in substance at least, made such statement. Since the purported statement was in direct conflict with Kennedy's testimony to the effect that the defendant directed him to commit the fraud, the court might well have overruled the objection to the impeaching question, but, in view of Kennedy's substantial admission that he had made the statement, it is thought that the defendant suffered no prejudice from the ruling made.

[7] At the oral argument the appellant contended that the city board of education is not authorized to allow claims of the character of that involved in this action. The board has authority "to manage and control school property" and "to purchase school furniture * * * and apparatus, and such other articles as may be necessary for the use of schools." Pol. Code, § 1608. It is also authorized to order the payment of claims against the district. If the county superintendent approves the claim, he indorses upon the order, "Examined and approved." The order is then presented to the county auditor, "who shall, in case he allows said demand, indorse upon it, 'Allowed.'" Pol. Code, § 1543. From the foregoing provisions it seems clear that the function of the school board in allowing claims against the district is similar to that of a board of supervisors in allowing claims against a county. Neither the county superintendent nor the auditor is ordinarily in a position to ascertain whether materials have been purchased and delivered to a school district or the quality or value thereof, and the Code provisions upon the subject do not contemplate that those officers shall make the investigation, but the duty of determining such facts has been imposed upon the school board. Such determination as to the validity of a claim, together with an order for the payment thereof, certainly constitutes an allowance of such claim, within the meaning of section 72 of the Penal Code.

[8] The defendant requested the court to instruct the jurors that it was material to determine whether the witnesses Kennedy and Brooks were accomplices, and that, if they entertained a reasonable doubt upon that question, they should find that such witnesses were accomplices. At defendant's request the court instructed the jury—

> "That all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are accomplices."

Kennedy testified that he instructed Brooks to remove a part of each load of coal after it was weighed and before the delivery thereof, and Brooks testified that he so removed 12 sacks of coal from each of 8 loads. Assuming that the jurors were of ordinary intelligence, they must have been satisfied beyond a reasonable doubt, from the testimony of Kennedy and Brooks, which was wholly uncontradicted as to their part in the fraud, that these witnesses were accomplices, under the foregoing definition given by the court, and therefore, the refusal of the proposed instruction was not prejudicial.

The other grounds urged for a reversal are so manifestly untenable as to merit no discussion.

The judgment and the order are affirmed.

We concur: WEYAND, Justice pro tem.; PLUMMER, J.

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67 Cal. App. 379

GREENE v. TOWN OF LAKEPORT.
(Civ. 2809.)

(District Court of Appeal, Third District, California. May 20, 1924.)

1. Appeal and error ⟹800—Motion to dismiss appeal for lack of certified copy of transcript denied, where appellant subsequently filed one.

Plaintiff's motion to dismiss defendant's appeal, on the ground defendant failed to file a properly certified transcript on appeal, will be denied, where, after permission granted at the hearing of the motion, defendant filed a duly certified copy of the transcript, in view of Supreme Court rule 15.

2. Appeal and error ⟹655(3)—On appeal on judgment roll alone, matter purporting to be statement of facts material to case stricken.

On appeal on judgment roll alone, matter set out by appellant under cover of printed transcript and purporting to be statement of facts material to case, is no part of record, and will be stricken therefrom.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by D. W. Greene against the Town of Lakeport, in which defendant appealed. On plaintiff's motion to dismiss appeal. Motion denied.

W. H. Hazell, of Lakeport, for appellant.

C. M. Crawford and H. G. Crawford, both of Lakeport, for respondent.

PER CURIAM. Respondent has moved to dismiss the appeal herein on the ground that no properly certified transcript on appeal has been filed.

[1, 2] The appeal is taken upon the judgment roll alone. The transcript is printed, and, as originally filed, contained what purported to be copies of the judgment roll and the notice of appeal, with the clerk's certificate attached thereto. Neither the clerk's signature nor seal appeared upon either certificate, but his name appeared in print at the end thereof. At the hearing of the motion appellant asked permission to file an authenticated copy of the transcript, and, permission being granted, it has filed a duly certi-

fied copy thereof. Under the same cover containing the printed transcript, appellant has set out what purports to be a statement of the facts material to the case. This statement is no part of the record on appeal, and it is ordered that the same be stricken therefrom.

Under the authority of rule XV of the Supreme Court, the motion to dismiss the appeal is denied. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214; Garroway v. Jennings, 189 Cal. 97, 207 Pac. 554.

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67 Cal. App. 279

HILL-TELLMAN v. MUSICIANS' UNION OF SAN FRANCISCO et al. (Civ. 4778.)

(District Court of Appeal, First District, Division 2, California. May 15, 1924. Hearing Denied by Supreme Court July 14, 1924.)

Certiorari ⚿14—Writ held improper remedy to review order of nongovernmental private association imposing fine on member.

Writ of certiorari *held* not proper remedy to review an order of a nongovernmental body such as an order of a voluntary unincorporated musicians' association, imposing a fine on a former member.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Petition by Mary J. E. Hill-Tellman for writ of certiorari to review an order of the Musicians' Union of San Francisco and others, imposing a fine on petitioner. From a judgment and orders in favor of defendants, petitioner appeals. Orders and judgment affirmed.

J. J. Dunne, of San Francisco, for appellant.

Sapiro, Levy, Hatfield & Hayes, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against her after a demurrer had been sustained to her petition for a writ of review, without leave to amend. Plaintiff sought to have a writ of review issue from the superior court of the state of California, in and for the city and county of San Francisco, directed to the defendants, Musicians' Union of San Francisco, an unincorporated volunteer association, and certain of its officers, for the purpose of inquiring into the action of defendants in imposing a fine upon plaintiff. She alleged that the fine was imposed after her resignation from the Musicians' Union, but does not seek reinstatement therein nor claim to be a member of such Union. She prayed that the judgment and penalty imposed upon her by said defendants be vacated and annulled. Defendant demurred and moved to quash the alternative writ issued at the time of the filing of the petition. The demurrer was sustained and the motion granted, and judgment for costs entered in favor of the defendants.

The action of the trial court was based upon the ground that writs of review issue only to governmental bodies and not to voluntary unincorporated associations such as the Musicians' Union. No authority is cited by the appellant to contradict this holding, and, as pointed out by the learned trial court, the cases relied upon deal with boards or officers acting as public agents and invested by law with judicial or quasi judicial authority in the administration of the business of the state or a political subdivision thereof. No case has been cited which authorizes a writ of certiorari when complaint is made of the action of a private association such as the organization involved here. We disagree with appellant that this fact is without significance in the absence of a direct holding in the state denying the writ under such circumstances. We think the absence of any instance in this state or elsewhere of the issuance of this writ against a nongovernmental body indicates that the writ is not the proper remedy in such situations. In the case of Whitehead v. Gray, 12 N. J. Law, 36, the Supreme Court of New Jersey denied the issuance of a writ to review the proceedings of private arbitrators, saying:

> "There is no precedent of such a certiorari, in this court, in the other states of the Union, or in the English reports, so far as I am able to learn, either from my own researches or from the brief of the plaintiff's counsel. Hence a very cogent and almost irresistible argument results against the present employment of this writ. So frequent here and elsewhere are arbitrations; so numerous are awards; so invariably is the losing party dissatisfied; so commonly are the very complaints made which are here urged; so usual is it for the unsuccessful litigant to suppose, and oftentimes most sincerely, that the arbitrators have done too little for him and too much against him; and the common modes of redress against awards are deemed so arduous and straitened, that we may presume, if not conclude, the omission to use the writ of certiorari is from the conviction of the profession, that it cannot lawfully be done. In The King v. Whitbread, Doug. 549, Lord Mansfield said: 'Though great industry has been employed, no case was produced, in which a certiorari has been granted to remove proceedings before the commissioners of excise. This circumstance alone affords strong ground to suspect that none is grantable.'"

In the case of Whitney v. Board, 14 Cal. 479, cited by appellant, it was said, with reference to the propriety of the issuance of a writ of review:

> "The only question is: Does the body whose acts are to be reviewed, exercise judicial func-

tions under the Constitution and laws of the state?"

In the case of Spring Valley Water Works v. Board of Supervisors, 52 Cal. 132, 137, the court said:

> "From the foregoing and other cases heretofore decided, it sufficiently appears that it has always been considered by this court that the office of certiorari is to bring here for review the proceedings of governmental boards exercising a mixed authority only when the matter is one in which they have acted judicially."

In the case of Imperial Valley Water Co. v. Supervisors, 162 Cal. 14, 120 Pac. 780, a writ was issued to review the acts of the board of supervisors in the organization of an irrigation district. It was there said:

> "Although such boards do not have the character of an ordinary court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them. In Robinson v. Board, 16 Cal. 208, the court says: 'It is sufficient if they are invested by the Legislature with power to decide on the property or rights of the citizens. In making their decision they act judicially whatever may be their public character.' * * * It is sufficient to come within the purview of the writ if such proceedings are of a judicial nature and are exercised by a quasi judicial body."

It appearing from the foregoing authorities that the plaintiff has mistaken her remedy, it becomes unnecessary for us to consider the further question discussed by the parties with reference to the adequacy of plaintiff's remedy at law.

The judgment and orders appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

67 Cal. App. 358

OLIVER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 4832.)

(District Court of Appeal, First District, Division 1, California. May 19, 1924.)

1. Appeal and error ⚿82(2)—Mandamus ⚿4(4)—Order denying motion to amend entry of judgment nunc pro tunc held appealable; remedy by appeal held adequate.

An order denying a motion to amend an entry of judgment nunc pro tunc is an appealable order, as being one made after final judgment, under Code Civ. Proc. § 963, subd. 2, and generally the appeal affords an ample remedy.

2. Mandamus ⚿154(2)—Petition pleading conclusion that remedy by appeal was inadequate held insufficient.

Mandamus to compel amendment of entry of judgment nunc pro tunc would not lie where petition therefor contained no allegation to indicate that appeal did not afford a full, speedy, and adequate remedy, except the bare recital of that fact, which was but a mere conclusion of the pleader.

Petition by A. J. Oliver, as trustee in bankruptcy of the estate of the Commercial Brass Foundry, a partnership, for writ of mandate to be directed to the Superior Court in and for the City and County of San Francisco and another. Writ denied and proceeding dismissed.

See, also, 223 Pac. 558.

McKannay & Hunt, of San Francisco, for petitioner.

Leon A. Blum and David K. Watkins, both of San Francisco, for respondents.

TYLER, P. J. Petition for writ of mandate to be directed to the superior court of the city and county of San Francisco for the insertion of certain names nunc pro tunc as of November 13, 1922, the date of the entry of a certain judgment, so as to conform to the facts.

The action in which the judgment was rendered was one in which petitioner, acting as trustee in bankruptcy in the estate of Commercial Brass Foundry, a proceeding pending in the United States District Court, brought an action on August 12, 1921, as such trustee, in the superior court of the city and county of San Francisco, against Staples & Pfeiffer, a partnership, to recover the sum of $689.49, alleged to have been received by defendant as a preference, voidable under the provisions of section 60a and 60b of the National Bankruptcy Act (U. S. Comp. St. § 9643) and the amendments thereto. The caption used in the complaint was, "Staples & Pfeiffer, a partnership composed of Earl I. Staples and L. A. Pfeiffer, defendants." In the complaint it is alleged in paragraph 2 thereof that at and during all of the dates and times hereafter mentioned the defendant Staples & Pfeiffer was and now is a partnership composed of the defendants Earl I. Staples and L. A. Pfeiffer, and engaged in business in said city and county. The prayer of the complaint is for judgment against the "defendants." Thereafter on the 8th day of September, 1921, defendants filed a demurrer in said action without specifying any defendant or defendants by name or otherwise identifying any particular defendant or defendants. Throughout subsequent pleadings and orders defendant was designated by both parties as "defendants" generally, although the caption of the pleadings and orders remained the same. In the amended complaint the description of the defendant is, "Staples & Pfeiffer, composed of Earl I. Staples and L. A. Pfeiffer, defendants". The prayer is as follows: "Wherefore plaintiff prays for judgment against defendants."

The action was tried before said superior court, department 7 thereof, Hon. E. P. Mogan sitting as judge; and thereafter and on the 13th day of November, 1922, the said judge signed and filed his findings of fact and conclusions of law. Paragraph 2 of said findings of fact reads as follows:

> "At and during all the dates and times herein mentioned the defendant Staples & Pfeiffer was and now is a partnership composed of the defendants Earl I. Staples and L. A. Pfeiffer, and engaged in business at the said city and county."

In the findings of fact the reference is always to "defendants." The conclusions of law are that the plaintiff is entitled to a judgment against the "defendants."

Thereafter and on the 13th day of November, 1922, judgment was entered in the action. The judgment does not specify the names of the persons against whom the judgment was rendered. The caption is as follows:

> "A. J. Oliver, as trustee in bankruptcy of Commercial Brass Foundry, a partnership, plaintiff, v. Staples & Pfeiffer, a partnership composed of Earl I. Staples, and L. A. Pfeiffer, defendants."

The body of the judgment recites:

> "The above-entitled action came on regularly for trial * * * the answer thereto of the above-named defendants * * * appearing as counsel for defendants. * * * It is hereby ordered that the plaintiff have and recover from the defendants the sum of $538.49 and costs of this action taxed at $48."

Thereafter on the 24th of November, 1922, defendant in said action filed its notice of motion to retax costs, which recites: "Please take notice that the defendants, * * *" and is signed by the attorneys as "attorneys for defendants."

In the notice to the clerk to prepare a transcript the defendant is referred to as "defendants," and the notice of appeal describes it as being "defendants" as does also the notice of justification of sureties.

Thereafter on the 14th day of September, 1923, the plaintiff in said action filed in said superior court his notice of motion to amend the said judgment nunc pro tunc by inserting therein the names of the defendants, namely, "Staples & Pfeiffer, a partnership, and Earl I. Staples and L. A. Pfeiffer, as individuals, as the persons against whom the judgment was rendered, so that the judgment entered shall conform to the judgment actually rendered by the court," and in said notice of motion stated that the same would be made upon the grounds that the judgment as entered was a clerical misprision and failed to name specifically the defendants against whom it was rendered, it being claimed that the record showed who the defendants were and against whom the judgment was actually rendered by the court. The said motion came on for hearing before the said superior court on October 5, 1923. The defendant in said action through its counsel appeared in opposition to said motion. The said motion was heard and submitted, and thereafter on the 16th day of October, 1923, the said superior court made an order denying the motion, and thereafter this proceeding was instituted.

Respondents demurred and answered to the petition, and they claim that it does not state a cause for the issuance of a writ of mandate for various reasons.

[1] It is first contended that the petition shows upon its face that respondent superior court duly acted on said motion, and in the exercise of its discretion, regularly made an order denying said motion; that said order denying said motion is an appealable order, and such appeal will afford a plain, speedy, adequate, and complete remedy, assuming that respondent was in error in denying said motion; that it does not appear from the petition that petitioner has not a plain, speedy, adequate, or complete remedy in the ordinary course of law to obtain the relief he seeks. It is further urged that the petition shows on its face that the judgment entered in said action corresponds with and conforms to and expresses the judgment actually rendered and declared by the court in said action, and that accordingly there was no clerical misprision in its entry.

In support of the latter contention it is pointed out that amendments to judgments can only be made for the purpose of having the record conform to the truth, and not for the purpose of reviewing or changing the judgment (citing Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Smith v. Ross, 57 Cal. App. 191, 207 Pac. 55), and where, as here, a judgment is entered in the exact form in which it is rendered, there is no room for a correction nunc pro tunc (Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775), but that the remedy for relief is by proceedings under section 632 et seq. of the Code of Civil Procedure. Accordingly, it is claimed that as the petition shows that the party defendant was sued as a partnership entity, the mere use of the word "defendants" in the subsequent pleadings and other documents by both parties did not have the effect of making the partners defendants as individuals, and petitioner is not therefore entitled to the amendment (citing Bollman Co. v. Bachman Co., 16 Cal. App. 589, 117 Pac. 690, 122 Pac. 835).

Whatever merit there may be in this contention we do not deem a discussion or decision upon the question necessary as we are of the opinion that the right to have the amendment made in this proceeding cannot be maintained. An order denying a motion to amend an entry of judgment nunc pro tunc is an appealable order as being one made after final judgment. Section 963, subd. 2, Code Civ. Proc. As a general rule the appeal affords an ample remedy.

[2] The petition herein contains no allegations to indicate that an appeal does not afford a full, speedy and adequate remedy, except the bare recital of this fact, which is but a mere conclusion of the pleader. Under such circumstances mandamus will not lie (Turney v. Morrissey, 22 Cal. App. 271, 134 Pac. 335; Foster v. Traeger, 56 Cal. App. 339, 204 Pac. 1089; Montgomery v. Neilon, 41 Cal. App. 184, 182 Pac. 456).

We are cited to case of Boust v. Superior Ct., 162 Cal. 343, 122 Pac. 956, and other cases as opposing this view. A discussion of these authorities would answer no useful purpose. Suffice it to say that there may be cases depending upon their facts where appellate courts will require by mandamus the correction of a judgment in furtherance of justice so that it may conform to the truth, and that this remedy will be granted either before or after an appeal, provided, of course, that the amendment does not affect the substantial rights of the parties. The instant case, however, presents no such facts, nor does it indicate that any useful purpose will be accomplished by the issuance of the writ that cannot otherwise be obtained. It is manifest from the allegations of the petition that the proceeding is instituted for the purpose of meeting anticipated questions presented by defendant upon its appeal from the judgment which is here pending.

This being so the writ will not issue (Holland v. Superior Court, 169 Cal. 361, 146 Pac. 878; Napa Union High School v. Board of Supervisors, 54 Cal. App. 326, 201 Pac. 948). It is therefore denied and the proceeding dismissed.

We concur: KNIGHT, J.; ST. SURE, J.

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66 Cal. App. 615

HALL v. FAIRCHILD-GILMORE-WILTON CO. (Civ. 4061.)

(District Court of Appeal, Second District, Division 2, California. April 18, 1924.)

1. Eminent domain 🔑47(6)—City or Legislature cannot take for other purposes land dedicated for park purposes.

Where land is once dedicated for park purposes a city, or even the Legislature, cannot take it for other purposes.

2. Municipal corporations 🔑426—Assessment of park for improvement of street unauthorized.

A city cannot devote property purchased for a park to improvement of a public street, and the assessment of such property for street improvement would be invalid.

3. Dedication 🔑19(2), 37—Offer to dedicate may be made by platting and permitting public use; user by public is valid acceptance.

If the owner of land has it surveyed and platted with the intended public use clearly indicated, allowing the public to so treat it, the offer to dedicate is sufficient, and no formal acceptance is necessary, and use of the land by the public is sufficient to show acceptance.

4. Dedication 🔑64—Board of park commissioners held to have no power to turn land dedicated to park purposes into streets.

Where a board of city park commissioners had management of parks with power to lay out, regulate, and improve them, its authority was that of a trustee, and it did not have authority to permit land dedicated to park purposes to be turned into streets.

5. Dedication 🔑35(1)—City held to have jurisdiction to treat streets as public highways and to improve them.

Where streets were named and shown on a map for many years, and reference was made to the map in an assessment for improvements and in diagrams and bonds issued pursuant thereto, they had become dedicated and accepted as public highways so as to give a city jurisdiction to treat them as such and to improve them.

6. Constitutional law 🔑290(3)—Municipal corporations 🔑293(1)—Notice of contemplated street improvement held sufficient.

Where city council adopted grade ordinance for street improvement before passing resolution of intention, but the grade was established when first resolution of intention was first published, and before posting notice, property owners had sufficient notice; technical failure to follow statutory procedure not being denial of due process.

7. Municipal corporations 🔑515(1)—Defects in improvement proceedings remedied by curative acts.

Defects in proceedings for street improvements and assessments therefor resulting from failure to strictly pursue statutory procedure *held* remedied by curative acts.

8. Constitutional law 🔑193—Curative statutes within legislative power to cure defects in proceedings.

A curative statute is within the legislative power to cure defects in proceedings, if the things omitted to be done or irregularly done might have been dispensed with or made immaterial by prior law.

9. Municipal corporations 🔑410(1)—Improvement of street illegally taken from park not a benefit to abutting lots.

Where taking strip of land from a park for street purposes was illegal, none of the work performed or expense incurred on that part of the improvement was a benefit to any of the lots abutting thereon.

10. Municipal corporations 🔑514(2) —Reassessment required.

Under St. 1921, p. 563, as amended by St. 1923, p. 110, providing for a reassessment whenever an assessment is or shall be void or unenforceable for any cause, where an assessment made in 1920 for improving park land was invalid, a reassessment under the 1923 statute should be made.

11. Statutes 🔑268—Curative acts necessarily retroactive.

The rule that a statute should not be construed to operate retroactively, unless the legislative intent be clear that it should so operate, has no application to curative acts, which are necessarily retroactive.

12. Municipal corporations 🔑514(4)—Statute authorizing reassessment held valid.

St. 1921, p. 563, as amended by St. 1923, p. 110, providing for reassessment wherever assessment for public improvement "heretofore issued or which may be hereafter issued" shall be void or unenforceable, and not made effective by curative provisions of act, *held* valid as against objection that it is retroactive.

13. Municipal corporations 🔑515(1)—Legislature cannot legalize void assessment.

A Legislature cannot legalize a street assessment, void for failure to comply with the state or federal Constitution.

14. Municipal corporations 🔑518(2)—Interest on reassessment properly computed.

Where assessments were made for street improvements on land dedicated for park purposes, and later held void, on reassessment under St. 1923, p. 110, interest should be computed from date of the recording of the original assessment, in view of the fact that the original act provided for interest upon unpaid assessments, and that interest was running when the act was amended.

15. Municipal corporations 🔑518(2)—Provision for interest on assessment authorized.

Legislature had power to require the interest on assessment for street work to be paid from the date when the original assessment was recorded.

16. Appeal and error 🔑1203(1)—Proceedings subsequent to reversal upon appeal conform to pertinent amendatory legislation.

In action to quiet title against a lien resulting from assessment for street improvements, where an amendment of a statute relating to such assessments was in effect when the trial court's judgment was reversed and a reassessment ordered, proceedings subsequent to reversal upon appeal must conform to the amended legislation, and a reassessment necessary will be made under the provisions of the amendment.

17. Statutes 🔑230—Mode of procedure and right to remedies of pre-existing statutes cease on amendment, unless expressly reserved.

Where an amendment became effective, the mode of procedure and any rights to remedies of pre-existing statutes ceased, unless such mode or right was expressly reserved by amendment or had been perfected by steps taken under the former act.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Suit by M. Hall against the Fairchild-Gilmore-Wilton Company. From judgment for defendant, plaintiff appeals. Reversed.

Herbert C. Kelly and Laurence H. Smith, both of San Diego, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

CRAIG, J. After an opinion rendered by this court on appeal of the instant proceeding, a rehearing was granted by the Supreme Court, which entered an order directing that the matter be retransferred here for such action as this court might deem proper, in view of the amendment of section 12¼ of the Vrooman Act, passed in 1923 (St. 1923, p. 110). In other respects, the opinion formerly written by this court must be regarded as having met with the approval of the Supreme Court. We shall therefore follow that opinion, except for giving consideration to the point presented for the first time upon application for hearing before the Supreme Court, and which merely requires that we determine whether or not the act as it stood in 1921 (St. 1921, p. 563) or the amendment of section 12¼ of 1923, shall prevail in making the reassessment contemplated by our former opinion.

The action is one to quiet title to a number of lots in the city of San Diego.

In the defendant's answer it asserts the ownership of a lien thereon arising as the result of an assessment for the improvement of certain streets under the Vrooman Act. The trial court held that the lien was void because of the facts found, but concluded that the curative clause in the bond act remedied the defects in the proceedings as to the property against which bonds had been issued. A decree was entered accordingly, quieting plaintiff's title as to lots which had been assessed for less than $25, but holding that defendant was the owner of a valid lien in each instance where a bond had been issued. The plaintiff moved to set aside this latter part of the judgment, and to amend the conclusions of law pursuant to sections 663 and 663a of the Code of Civil Procedure, which motion was denied. Plaintiff thereupon appealed from so much of the judgment as declared the street bonds valid as above stated, and from the order denying the motion to modify the judgment.

The findings of the trial court detail the various steps which were taken in the assessment proceeding. It was found that the street improvement work in question was ordered to be done by the legislative body of the city of San Diego, and generally that the proceeding was conducted under the Vrooman Act.

"That portions of the ground for the improvement of which said resolution of intention No.

24453 made provision were at all times prior to November 27, 1918, part of that certain public square known as Washington Square, and shown and designated as such on said Pascoe map; that there has been no dedication, opening, or setting apart for street purposes of said portion of Washington Square, except by virtue of that certain ordinance passed by the legislative body of said city, November 20, 1918, approved by the mayor of said city November 27, 1918."

Here follows a copy of ordinance No. 7563 of the city of San Diego, where it is recited that the board of park commissioners of said city had requested and authorized the opening, naming, and dedicating of certain public ways along and over that certain public square in Old Town in the city of San Diego, named and dedicated Washington Square. That it was for the public interest and convenience that such portions of said Washington Square should be used by the public, and for public ways and thoroughfares. It was then ordained:

> "That a strip of land (describing strips lying along each side of said square, and including) 90 feet in width off of and along the southwesterly side of said Washington Square, be, and the same is hereby, dedicated and set aside as and for a public way and thoroughfare, and the same shall be known as and is hereby named San Diego Avenue."

The court also found:

> "That the portion of said Washington Square designated by said ordinance No. 7563 as public streets constitutes more than 60 per cent. of the total area of said public square. That the portion of said Washington Square declared by said ordinance No. 7563 to be a portion of San Diego avenue was included by said resolution of intention No. 24453, as a portion of San Diego avenue, to be improved, without describing it other than as San Diego avenue, and without any reference to Washington Square."

In addition to these findings relied upon by appellant is another as follows:

> "That no resolution has ever been passed or adopted by the legislative body of said city, accepting, naming, or defining the boundaries of said Taylor street, or the portions of said San Diego avenue (excepting said ordinance No. 7563), directed to be improved by said resolution of intention; but said streets are shown upon said Pascoe map of Old San Diego, but no definite or certain boundary line is shown upon said map for a portion of said San Diego avenue, which portion of said avenue was included by said resolution of intention No. 24453 among those to be improved thereunder."

The charter of the city of San Diego which was in force at the time the rights of the parties to this proceeding accrued and subsequent thereto contained the following provisions:

> "All parks, places and squares now open and dedicated to the public use, or which may hereafter be opened or dedicated to the public use, shall be under the exclusive control and management of the said board of park commissioners, with power to lay out, regulate and improve the same."

Appellant attacks the proceeding upon numerous grounds, but on account of the views hereinafter expressed a single fundamental proposition involved renders it necessary to reverse the judgment and order from which appeal is taken.

If for any reason the proceeding was invalid as to the taking of a portion of Washington Square for street purposes, and if this invalidity was of such character that it cannot be remedied by the curative clause of the act of 1917, then the entire assessment was void, and the appellant must prevail. City of Moline v. Greene, 252 Ill. 475, 96 N. E. 911, 37 L. R. A. (N. S.) 104; City of Chicago v. Hill, 251 Ill. 502, 96 N. E. 223:

> "The 17-foot 'parkway' here in question is as much a part of the improvement as any other part of the land to be taken. The striking from the ordinance and petition of the description of this 17-foot 'parkway' would make the improvement remaining in the ordinance another and different improvement from that originally provided for therein."

[1] We think it is clear that the city council of San Diego was utterly without jurisdiction to take over 60 per cent. of Washington Square, a public park, and make of it a highway, thus entirely withdrawing that portion of it from the purposes of its original dedication. Numerous authorities sustain the proposition that when land is once dedicated for park purposes it is beyond the authority of a city, or even the Legislature, to withdraw it therefrom.

[2] The city council could not devote property purchased for a park to the improvement of a public street, and the assessment of such property for street improvements would be invalid. Powell v. Walla Walla, 64 Wash. 532, 117 Pac. 389.

Warren v. Lyons City, 22 Iowa, 351, is in point. There the state Legislature enacted a statute "to enable incorporated towns and cities to acquire, hold, improve and dispose of land for public squares, parks, commons and cemeteries," and provided that—

> "Incorporated towns and cities within or without whose limits lands have been or may be dedicated to the public for the uses mentioned in the preceding section of this act, shall have the entire control of the same, and shall have power in case such lands are deemed insufficient or unsuitable for the purpose for which they originally or may hereafter be granted, to dispose of and convey the same; and conveyances executed in accordance with this act shall be held to extinguish all rights and claims of any such town or city to such land, existing prior to such conveyance."

An ordinance of Lyons City, adopted in pursuance of such statute, was under consideration by the Supreme Court, which held:

> "It must be, that if the right vested in the city for a particular purpose, the Legislature cannot vest it for another; that, when the dedicator declared his purpose by the plat, the land cannot be sold or used for another and different one; that while the corporation took the premises as trustee, it took them with the obligations attached as well as the rights conferred; that while the Legislature might give the control and management of these squares and parks to the several municipal corporations, it cannot authorize their sale and use for a purpose foreign to the object of the grant. Without quoting, we cite the following cases: Trustees of Watertown v. Cowen, 4 Paige, 510, 2 Stra. 1004; Commonwealth v. Alberger, 1 Whart. 469; Pomeroy v. Mills, 3 Vt. 279; Abbott v. Same, 3 Vt. 521; Adams v. S. & W. R. R. Co., 11 Barb. 414; Fletcher v. Peck, 6 Cranch, 87; Godfrey v. City of Alton, 12 Ill. 29; Sedgwick's Constitutional and Statute Law, 343, 344; Haight v. City of Keokuk, 4 Iowa, 199; Grant v. City of Davenport, 18 Iowa, 179; Le Clercq v. Trustees of Gallipolis, 7 Ohio, 217; Common Council of Indianapolis v. Cross, 7 Ind. 9; Rowan's Ex'r v. Portland, 8 B. Mon. 232; Augusta v. Perkins, 3 Id. 437."

See, also, Douglass v. Montgomery, 118 Ala. 599, 24 South. 745, 43 L. R. A. 376; Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849, 61 Am. St. Rep. 185; Hopkinsville v. Jarrett, 156 Ky. 777, 162 S. W. 85, 50 L. R. A. (N. S.) 465, and note; Codman v. Crocker, 203 Mass. 146, 89 N. E. 177, 25 L. R. A. (N. S.) 980; Rowzee v. Pierce, 75 Miss. 846, 23 South. 307, 40 L. R. A. 402, 65 Am. St. Rep. 625; Hoboken M. E. Church v. Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696; Church v. Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; Sturmer v. Randolph County Court, 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

We are not unmindful of the rule that, if the area of a park is used for buildings or activities of any character incidental to its enjoyment as a park, such use will be upheld by law, but we know of no authority which has held that the taking of any portion of the space of a park and devoting it to strictly highway purposes can be regarded as consistent with the original dedication. On the contrary, the following cases hold that such action is inconsistent with the use of land for park purposes, and is therefore void: Mulvey v. Wangenheim, 23 Cal. App. 268, 137 Pac. 1106; City of Moline v. Greene, 252 Ill. 475, 96 N. E. 911, 37 L. R. A. (N. S.) 104; Price v. Thompson, 48 Mo. 361; Henderson v. Morrison, 18 U. C. C. P. 221. As was well said in City of Moline v. Greene, supra:

> "The case must be controlled by legal principles and not by considering the practical effect of allowing the taking of the land in this particular case. If it is held appellant has authority to take part of the property, it would necessarily require holding that all of the property could be taken by virtue of the same authority, if that were sought to be done."

See, also, Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164, Spires v. City of Los Angeles, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465. In the instant case the findings indicate that more then 60 per cent. of the area of Washington Park is included by the ordinances in question for proposed street purposes.

It has been said by text-writers, and held by the courts of last resort, that a distinction is to be made between cases where a public square is dedicated without restriction and cases where the dedication is restricted to a particular purpose; that in the former case any reasonable public use may be made of the park, but that in the latter it must be devoted to the particular purpose indicated by the dedicator.

[3] As to what constitutes dedication: It is well settled that, if an owner of land has it surveyed and platted with the intended public use clearly indicated, allowing the public to so treat it, the offer to dedicate is sufficient (Los Angeles Cemetery Ass'n v. City of Los Angeles, 3 Cal. Unrep. 783, 32 Pac. 240; City of Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914, 23 L. R. A. [N. S.] 378; San Francisco v. Burr, 4 Cal. Unrep. 634, 36 Pac. 771); and that no formal acceptance is necessary to complete the dedication of the property represented (San Leandro v. Le Breton, 72 Cal. 170, 175, 13 Pac. 405); but use of the land by the public for the purposes to which it was so dedicated is sufficient to show an acceptance (People v. Davidson, 79 Cal. 166, 21 Pac. 538; People v. O'Keefe, 79 Cal. 171, 21 Pac. 539; Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591).

Under these and many other authorities which it is unnecessary to accumulate, the uses to which Washington Square has so long been devoted would seem to establish its character as a pleasure ground, beyond question, as the purpose for which it was dedicated; and this would be so under any form of dedication, and leaving out of consideration the fact that the park had been officially and formally dedicated.

In Spires v. City of Los Angeles, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465, the trial court found that the land there in question had been set apart and dedicated by the city authorities of Los Angeles for the use of the public as a public park, that for many years it had been maintained and used by the people of the city exclusively as a park. An injunction was granted by the superior court restraining the construction of a library thereon, and in reversing the judgment and order the Supreme Court unanimously held:

"The corporation is in the position of a trustee, and the question is whether in building a museum and library it is improperly executing a trust. The primary object of the trust is to provide a place of enjoyment and recreation; nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation, in a reasonable exercise of their discretion, consider conducive to it. * * * It appears from the evidence set forth in the bill of exceptions accompanying this appeal that it is the purpose of the city to provide rooms therein as a meeting place for the board of library directors of such city, and that application has been made to such board of directors to provide rooms therein for the board of education. As far as the board of directors is concerned, this would seem permissible on account of their control of the library. But as to the board of education this cannot be done. The library building can be used for strictly library purposes only, and cannot be devoted to the establishment of municipal offices therein or used for municipal administration purposes other than as indicated relative to the board of library directors.

"If any part of such building could be used for one administration purpose, it might gradually be devoted to another. If one municipal board or municipal officer of the city having no direct relation to the library can be located therein, so may another, and so the building which the city has a right to erect as a library building solely in aid of the public enjoyment of the park may be gradually invaded for administration purposes and ultimately devoted to those purposes."

It is too obvious for argument that, if the council was totally without jurisdiction to thus change the character of Washington Square, the curative act to which reference is made can have no application. It does not purport to apply to such instances. If the ordinance of the city council, purporting to dedicate as streets portions of the park formerly dedicated to park purposes only, was void, the spaces sought to be used for street purposes are still parts of Washington Square.

[4] It may be said that the board of park commissioners is intrusted by the city charter with the "management and control" of the park property, and that it appears from the findings that this board requested the city council to adopt the ordinance. However, this charter provision confers no authority upon the board of park commissioners to destroy the subject of its trust, or to devote it to uses other than that of enjoyment and recreation. Its authority is merely that of a trustee, invested with limited jurisdiction, having imposed upon it the duty to protect parks within its management and control, which should at the same time compel such board to protest, rather than instigate, usurpation of authority over parks of the city by another body, or pass its trust property, into the street department. In M. E. Church v. Mayor, etc., 33 N. J. Law, 13, 97 Am. Dec. 696, 700, it was said:

"The power of the local corporate authorities is vested in them only as the representatives of the public, and for the protection and regulation of the public use. They cannot sell the lands so dedicated, nor release or extinguish the uses for which they were dedicated, nor employ them in any way variant from the purposes for which they were designed. But within the limits of the purposes and uses for which the dedication is made to regulate the use, the authority of the local corporate authorities is unlimited, against which no mere private right can be set up. Commonwealth v. Alburger, 1 Whart. 469, 485; Ring v. Shoneberger, 2 Watts, 23, 25, 26 Am. Dec. 95; Commonwealth v. Borman, 3 Pa. St. 203; Commonwealth v. Bush, 14 Pa. St. 186; Langley v. Gallipolis, 2 Ohio St. 107; Washburn on Easements, 155, 156; 2 Smith's Lead. Cas. 232, 241, 242; Still v. Trustees of Lansingburg, 16 Barb. 107; Alves v. Town of Henderson, 16 B. Mon. 169."

The powers of the board of park commissioners of San Diego extend only to the "exclusive control and management" of parks, places, and squares, "with power to lay out, regulate and improve the same," and this express authority could by no stretching of the rules of construction be held to include a complete annihilation of the trust property with the regulation and improvement of which they are charged.

We now proceed to a consideration of appellant's points numbered in his brief 2 to 7 inclusive, a ruling upon which is rendered necessary because a defect in the proceeding of such a nature as to deprive the property owner of his property rights without due process of law would so nullify the assessment as to place it beyond the power of the curative provision of the statute to validate and thus permit a reassessment to be made.

[5] It is insisted that the streets ordered improved had not been officially accepted or named at the time of the passage of the resolution of intention. As has already been pointed out, a technical formal offer and acceptance is not requisite to dedication of a public street. The findings of the trial court show that these streets were named and shown on the Pascoe map of old San Diego, filed in the San Diego city engineer's office, long before and at the time of the institution of the proceedings in question, and on the map of Middleton, filed in the San Diego county clerk's office in 1874, reference to which maps was made in the assessment and diagram, and in the bonds issued pursuant thereto. We think that these circumstances, in addition to the fact that the streets apparently existed regardless of the names applied to them, were sufficient to warrant the conclusion that they had become dedicated and accepted as public highways so as to give the city jurisdiction to treat them as such and improve them.

[6, 7] The remaining defects in the improvement proceedings assigned in appellant's points numbered 3 to 7 inclusive, re-

volve around the fact that the grades had not been officially established at the time of adopting the resolution of intention, and it is argued that, since the resolution did not in this respect describe the work contemplated, the property owners affected did not receive the statutory notice, and were deprived of the guaranties afforded by "due process." The city council adopted the grade ordinance on April 14th thereafter, on April 21st it passed the resolution of intention; on April 24th the mayor approved the grade ordinance; and the work was ordered in June. No case cited by appellant requires more than a substantial compliance with the constitutional due-process provisions. A failure to follow technically the procedure outlined by the statute in each detail is not fatal to the proceeding, if steps calculated to protect the property owners against deprivation of their property without due process have been taken. The purpose of the resolution of intention is to initiate the proceeding and be the basis of notice to the property owners of the improvements about to be made. Such notice results, not from the mere passage of the resolution of intention, but from the publication and posting of it. It appears that at the time of the first publication and before posting of the notice an official grade had been legally fixed. The grade ordinance had passed a reading before the resolution of intention was introduced; it was passed and became effective before the work was ordered. Under these circumstances no substantial right of the property owner was violated. Those interested were given ample information concerning the general character of the improvement, and the particular kind of improvement, which is the purpose for which a resolution of intention is contemplated by statute. Chase v. Trout, 146 Cal. 350, 80 Pac. 81. For the purposes of this appeal it is not necessary that we pass upon the issue argued at considerable length in the briefs as to whether or not the establishment of grades is sufficient to comply with the statute if the grade ordinance be introduced before the passage of the resolution of intention and be passed and become effective before the work is ordered. While this is the situation presented in the case at bar, we need only hold, as we do, that under such circumstances the procedure has not been so defective as to be without "due process." Upon this assumption we have no difficulty in agreeing with the trial court that the curative clause in the act remedied such defects in the proceeding as are claimed by appellant to exist as a result of the fact that the grades had not been officially established when the resolution of intention was adopted.

Fair v. Buss, 117 Iowa, 164, 90 N. W. 527, involved public highways constructed by a board of supervisors without giving any notice to resident landowners as required by the statute. The plaintiff there questioned both the constitutionality of a curative act and the legality of a notice published pursuant thereto. The Supreme Court of Iowa said:

> "It is conceded that the Legislature may legalize any act which it might lawfully have made the law in the first instance, but it is said that it could not provide for such a notice to nonresidents as was published in this case, and that it cannot legalize a void act. That it may legalize a void act has been repeatedly held by this court. Richman v. Supervisors, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308; Tuttle v. Polk, 84 Iowa, 12, 50 N. W. 38; City of Clinton v. Walliker, 98 Iowa, 655, 68 N. W. 431. It may be conceded that some notice in cases of this kind is required under the Constitution, even if not provided for by statute, but it is the general holding that the notice is sufficient if it describes the location of the road and indicates the nature of the proceedings and states the time when and place where the interested persons must appear to protect their rights, even if the owner's name is not given in the notice. 2 Lewis, Em. Dom. (2d Ed.) § 367, and cases cited in note 27; McIntire v. Mamie, 93 Ind. 193; Gravel Road Co. v. State, 105 Ind. 37, 4 N. E. 316. And see Wilson v. Hathaway, 42 Iowa, 173. If this is true, it follows that just such a notice as was given might have originally been prescribed by the Legislature, and that the legalizing act in question is valid so far as this question is concerned, and the owner of the land cannot complain that his property has been taken without due process of law."

[8] There is no contention in the case now before us that the grade was not subsequently established and the streets completed. The curative act of 1921 requires a reassessment in all cases where the original assessment was void or unenforceable because of irregularities or illegalities in the proceedings, and "the true intent and meaning of this section is to make the cost and expense of work or improvement made through an attempted compliance with this act, payable by the real estate benefited by such work or improvement by making a reassessment therefor." Manifestly in the enactment of the Vrooman Act the Legislature had authority to permit the fixing of a grade after adoption of the resolution of intention, and it therefore follows that it may by subsequent legislation legalize a procedure which it had the power to originally direct. Appellant quotes extensively from the opinion of the Supreme Court in denying a rehearing in Beck v. Ransome-Crummey Co., 42 Cal. App. 674, 184 Pac. 431. In that case it was held that uniformity in the administration of justice is a substantial right, and that failure to furnish the information required by statute in a resolution of intention, or in the summons in an action at law, affords no notice, and consequently confers no jurisdiction. It is there said:

"The requirement of the statute is as positive in regard to the reference to the map as that of section 407 of the Code of Civil Procedure that the summons must contain a notice that unless the defendant appears the plaintiff will take judgment or apply to the court for other relief demanded in the complaint. These requirements are mandatory and jurisdictional in the one case as in the other."

Quotation from the opinion in that case effectively answers appellant's argument, for, while it affirms the authority of the Legislature to prescribe a formal mode of procedure, it does not purport to hold that such jurisdictional steps would be necessary had the Legislature otherwise provided; and the inevitable conclusion therefore is that the Legislature may lawfully ordain retrospectively that other or more or less information shall appear in a resolution of intention.

Judge Cooley, in his work on Constitutional Limitations, at page 457, states concisely the rule on this subject, thus: 'If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is some thing the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statutes; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.'" Gordon v. San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73.

See, also, to the same effect, 17 Corpus Juris, at page 402; Thomson v. Lee County, 3 Wall. 327, 331, 18 L. Ed. 177, 178; Madison v. Commissioners, 34 Me. 592; State v. Bruggerman, 31 Minn. 493, 18 N. W. 454; Parker v. Van Houten, 7 Wend. (N. Y.) 145; L. H. & St. L. Ry. Co. v. Commonwealth, 104 Ky. 35, 46 S. W. 207.

Appellant expressly bases his exceptions to the resolution of intention and other alleged irregularities upon the ground that they were "defects in the proceedings," and, the operation of the statutory provisions herein quoted being directed at irregularities and illegalities in the proceedings, they were thereby cured.

Respondent contends that this court should direct a reassessment of such of the lots as were subject to assessment, because abutting owners benefited by the improvement, and should pay therefor. When the appeal was last before us for consideration, our attention was called to section 12¼ of the Vrooman Act, Statutes of 1921, at page 563, from which respondent quoted in part in support of his position as follows:

"Third—Whenever any court of competent jurisdiction in any suit to set aside the lien of any assessment or of any bond representing any assessment or in any suit to quiet title against the lien of any such assessment, or bond shall in its judgment decree such assessments or bonds to be void, or unenforceable, then it shall in and by its decree direct the making of a reassessment to cover the assessments involved in such suit."

In 1923 this section was amended so that in lieu of the words "for want of sufficient authority for its issuance or from irregularities, or illegalities in the proceedings," the words "for any cause" were substituted, so that a reassessment is required by the statute when the original assessment shall have been found to be void "for any cause." It is apparent that upon the issue as to whether or not a reassessment should be directed what was said in our former opinion has the same application to the provision under consideration since the amendment of 1923 as to that of 1921.

[9] This action was instituted May 10, 1920, to set aside an assessment dated and recorded March 25, 1920, but respondent argues that the amendment is retroactive, and that it is the duty of this court, should it reverse the judgment by holding the assessment void, to order the making of a reassessment to cover the expense of building the streets. We have held that, inasmuch as the strip carved from the park should not be devoted to street purposes, it still constituted a portion of the park property, and it is therefore obvious that none of the work performed or expense incurred upon that particular part of the improvement can be said to have benefited any of the lots abutting thereon.

[10] However, appellant has insisted that, if a reassessment be made, it should be made pursuant to the provisions of the act of 1913 (St. 1913, p. 845), and not that of 1921 or 1923, it being claimed that the latter cannot be applied retroactively. We believe that a reassessment is necessary, and that the act of 1923, and not that of 1913, must be followed in levying it. The provisions of the statute of 1923 above quoted are sufficient authority for the conclusion that a reassessment should be made, unless that law cannot be given a retrospective application.

[11, 12] The Supreme Court in Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, held that the rule that a statute should not be construed to operate retroactively, unless the legislative intention that it should so operate is clearly apparent, cannot apply where it is essentially a curative act intended to give effect to past transactions which are ineffectual because of neglect to comply with some requirement of law. Hence, inasmuch as the provision here involved is essentially of a curative character, it must be held to operate upon assessments begun before as well as those commenced after its enactment. That this was the intention of the Legislature is clearly indicated by the terms of the

statute itself. The opening provision of the section of the statute of 1921, a portion of which is quoted above, reads as follows:

> "Sec. 12¼. Whenever any assessment *heretofore issued* or which may be hereafter issued is or shall be void, or unenforceable, for want of sufficient authority for its issuance or from irregularities, or illegalities in the proceedings, or if bonds shall have been, or shall be issued to represent any assessments and such issuance shall not have been, or shall not be effective through the curative provisions thereof to make them valid and enforceable, then, in any of such events a reassessment therefor shall be issued." (Italics ours.)

This language does not admit of doubt as to the intent of the Legislature. That such a provision is valid is not seriously contested by respondent, and the proposition has been decided affirmatively by well-considered cases in other jurisdictions. Among these are Protestant Foster Home of Newark v. Mayor, etc., 52 N. J. Law, 138, 18 Atl. 572; Brown v. City of Silverton, 97 Or. 441, 190 Pac. 971; Conde v. Schenectady, 164 N. Y. 258, 58 N. E. 130; Frederick v. Seattle, 13 Wash. 428, 43 Pac. 364.

Appellant cites Chapman v. Jocelyn, 182 Cal. 294, 297, 187 Pac. 962, to sustain the claim that all such legislation is retroactive, and argues that any reassessment here should be made under the statute of 1913. That case, while construing provisions of the Vrooman Act, is not one involving reassessment. It decides that a street assessment is a contract, and that the provisions of the statute in force when it was made must be followed in so far as they prescribe the manner of enforcement of the contract; also that to hold otherwise would amount to an impairment of contract. In the instant case the street assessment contract is void, but under the curative provisions of the law a new one is to be made. In creating this enactment the Legislature has legalized transactions which were ineffective on account of noncompliance with the law, and in doing so it had full authority to provide conditions on which the invalid acts should become valid, and to give such provision a retrospective effect, or even to make it retroactive.

Argument of appellant upon the rehearing is based wholly upon that portion of the former opinion providing for a reassessment under the act of 1921, appellant contending that the right to reassessment was a vested right incidental to the ownership of street bonds, and that the rights of all parties were definitely fixed by the law existing at the time the original bond or assessment was issued. It is said that the amendment of 1923 is not a reassessment statute but a "mere subterfuge" to avoid constitutional limitations; that the act of 1913 provided for a totally new assessment, and that the latest act seeks merely to cure defects in the original assessment and to validate it as of its original date. Appellant therefore asserts that, notwithstanding the plain legislative intention to make the amendment retroactive, it should be declared unconstitutional in so far as bonds or assessments in existence before its passage are concerned, and therefore void and inapplicable as to the street bonds in question.

Respondent concedes that a rehearing is essential, since through inadvertence the subsequent amendment of April 30, 1923 (Stats. 1293, p. 110), was overlooked, and asserts that it is controlling as to the assessment ordered herein. To determine the question thus presented it is necessary that certain points raised by appellant in attacking the constitutionality of the amendment of 1923 be passed upon, since, if his contention is correct, the reassessment cannot be made under this statute.

As we have observed, section 12¼ of the act of 1921 provides for reassessment whenever an assessment theretofore or thereafter issued for street work shall be "void, or enforceable, for want of sufficient authority for its issuance or from irregularities, or illegalities in the proceedings," whereas in said section, as amended by the act of 1923, a reassessment is directed to be made whenever any such assessment "is or shall be void, or unenforceable, *for any cause.*" (Italics ours.) All other language of the two enactments of section 12¼ is the same, so that, if appellant's argument that the amendment of 1921 was unconstitutional be tenable, that of 1923 is subject to the same criticism.

[13] Appellant's argument wholly fails to recognize the express language of the amendment, which provides, not for the validation of the original assessment, but for a reassessment when for the reasons therein specified the assessment first levied shall be held void or unenforceable. We held in the first instance that, since the taking of a portion of Washington Square rendered the proceeding invalid in that respect, the entire assessment was therefore void, and it requires no citation of authority that a void assessment is ineffective for any purpose. The curative statute ratifies the proceedings authorizing improvements which rendered an assessment necessary, and directed a reassessment of properties benefited thereby for the amount of indebtedness incurred, with "interest thereon for thirty days after the date of recording the original assessment at the rate of seven per cent. (7%) per annum," or from the date when payment became due. The Legislature cannot legalize a street assessment which is void for failure to comply with the jurisdictional requirements made necessary by the state or federal Constitution (Kelly v. Luning, 76 Cal. 309, 18 Pac. 335; Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; Haaren v. High, 97 Cal. 445, 32 Pac. 518; Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920), and a reading of the act does not

permit us to assume that it attempted to do so. We previously held herein, upon abundance of authority, that a curative act may dispense with the steps which were not taken in such a proceeding if they were such that the Legislature could in the original act have dispensed with them, or it may ratify acts done which were not embraced therein if it had authority to require that they be performed. It has repeatedly been held that such legislation is constitutional.

[14, 15] A vigorous attack is launched against the provision that interest shall be computed from the original date, it being contended that "such a construction shocks all sense of justice," but the reply to this argument is that "it is in the plain wording of this act." It is not denied that properties which were benefited by the improvement began to enjoy that benefit when the work was completed, nor could it successfully be argued that compensation therefor was not due when the original assessment was recorded. That assessment being void, the initial mode of collection was rendered ineffectual, but substantive rights vested in the lien and not in the method of procedure; the latter was properly subject to legislative modification. Teralta Land Co. v. Shaffer, 116 Cal. 523, 48 Pac. 613, 58 Am. St. Rep. 194. The original act provided for interest upon unpaid assessments for street work, and since interest therefor was running at the time the amendment was enacted, no more onerous burden was created thereby; and no logical reason is advanced for deducting accrued interest from the amount concededly due under such circumstances. It was within the power of the Legislature to require that interest be paid from the date when the original assessment was recorded, and the fact that the amendments in question do in plain language so require leaves no room for construction.

[16, 17] The amendment of 1923 was in effect at the time the judgment of the trial court was reversed and a reassessment ordered (December 7, 1923, 42 Cal. App. Dec. 668), and it has not since been modified or repealed. When such amendment became effective, the mode of procedure and any right to remedies in pre-existing statutes ceased, unless such mode or right was expressly reserved by the amendment, or had been perfected by steps taken under the former act. Hibernia Sav. & L. Soc. v. Hayes, 56 Cal. 297; Estate of Wixom, 35 Cal. 320; Tuttle v. Block, 104 Cal. 443, 38 Pac. 109. Proceedings subsequent to reversal upon appeal must conform to pertinent amendatory legislation now in effect (Vanderbilt v. All Persons, etc., 163 Cal. 507, 126 Pac. 158), and it is therefore ordered that the reassessment be made under the provisions of the statute of 1923.

The judgment is reversed, and the superior court is directed to amend its conclusions of law and enter a judgment to conform with the principles of law as announced in this opinion.

We concur: FINLAYSON, P. J.; WORKS, J.

(67 Cal. App. 300)

In re BABCOCK'S ESTATE. (Civ. 4597.)

(District Court of Appeal, Second District, Division 2, California. May 16, 1924. Hearing Denied by Supreme Court July 14, 1924.)

1. Wills 🔑384—Order directing jury to find mental capacity held equivalent to granting motion for nonsuit.

On appeal, on opposition to probate on ground of lack of testamentary capacity, from an order directing jury to return verdict that testatrix was not of unsound mind, such order is to be considered as if judge had granted motion for nonsuit.

2. Wills 🔑327—Direction to find testamentary capacity erroneous if evidence would support contrary finding.

A direction to find that testamentary capacity existed is erroneous where the evidence would support a finding to the contrary.

3. Wills 🔑324(2)—Whether testatrix was of unsound mind held for jury.

Whether testatrix was of unsound mind *held* for jury under the evidence including testimony of intimate acquaintances within Code Civ. Proc. § 1870, subd. 10, and evidence that during last few months of her life she was insane in full sense of word.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

The superior court made an order admitting the will of Mary C. Babcock, deceased, to probate, and contestants appeal from that order. Reversed.

Rehearing denied; SEAWELL, J., and STURTEVANT, Justice pro tem, dissenting.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for appellants.

Dailey S. Stafford, of Los Angeles, for respondent.

WORKS, J. This is an appeal from an order admitting the will of Mary Catherine Babcock, executed September 28, 1917, to probate. Appellants, contestants in the trial court, opposed the probate of the will on the ground that the testatrix was not of sound mind at the time the instrument was executed. The contest was tried before a jury, but at the conclusion of the testimony on behalf of both the contestants and the proponent of the will the trial judge directed the jury to return a verdict that the testatrix was not of unsound mind. Verdict was rendered accordingly, and the order from which the appeal is taken was thereupon entered.

[1, 2] Appellants make the contention that the court erred in directing the verdict which was returned. There is thus presented the question whether the record contains evidence of a substantial character tending to show that the deceased had not testamentary capacity at the time the will was made, for the rule is that such a direction is to be considered as if the judge had granted a motion for a nonsuit. Stated in other terms, the rule is that if the evidence introduced is such that it would support a finding by the jury of lack of testamentary capacity, the direction to find that testamentary capacity existed is erroneous. This rule is so firmly established that no citation of authority to support or illustrate it is necessary. A consideration of the question presented demands that we shall marshal the evidence upon the question of capacity which is most favorable to the contest, and upon that labor we shall now embark.

[3] Mrs. Babcock was twice married, her second nuptial venture being with W. W. Babcock. This union occurred in 1899. Mrs. Babcock had no children by either marriage, but her second husband had a son, Eli Babcock, as the result of an earlier matrimonial alliance. At the time of her marriage with Babcock, the decedent owned a ten-acre orange grove near Pomona, in which town she and her husband resided until his death, which occurred in May, 1917, and in which she continued to live until in January, 1922, when she was removed from her home for reasons below to be stated. The orange grove will be mentioned frequently in this opinion as the ranch. Mrs. Babcock conveyed this property to her husband in 1901. He conveyed to her a life estate in it in 1909 and the fee to an undivided half interest in it in 1915. The decedent made a will on September 15, 1911, which she never destroyed, although it was abrogated by the will of 1917, granting for the moment that the latter made valid testamentary disposition of her estate. The will of 1911 was found in Mrs. Babcock's Bible after her decease. The instrument recited the testator's age to be 65, but the will of 1917 recited her age as 69, thus showing a discrepancy of two years. She died on March 15, 1922, at the age, as stated in respondent's brief, of 76. It is to be observed, as a circumstance to be considered in connection with other facts shown by the record, that the statement in the brief is probably in accord with the recital in the will of 1911, while it surely disagrees with that in the will of 1917, the assertion first made being somewhat affected by the question whether Mrs. Babcock's birthday occurred between September and March or between March and September.

The testimony concerning the mental condition of the testatrix relates to a period commencing as early as 1914 and extending to the day of her death. In relating the story told by the evidence which is favorable to contestants we shall be able, in some measure, to divide it under separate heads or subjects, observing, however, that some of it is not susceptible of that mode of treatment, while it will be noted, also, that in some instances the subjects overlap or merge into each other. In the fall of 1914, while visiting at the home of a nephew and his wife, Mrs. Babcock lay upon a couch next the wall and tore off pieces of the wall paper. It was testified that she was "quite erratic" from 1915 forward. In 1916 she became unreasonably angry with her husband over small matters. One witness, a niece of decedent, relating occurrences between May and September, 1917, during which period she resided with decedent, said that she (the witness) would sometimes "get up in the middle of the night and I would find her [the testatrix] sitting in the front room, and I would say, 'Aunt Mary, what are you doing?' She would say, 'I am waiting for your Uncle Will to come home' [referring to her husband, who, it will be remembered, died in May, 1917]. I would say, 'Why, Uncle Will is dead.' She would say, 'No, he has gone to lodge.'" Speaking of occurrences at meal times and testifying as to the period mentioned, the same witness said:

> "Sometimes I would come in, and she would have an extra plate set, and I would ask what it was for, and she would say, 'Your Uncle Will is coming in for supper.'"

Mrs. Babcock visited at the home of a nephew in August, 1917. The nephew testified:

> "I went downtown, and when I came back she asked me if I saw Uncle Bill downtown; and I laughed at her, and thought she was just making a foolish remark, and * * * I says, 'Aunt Mary, Uncle Will is dead.' 'Well,' she says, 'he is not dead.' And I changed the subject onto something else."

The effect of the testimony of several witnesses is that Mrs. Babcock never went out alone after the death of her husband, as she was confused as to direction and location and lost herself. On one occasion in August, 1917, she went to the home of a grandniece, distant over 40 miles from her own home, upon a visit which was to have been of a week's duration. She was driven to her destination by the husband of the grandniece. He testified:

> "On the next morning, when I got up, she was getting ready, dressing. I says, 'Where are you going, Aunt Mary?' * * * She says, 'I am going home.' I says, 'You promised me to stay a week.' 'No,' she says, 'I am going home, because I have got some chickens there.' 'Well,' I says, 'I am not going to take you home to-day, because I am tired.' 'Well,' she says, 'I am going to walk if you don't, because it will not take me long.' So * * * after dinner I took the machine and took her home."

In response to a question by the court the witness said further:

> "She said she had a party there in charge of her chickens; * * * and I told her, I says, 'He is a good responsible man.' She says she was afraid he would steal her eggs."

On an occasion in the summer of 1917 Mrs. Babcock, in company with the grandniece above mentioned, took a pair of shoes to a shoemaker to be mended and told him to deliver them to her home. The grandniece testified that she and the testatrix made three trips downtown on that same day "to tell the man about sending them up. * * * He told her he would send them up next day, but that didn't satisfy her. I had to go back with her about three different times to the same store." A witness testified that in October, 1917, Mrs. Babcock wound her clock three times in one day. When this action was called to her attention, she said she did it because she did not want the timepiece to run down and that "she would wind her clock when she wanted to." A greatnephew of testatrix visited her for three days in the latter part of 1919 or early in 1920. One evening she invited him to go to a theater, saying that she had procured tickets for the performance. He accepted the invitation, but on reaching the theater found that she had no tickets and purchased tickets himself so that they might witness the performance. This same witness testified concerning another matter which occurred during his visit with Mrs. Babcock:

> "We came home, and then after that she had a chicken for dinner, and the chicken, somehow or other she would cook just a little piece at a time, and never would put it on the table all at once; that is, we didn't have no chicken to amount to anything, you know. Q. How long did that take place? A. That took place the three days I was there. Q. You mean she was cooking the same chicken all the time? A. The same chicken all the time; yes, sir."

He also testified that at about 8 or 9 o'clock of a morning during his visit Mrs. Babcock said she must clip the wings of her chickens to prevent them getting over the fence and away. He said the fence was so high that the chickens couldn't have gotten out, but she insisted on clipping their wings, and that he held them while she did so. Later in the day she cut the wings of some of the chickens again, although he told her they had been cut already.

There is much testimony in the record as to the ability of the testatrix to recognize her relatives and other people and to keep them in mind. Early in 1915 a niece whom she had known intimately for many years made her a small present at Compton, Cal. Later in the same year Mrs. Babcock exhibited the present to the niece and stated that it had been sent to her from the East by a certain named person. In 1915, also the testatrix mistook the husband of this niece, whom she had known well for several years, for a strange man. The pair were visiting the testatrix at the time. The niece testified:

> "We went up on Saturday; she invited us to go to Riverside, and on Sunday my husband was filling the radiator in her back yard, and she says: 'There is a strange man filling the radiator out of my faucet. I wish you would have him go downtown and fill his radiator, because I am on a meter.'"

Another niece testified that in 1917 relatives and friends "would come there and she didn't know them," and she said, more specifically, that in October of that year the male relative just mentioned in connection with the radiator incident of 1915 "came up, and she wanted to know what man that was." The husband of one of Mrs. Babcock's grandnieces testified thus of the testatrix in 1917:

> "Q. Were you present on the occasions when she failed to recognize your boys? A. Yes, sir; * * * she would ask my wife whose boys they were; and when she come down to the house, she would ask us the same question. * * * Q. How many times do you suppose she saw those boys? A. Well, * * * once every month or so. Q. And how soon would it be after you had told her who the boys were before she would forget who they were? A. Why, it would not be very long. Sometimes she would get one mixed up with the other; and sometimes she would want to know where the boys came from. * * * Would not recognize them. * * * I saw it happen the same day. They would go out and come back in and she * * * could not tell one from the other. Q. Although you had told her who they were the very same day? A. Yes, sir. Q. Well, would it happen that she would not know that they were your boys * * * after you had told her they were the same day? A. Yes. Q. That happened frequently? A. Yes."

The niece who resided with Mrs. Babcock from May to September, 1917, as already stated, was a grandmother, and Mrs. Babcock had great difficulty in remembering and recognizing her grandchildren. The niece testified:

> "She would never know them. * * * About every three weeks, while I stayed with my aunt, my son-in-law and my daughter would come up with the boys and spend the day with me; about every three weeks they made me a visit. * * * She would not recognize the boys; she would always ask who they were all the time."

The niece who was the wife of the man of the radiator incident testified that in May, 1917, at or near the time of Babcock's death, "I went to her [Mrs. Babcock's] home, and she said, 'Where are you going to get your dinner?' I said, 'I am going to have dinner with you.' She said, 'I am not feeding strangers.'" One of the witnesses, the wife of a grandnephew of Mrs. Babcock, whose first name was Arthur, had seen the testatrix two or three times a year for a dozen years prior to her death. Shortly after Babcock's death, on seeing the witness, the testatrix asked who she was. Upon being told that she was Arthur's wife, she asked, "Who is Arthur?" In 1918 Mrs. Babcock asked one of her nephews to pay her a visit. Three weeks or a month later he went to her house to accept the invitation. He testified:

> "She did not recognize me when I first went there. * * * I told her who I was, and told her she asked me to come up, and I promised her I would."

A greatniece of Mrs. Babcock was married October 15, 1919, at the home of one of her greatnephews. The testatrix was present at the wedding and remained overnight at the house in which it occurred. On the morning after the wedding the bride came into the room where the testatrix and others were seated and gave a morning greeting. Mrs. Babcock, according to the bride, "turned and looked at me and says, 'Why, who are you?' Q. Did you tell her who you were? A. I did. Q. What did she say then? A. She didn't seem to say anything. She went on talking to my mother." There is other testimony in the record touching upon the conduct of the testatrix at the time of this wedding. The wife of the greatnephew at whose home the ceremony occurred testified:

> "My husband got his aunt, Mrs. Babcock, to come to the wedding. He went after her in a machine, he and his mother. * * * And when she came she did not seem to know who I was, and asked me the question and I told her. And so she asked his mother also who I was, and how many children she had, * * * Mrs. Babcock, my mother-in-law. And she told her. And the next morning, when she came downstairs, she asked again who I was, and I told her. And sitting at the breakfast table that morning she asked my husband's mother how many children she had again, and she repeated that again at least three times that morning to my remembrance. And then I took her home * * * in the machine and my mother-in-law went with me."

When the witness and her mother-in-law started to return to the home of the former, the following occurred, according to the testimony of the witness:

> "She [the testatrix] says, 'Well, how are you going to get home?' I said, 'The same way we got out here.' 'Well,' she says, 'who is going to drive your machine?' I says, 'I am.' 'Well,' she says, 'you did not drive it out here.' And she sat in the front seat with me going out. So she did not seem to remember that I had drove the machine; she didn't seem to know that."

The record also includes testimony relating to what may be termed Mrs. Babcock's sense of property at different periods, and relating to her familiarity with business and business methods. It is to be observed also, in passing, that some of the testimony already noted bears upon the question of her financial and property sense, although perhaps but slightly. The niece already mentioned as residing at Compton testified that Mrs. Babcock and her husband visited her in September, 1914. One night Babcock came to the room of the witness and rapped on her door. The witness followed him to the room occupied by himself and his wife. We now quote from the testimony:

> "Q. What was she [the testatrix] doing? A. She was lying on the floor. * * * She said they were trying to get her property away from her. * * * I coaxed her to go back to bed. I told her they wasn't trying to get her property away from her at all. * * * She said her husband was trying to influence her, to get the property away from her for his son. Q. Did she finally go to bed. A. She did."

The niece who resided at Mrs. Babcock's home from May to September, 1917, testified to various occurrences of that period:

> "All times of the night I would wake up, and she would be at the dresser drawer, and she would pack and unpack * * * all the time, and go to her trunk and pack and unpack; and at other times I would find her in the bedroom and I would say, 'What are you doing?' She would say, 'I want something to eat.' And I would say, 'We don't keep the things in the bedroom.' * * * Q. Packed and unpacked what? A. Well, she would take things out of her dresser drawers, and she would take hairpins and she would tie them up with fine strings, and tie up little wads with threads. * * * She would place it back in the drawer; and then she would take out her clothes and put them back, and then she would go to her trunk and unpack."

In the next house to that of Mrs. Babcock resided a worthy neighbor named Avery. During 1917 she said to various of her relatives including the niece last mentioned, at different times, that this neighbor had stolen her husband's tools and that he continually knocked on the wall of her house. The niece testified:

> "At any time if there was a little noise at night she would say, 'Well, there is old man Avery around.'"

One of the greatnephews of the testatrix, already mentioned, testified:

> "I had been out in the yard with her and she would say—the old man would be on the other side of the fence; she would say: 'Look at that old thief; he is trying to come over and get some more tools.'"

The wife of the witness last mentioned testified:

> "She would tell me about him [Avery] knocking on the wall at night. * * * Q. What did she say about the tools. A. That Mr. Avery had stolen her things, her tools."

The niece who was with Mrs. Babcock in 1917 testified that in that year and also in 1919 "she would shut off the gas on me when

I was cooking meals. In 1917 my sister's folks came up for dinner, and I was getting the dinner, and I went in for something and came back, and she had all my fires shut off." This niece testified that—

> During 1917, "when they conserved sugar, I would go down and buy sugar, and she would hide it and I never would find it. * * * She would hide soap and food. * * * Sometimes she would hide them in the bedroom, sometimes under the dresser, and in between her bandboxes. * * * Q. What else would she hide besides sugar? A. Cinnamon and lard. You would find a can of lard hid in the closet. Q. When did you find a can of lard hid in the closet? A. In 1917, two or three times."

In October, 1917, Mrs. Babcock told a witness, "I think that Mr. Steadman is cheating me out of money." Mr. Steadman was a banker who will be mentioned below. The niece who was with the testatrix in 1917 was also with her for several months in 1919. She testified:

> "Q. Did anything unusual happen in the nighttime during this visit? A. Yes, one time I got angry about the packing and unpacking, and I told her if she didn't quit it I would go home, and she got up and laid on the floor for a couple of hours. Q. Did she have anything over her? A. No. Q. Did you try to make her go back in bed? A. Yes, but she would not for a long time."

We have already related certain occurrences in connection with a wedding which took place on October 15, 1919, and have mentioned the fact that Mrs. Babcock was driven home the next day after the event. The witness who drove the car testified:

> "On the way she said, 'I am going to give you some eggs when I get home.' And so when we got there I said, 'Aunt Mary are you going to give me those eggs?' And she said, 'Yes.' And she had a big market basket that would hold at least a peck of lovely big eggs, and she went over to a small dish, where there wasn't eggs any larger than a bird's egg, almost, and she picked out five or six and put them in a great big bag, and she gave them to me. 'Here,' she says, 'are your eggs.' * * * And also at the house the following morning at the wedding on the 16th, she says, 'I am going to give Mamie a nice wedding present.' And she got her purse and she took out a roll of bills; I should think there was nearly $200 in the roll; and she sat down in the kitchen at the table and counted the bills out; and I thought my sister was going to get quite a royal present; and she counted them all out asked my mother-in-law for a rubber band to put around those bills; and she stuck them back in her purse."

The proponent of the will introduced in evidence a large number of checks which had been signed by Mrs. Babcock. Steadman, the banker, already mentioned, testified that each of these checks was in his handwriting, except the signature. The banker also testified from the books of his bank that from May 23, 1917, to the time of the death of the testatrix the smallest balance she had on deposit in the institution was $1,231.67, that having been the balance on the first-mentioned date. The largest balance during the period in question was $3,296.83 on January 29, 1918. Other balances on dates not far from the execution of the will were: July 12, 1917, $1,761; September 17, 1917, $2,105.79; October 30, 1917, $1,930.15; December 19, 1917, $2,800; December 22, 1917, $1,800. Steadman testified that these balances did not draw interest, as the account was simply a commercial account. He then testified further:

> "Q. Do you know why she kept so large a balance in cash that was not bearing interest. A. No; I have spoken to her at various times that she could cut down a little closer on the checking account if she wished, but she said it was always her wish to carry this much money on deposit, and I never questioned her further."

Considering a special matter indicating the nature of Mrs. Babcock's property sense, it will be remembered that as the result of conveyances mentioned early in this opinion she was the owner of an undivided one-half interest in the ranch and the owner of a life estate in the remaining half. She had a conversation with Eli Babcock a few days after her husband's death, in May, 1917, and she seems to have had a fairly correct understanding of the nature of her interest in the ranch at that time. Her stepson testified that she then said to him, "I think everything is mine as long as I live." He remarked further that "she said she thought Father's part was left to her as long as she lived." There is evidence in the record, however, which tends to show that the same understanding was not present with the testatrix at the time she executed the will, on September 28, 1917. The will was prepared by a lawyer and he talked with Mrs. Babcock about her property a few days before the instrument was drawn and executed. His testimony was:

> "Q. She told you what property she owned did she not? A. Yes, sir. Q. She told you that she owned the ranch? A. Yes. I asked her—I think my language was: 'What does your property consist of?' And she answered that question. Q. She said it consisted of the ranch and the home. A. Yes, sir; and the furniture and something in the bank in some form."

A witness with whom Mrs. Babcock frequently advised concerning her affairs testified that she consulted him "late in 1917 or early in 1918" about a contract she was contemplating "with some young man in regard to taking the ranch." The young man was also present at the time. The witness further testified:

> "The proposition between the two was that he was to take the property—she was to sell the property to him and he was to pay for it out of the crops, care for it and pay for it out of the crops. And, after conferring, one with the other, they were not able to come to any definite agreement."

In the latter part of January, 1918, the testatrix had a conversation with this same witness in which she told him that she owned the ranch in its entirety, showing him at the time her deeds from Babcock. The witness examined the deeds and explained to her the true state of her title in the property.

There are certain considerations concerning the two wills which, in connection with the other matters contained in the record, cast some light upon the question of Mrs. Babcock's mental condition at the time the second will was executed. We have already adverted to the apparent error made by the testatrix in the statement of her age in the second will and to the fact that the will of 1911 was preserved by her and was found in her Bible after her death, despite the fact that the later will had been executed. Further, in "the first part of October," 1917, and therefore but a few days after the will of that year was made, Mrs. Babcock had a conversation with one of her nephews, during which she exhibited to him the will of 1911 and called it a valuable paper. How this circumstance occurred is shown by the testimony of the nephew:

> "She made the remark that she was losing quite a little bit of stuff from the house; that somebody was stealing, and so forth; and I asked her if she had any valuables lying around; and she says, 'I have got a few papers and some other little trinkets.'"

It was at this juncture that the testatrix produced the 1911 will as a valuable paper. The will of 1917 was drawn by Mrs. Babcock's counsel with the beginning, "I, Mary Catherine Babcock," etc., but she signed it "Mary Cathrin Babcock." The signature to the will of 1911 was perfect in form. In addition to her husband, who was living at the time the will of 1911 was executed, Mrs. Babcock named in that instrument 25 persons as beneficiaries. In the will of 1917 she named as beneficiaries Eli Babcock and five other pesons, L. S. Wilson, Myrtle Carrigan, Jessie Newmark, Henderson Heath, and Laura Matney. There are several peculiar circumstances connected with these changes in the second will as compared with the first. By the 1911 will a one-twelfth part of the testatrix's estate was bequeathed to her husband, together with her household goods and chattels, while by the later instrument a one-fourth part of the estate went to Eli Babcock, her stepson. This apparent discrepancy might be explained by the fact that Mrs. Babcock had in the meantime acquired some estate from her husband, were it not that one witness testified that the testatrix said after Babcock's death that he left no estate. This statement, it is to be observed, accords strictly with her belief, above mentioned, that she owned the ranch in its entirety, as there is no showing in the record that Babcock possessed anything except his interest in that property. Other matters in connection with the 1917 will are worthy of note: Myrtle Carrigan was not mentioned in the instrument of 1911, the Jesse F. Newmark of that document becomes the Jessie Newmark of the later one, and the Henderson G. Heath of the first becomes the Henderson Heath of the second.

Several persons, "intimate acquaintances" of Mrs. Babcock as that term is used in subdivision 10 of section 1870 of the Code of Civil Procedure, were allowed by the trial court to testify as to her "mental sanity," to employ the language of section 1870, or competency, or soundness of mind, at or near the time of the execution of the will of 1917; some expressing the opinion that she was competent, others that she was not. Upon the present appeal we are of course interested only in the testimony to the effect that she was incompetent. The niece who lived with Mrs. Babcock from May to September, 1917, after stating the testimony which we have above ascribed to that witness, said that in August of that year the testatrix offered to give her the home in Pomona if she would continue to live with her. The niece refused the offer "because I didn't think she was competent to give it to me." She said further:

> "If she had been competent, I would have accepted it; but I didn't think she was competent to make any paper."

The offer was again made a few weeks later, but was again refused for the same reason, as the witness testified. The husband of the grandniece to whom Mrs. Babcock had gone for a visit of a week, the visit being cut to one day, testified as to her condition in 1917:

> "My opinion would be that she was not capable of doing any business—any legal business. And her actions were—just like that time she come down, for instance to stay a week; she was going to start and walk home the next morning, 40 some odd miles, and I had an awful time to get her to stay."

One of the nephews of the testatrix testified that in 1917 she offered to give him and his brother her home if they "would go up there and take care of her," but that the offer was refused because "we did not think her competent to make any such contract." The witness testified further that he partially based his opinion as to her "unsoundness of mind" upon arguments she had with her husband before he passed away. He said, "they were unfounded; she had no right to make any argument with him whatever." He also said:

> "I was with her quite a bit, and I would not consider a person, the way she acted, as of sound mind."

He testified further that—

> "In the latter part of 1917, after she become so totally deranged—that is, in my opinion, she used to telephone to my sister-in-law quite frequently to come after her, and she would not let her go back by herself; she would want to do it, and we were afraid that she would get killed. She would get lost, in fact."

This same nephew testified that he saw Mrs. Babcock at his brother's home in September, October, or November, 1919, that her clothing was then filthy, and that he regarded her as totally insane.

It is certain that during the last few months of her life Mrs. Babcock was insane in the fullest sense of the word. In January, 1922, she was taken to the psychopathic ward of the county hospital where, after examination by a judge of the superior court, she was placed in the care of a psychopathic officer. This officer testified that she was then "disoriented and confused, and flighty, and sometimes quite disturbed"; that—

> "She did not know whether she was in Los Angeles, or whether she was in Pomona, or where she was. Sometimes she thought she was in Pomona, and sometimes she thought she was in Los Angeles; she could not tell. * * * She talked in a rambling and incoherent way about her people and her relatives and her circumstances, and her condition, but she did not say anything that I took seriously at all. Q. Her condition at that time—did you consider her incompetent? A. Oh, yes."

Upon the arrival of Mrs. Babcock at the psychopathic ward, she was examined by a specialist in nervous and mental diseases. He testified that—

> The testatrix then "showed evidence of marked mental deterioration, and also physical. * * * She was disoriented and confused, and didn't know where she was. She thought she was in Pomona, and would think that various people in the hospital were from Pomona. She would constantly ask the same old questions over and over again, and then seemed to forget that she had just been answered. She didn't even know her way very well about the wards. To my best recollection, she would not know her own room. * * * Q. Did you make a diagnosis of her trouble? A. Yes. Q. Did you form an opinion as to the mental condition of this woman apart from the result of the laboratory tests? A. Yes, sir. Q. Eliminate the matter of the laboratory test. A. It is more confirmatory. It was not the basis for the diagnosis. It simply assisted in making the final diagnosis, that is all. Q. Will you state your diagnosis, Doctor? A. General paresis. * * * Q. And what in your opinion was the progress of the disease at the time you observed her? A. She was in an advanced stage of mental deterioration. There was no question as to the insanity of the patient. There might have been some question as to the diagnosis, as to whether it was general paresis or senile dementia. That is the only question that could arise, without the aid of the laboratory tests, if I may be permitted to mention that again. She, as I stated before, showed marked mental deterioration. That was evident by the symptoms that I have mentioned herebefore. She did not know where she was; she did not know but that she was in Pomona; she made mistakes of identity; and I think she had some delusions of persecution. * * * Q. Doctor, what is the type of disease known as general paresis? A. Softening of the brain. Q. And is it a progressive disease? A. Oh, yes, it is a chronic, progressive disease; it is characterized by mental and physical deterioration. * * * Q. You would differentiate general paresis from other forms of insanity? In other words, this is not something that would come on suddenly? A. No. Q. What is the effect of general paresis or senile dementia upon the business ability of the person so afflicted? A. Why, it is—inasmuch as the judgment is disordered, necessarily they are incompetent to carry out a business transaction. * * *
>
> "The Court: Doctor, limiting yourself to the information that you got by the observation and examination by yourself of the patient at the county hospital in 1922, * * * are you able at this time to express an opinion as to her mental competency in September of 1917? * * * A. * * * Well, in view of the fact that there was a very marked mental deterioration, I am of the opinion that it had taken a long time, years, for it to have progressed to the degree that it was in when I saw the patient; a number of years. * * * How many, of course, I am unable to say. * * *
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> "The Court: I will ask you the question whether you are able to express an opinion from the examination and observation that you made in 1922 * * * as to whether or not she was competent in September, 1917? A My opinion is that she was not."

From the psychopathic ward Mrs. Babcock was sent to a home for the treatment of insane persons, where she died March 15, 1922.

The rules of law governing the settlement of such questions as the one here presented are well established by a number of cases, among which are Estate of Huston, 163 Cal. 166, 124 Pac. 852; Estate of Purcell, 164 Cal. 300, 128 Pac. 932; Estate of Collins, 174 Cal. 663, 164 Pac. 1110; Estate of Allen, 177 Cal. 668, 171 Pac. 686; and Estate of Hess, 183 Cal. 589, 192 Pac. 35. We need not pause to quote from the opinions rendered in those cases, but we have endeavored, in our full and circumstantial statement of the evidence which is favorable to the claim of appellants, to so segregate the evidence as to lay ground for the ready application of the different principles of law enunciated by them. The testimony of two experts, one a psychopathic officer, so called, and the other a skilled specialist in mental diseases, given pursuant to an examination of the patient and not upon hypothetical questions, shows that she was insane in January, 1922. The specialist testified, again not in answer to a hypothetical question, but upon a personal examination followed by a laboratory test, that the testatrix was suffering at that time from the progressive mental disease known as general paresis. There being evidence in the record upon these points the contest resolves itself into a question whether the disease had so fastened itself upon Mrs. Babcock in September, 1917, four years and five months before she was confined in the psychopathic ward, hopelessly insane, that she was then incompetent to make a will. Upon this exact question the specialist, again basing his answer upon a personal examination and a laboratory test and not upon a hypothetical question, expressed the opinion that the testatrix was incompetent at the time she put her hand to the contested will. Upon this exact question there is also the mass of evidence, some parts of it weak, some parts of it relatively strong, which we have set forth above at such length. Upon the whole record, we are satisfied that there was substantial evidence to support the contest, that the trial judge erred in directing a verdict as he did, and that the question of Mrs. Babcock's competency should have gone to the jury.

Order reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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67 Cal. App. 328

WATSON v. GREELY, County Auditor. (Civ. 2816.)

(District Court of Appeal, Third District, California. May 17, 1924.)

1. Counties 🔑1—Are governmental agencies.

Counties as political entities are governmental agencies, all powers of which have a direct and exclusive reference to state's general policy, and are but a branch of general administration of that policy, and state may through its Legislature and exercise of its sovereign power apportion and delegate to counties any of the functions which belong to it, and may take back and resume exercise of functions which it had delegated to such local agencies.

2. Highways 🔑99 — State may declare any county road a state highway and take supervisory control over it.

Under Const. art. 4, § 36, Legislature is empowered through appropriate branch of its administrative machinery to declare any county road a state highway, and to take sole supervisory control over it; it being the sole judge whether a county road shall be made a state highway, and its conclusion cannot be successfully challenged.

3. Highways 🔑99—Legislature may authorize counties contiguously situated to jointly build highway.

Legislature may authorize two or more counties contiguously situated to each other to jointly build and maintain highways through their respective counties and may authorize one county to extend, when public convenience demands it, and at its own expense, any of its own county roads into limited portions of an adjoining county, and thus connect with a road in that county.

4. Statutes 🔑89—Statute held not invalid as conflicting with Constitution requiring Legislature to establish system of county governments "uniform throughout the state."

Const. art. 11, § 4, requiring Legislature to establish a system of county governments which shall be "uniform throughout the state," which last clause means "an organized plan in keeping with which constituent parts are rendered similar," does not designate quantum of governmental powers which shall be delegated to counties, nor does it declare what particular functions or policies included within state sovereign powers shall be conferred upon counties, and Pol. Code, § 2639, subd. 12, is not invalid as conflicting therewith.

5. Statutes 🔑67, 105(2)—Mandatory section of Constitution must be followed with substantial strictness.

Const. art. 4, § 24, requiring every act to embrace but one subject, expressed in its title, and article 1, § 11, requiring all laws of general nature to have uniform operation, are mandatory, and must be followed with substantial strictness, in view of article 1, § 22.

6. Statutes 🔑123(4) — Statute held not to treat of any subject not germane to general subject expressed in title.

Pol. Code, § 2639, subd. 12, declaring its general subject to be "the powers and duties of boards of supervisors over roads and highways of the county," is not in conflict with Const. art. 4, § 24, in that subjects are treated in the act which are not germane to its general subject, since every provision therein relates solely to county roads or highways and powers which may be exercised over them by boards of supervisors.

7. Statutes 🔑73(2)—Statute applying to every county in state without discrimination held not in conflict with Constitution.

Pol. Code, § 2693, relating to county roads or highways and powers which may be exercised over them by county supervisors, is not in conflict with Const. art. 1, § 11, since it applies without discrimination to every county in the state.

8. Statutes 🔑73(2)—Statute not rendered less "uniform" in operation because some counties might never apply it to their purposes.

That some counties may never apply Pol. Code, § 2693, subd. 12, to their own purposes, does not render such statute less uniform in operation, under Const. art. 1, § 11; requirement of uniformity being satisfied if statute applies to all of a class alike, the class being a legally proper one, for the word "uniform" does not mean universal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Uniform.]

9. Highways 🔑97¾, New, vol. 16A Key-No. Series—Statute relating to county roads and highways held not in conflict with other statutes.

There is no incongruity between Pol. Code, § 2693, subd. 12, and those sections of the county government act defining powers of supervisors with respect to maintenance of roads and bridges within their counties, nor with certain sections of the Political Code relating to the same subject.

Application for a writ of mandate by Thomas D. Watson against F. H. Greely, Auditor of the County of Yuba. Issues of fact referred to Superior Court of Yuba County for determination.

T. H. Christiansen, of Sacramento, W. H. Carlin, of Marysville, and Arthur Coats, of Yuba City, for petitioner.

Ray Manwell, of Marysville, and McLaughlin & McLaughlin, of Sacramento, for respondent.

HART, J. The petitioner, a freeholder and taxpayer in and a resident of the county of Yuba, presents to this court this petition for a writ of mandate to compel the respondent, as auditor of said county, to draw and issue his warrant in favor of petitioner, on the treasurer of Yuba county, for the sum of $75 as in payment for certain alleged services performed by petitioner for said county.

The services for which petitioner by this proceeding is seeking to secure payment are alleged to have been performd by him under a contract with the county of Yuba arising under the authority alleged to be vested in said county by two certain ordinances, one adopted by the county of Yuba and the other by the county of Sutter, which ordinances are alleged to be authorized by subdivision 12 of section 2639 of the Political Code. Said subdivision of said section reads as follows:

"The boards of supervisors of any county in the state may, by and through an ordinance duly passed, permit the use of any of its public highways connecting with any main public highway of an adjoining county by the board of supervisors or highway commissioners of such adjoining county, for the purpose of constructing and maintaining thereon a highway or boulevard serving the needs of residents of both counties; and the board of supervisors of any such adjoining county, if it accepts the provisions of the ordinance adopted by the board of supervisors of the county granting the use, shall have the power to construct and maintain any such highway or boulevard, or to construct or maintain such bridge or bridges on such highway or boulevard as it may deem necessary, or to macadamize, pave, curb or gutter such highway or boulevard in such manner as it may determine, and the cost or expense thereof shall be paid out of the general fund of the county treasury, or such other fund as the board of supervisors may designate, or which shall otherwise be provided, of the county to which the use is granted. The board of supervisors of any counties proceeding under the provisions of this act may acquire real property adjacent to such public highway in an adjoining county for county purposes, and may expend thereon such funds as said board of supervisors shall deem necessary for county purposes. The board of supervisors of any counties proceeding under the provisions of this act may by mutual consent, expressed through ordinances of the respective boards, retransfer the use, control, maintenance and jurisdiction of any highway or boulevard constructed under the provisions hereof to the county originally granting the use."

The facts as stated in the petition are as follows: That Bear river, a torrential stream, at all times in every year carrying water, and having its source on the northerly slope of the Sierra Nevadas, flows in a general westerly direction down to a certain point in the county of Sutter, where it empties into the Feather river; that, until approximately 20 years ago, the filum or center thread of said river constituted and was the boundary line between the county of Yuba and "that portion of said county of Sutter lying and being easterly from said Feather river"; that during approximately all that time a public road or highway was maintained by the county of Yuba from the city of Marysville, the county seat of said county, down to said Bear river, where it then formed said county line, and by the county of Sutter southerly therefrom down to the county of Sacramento; that a bridge across said river, forming a part of said public road or highway, was constructed, "and during said time was maintained jointly by the joint efforts and the joint expense of said counties." The petition proceeds:

"On or about 20 years prior to the date of the commencement of this action, the exact date whereof petitioner cannot state, said Bear river, due to large deposits of detritus, sand, and other material in its channel carried there from the operation of hydraulic mines near the headwaters of said stream, changed its course, and wandered from its original channel, which formed said boundary line of said two counties, southerly, and formed a new channel in said county of Sutter approximately one mile south of said former channel, and said boundary line, and which said new channel said river has ever since followed and now does follow, excepting only that said new channel aforesaid did return to the old site of the old channel a comparatively short distance east of the easterly bank of said Feather river.

"That said change of channel by said Bear river ever since its change has interfered with and still does interfere with convenient and proper communication by and between the residents and inhabitants of said county of Yuba and said county of Sutter, and for that matter of all persons seeking to traverse the territory lying in said county of Sutter south of said old channel of said Bear river and rendering the joint bridge heretofore referred to as utterly useless.

"That for a period of more than one year prior, and up to the date of the commencement of this action there has existed and still does exist in said county of Sutter a certain road or highway which is particularly described and referred to in the resolution of the board of supervisors of the respective counties of Yuba and Sutter hereinafter in this petition set forth, which said highway crosses the said changed channel of said Bear river in paragraph 4 of this petition set forth and referred to, and which said highway not only extends in a southerly direction south from said changed channel of said Bear river down through said county of Sacramento and on into the city of Sacramento, but it also extends northerly from where it crosses said changed channel of said Bear river to the dividing line btween said counties of Yuba and Sutter and in its course northerly from said changed channel of said Bear river during all of said times said highway did and still does connect with a main public highway of said county of Yuba.

"That in order to cause said highway extending across said changed channel of said Bear river aforesaid to be and remain passable and of use to the traveling public, including the residents of said counties of Yuba and Sutter, it is necessary that said highway be placed and maintained in good repair, and that a good and sufficient bridge be constructed and maintained as a part of said highway across said changed channel of said Bear river."

On the 5th day of November, 1923, the board of supervisors of Sutter county, at a regular meeting thereof, passed and adopted an ordinance granting to the board of supervisors of the county of Yuba permission to use a certain described portion of said public highway in the said county of Sutter, connecting with a main public highway of the county of Yuba, for the purpose of constructing and maintaining thereon a highway or boulevard or both, "serving the needs of the residents of both the counties of Yuba and Sutter," upon the following conditions:

"(a) That all bridges that are constructed upon said highway be constructed jointly by said two counties in the manner prescribed by law for the construction of joint bridges across streams and rivers upon the boundary line between counties, and that the cost thereof be borne equally by said counties.

"(b) That notwithstanding anything in this ordinance contained, the board of supervisors of the county of Sutter may enter and do any work upon said highway for the maintenance or construction thereof, so long as such work does not interfere or conflict with any work then being done or contracted to be done by the board of supervisors of the said county of Yuba; and, also, that the board of supervisors of the county of Sutter in case of mutual agreement with the said board of supervisors of the county of Yuba, may join with said board of supervisors of the county of Yuba, in the doing of any maintenance or construction work upon said highway."

The ordinance further provides that the permission therein and thereby granted is upon the express condition that the board of supervisors of the county of Yuba shall accept the provisions of said ordinance within a reasonable time, otherwise said ordinance shall cease to be effective, etc.

On the 11th day of December, 1923, the board of supervisors of Yuba county, at a regular meeting of said board, duly passed and adopted a resolution embodying the above-mentioned ordinance passed and adopted by the board of supervisors of Sutter county, and thereby accepted said ordinance, "and all and singular the terms, conditions, and provisions thereof."

Proceeding thereafter to carry out the provisions of the said resolution of the board of supervisors of Yuba county, the said board, on the 17th day of December, 1923, having employed him for that purpose, authorized and directed the petitioner "to go upon and clear from brush and material deposited thereon a portion of said highway in said resolution described, and thereupon petitioner did proceed and did perform said work and labor in accordance with said order or resolution of said board of supervisors aforesaid, and did, in connection therewith, perform labor of the reasonable value of $70."

It is further alleged in the petition that the petitioner regularly and according to law presented his claim for said work to the board of supervisors, and that the same was subsequently duly approved and allowed by said board, but that, on his presentation of said claim to the respondent, as auditor of the county of Yuba, on the 8th day of January, 1924, accompanied by a demand that said respondent, as such auditor, draw his warrant for the amount thereof on the treasurer of said county in favor of petitioner, said respondent, as such, refused, has at all times refused, and "still does refuse to draw his warrant for said claim upon said treasurer in favor of petitioner" for said sum of $70.

The respondent has filed herein a motion to strike from the petition certain specified portions of its averments, a demurrer to the petition on the general and certain special grounds, and an answer denying certain of the allegations of the petition.

By the answer certain material issues of fact are tendered, but the parties at the hearing of the arguments herein stipulated that the questions of law might first be determined, and, if in favor of the petitioner, then the issues of fact should be referred to the superior court of Yuba county for trial and determination.

The petition contains no averment of fact which is not essential to a statement of a case for the relief herein demanded. And the facts therein stated are well pleaded, if the law under which the proceedings had by the respective boards of supervisors of Yuba and Sutter counties involves a valid legislative enactment. This is the important question raised by the motion to strike. The same question is presented by the demurrer to the petition.

The respondent contends that section 2639 of the Political Code, in so far as is concerned subdivision 12 thereof, is unconstitutional, in that it is in conflict with so much of section 24 of article 4 of the Constitution as reads as follows:

> "Every act shall embrace but one subject, which subject shall be expressed in its title."

It is further likewise contended that subdivision 12 of section 2639 is void, because it is violative of article 1, § 11, and article 11, § 4, of the Contitution. The first named section provides:

> "All laws of a general nature shall have a uniform operation."

The last-named section reads as follows:

> "The Legislature shall establish a system of county governments, which shall be uniform throughout the state; and by general laws shall provide for township organizations, under which any county may organize whenever a majority of the qualified electors of such county, voting at a general election, shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein shall be managed and transacted, in the manner prescribed by such general laws."

[1] Before proceeding to the consideration of the specific points urged by the respondent involving a challenge of the constitutional validity of subdivision 12 of section 2639 of the Political Code, it is deemed proper to have before us the legal status of county government organizations and their legal relation to the state government, and, as to this, these propositions may be set down as fundamental or at least so thoroughly established as to be entirely removed from the field of speculation or the realms of legitimate disputation: (1) That counties, as political entities or subdivisions of the state, are governmental agencies, all the powers and functions of which "have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." 1 Dillon on Municipal Corporasions (5th Ed.) § 35; County of Sacramento v. Chambers, 33 Cal. App. 142, 146, 164 Pac. 613; County of San Mateo v. Coburn, 130 Cal. 636, 63 Pac. 78, 621; Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 679, 154 Pac. 845; Dillwood v. Riecks, 42 Cal. App. 602, 607, 184 Pac. 35. (2) That, as a corollary of the foregoing proposition, "the state may, through its Legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it," and, "on the other hand, the state may take back and itself resume the exercise of certain functions which it had delegated to those local agencies." County of Sacramento v. Chambers, 33 Cal. App. 149, 164 Pac. 613.

We know of no reason, constitutional or otherwise, why the state and the counties may not act jointly in carrying out certain of the policies of the former. There are several instances in which this has been done and is now being done. Formerly the counties were required to assess all taxable property within their respective territorial limits for state purposes and to collect and pay the same into the treasury of the state. At the present time the state and the counties have the joint control, support, and care of indigent persons afflicted with tuberculosis, who are without relatives from whom they may legally require support and care. Stats. 1915, p. 1530; County of Sacramento v. Chambers, supra; Matter of Controversy between City and County of San Francisco and County of Alameda, on the one part, and Thomas F. Boyle, Auditor of the City and County of San Francisco, on the other part (Cal. Sup.) 215 Pac. 549. There are, of course, many matters or subjects of governmental concern of which the state itself must maintain the power of sole and exclusive administration, and which, by the mandatory terms of the Constitution, cannot, and, indeed, by the very nature and logic of the situation, should not be transferred or delegated to the governmental cognizance of any of its political subdivisions; but, as to all of that great variety of matters or subjects which may be committed to the governmental jurisdiction of counties, the state, in its discretion, may delegate the same to counties, or having already delegated them to counties, withdraw them from their further cognizance.

There is nothing in the Constitution which would prevent the state itself from taking over the exclusive control of the matter of the construction and maintenance of all public highways in the state, whether they be trunk or main highways or so-called county roads. The power and corresponding right to do so have always resided in the state through its Legislature. But to leave free from all possible doubt the right of the state to control the construction of main or trunk highways therein, the people in the year 1902 added to article 4 of the Constitution, section 36, which reads as follows:

> "The Legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance in whole or in part of any county highway."

[2] Under that section the Legislature is empowered, through the appropriate branch of its administrative machinery, to declare any county road a state highway, and thus take sole supervisory control over it. No exception is made as to the character of the county road which the state may translate into a state highway; it may be a road connecting with a main line road through the state or it may be a lateral leading to some point on a trunk road to another point in the county. The state is itself the sole judge of whether a certain county road should be made a state highway or a part of the state highway system, and its conclusion as to that matter could not be successfully challenged.

[3, 4] Nor is there any provision of the Constitution which prohibits the Legislature from authorizing two or more counties, contiguously situated to each other, to jointly build and maintain highways through their respective counties, or, indeed, from authorizing one county to extend, when public convenience demanded it, and at its own expense, any of its own county roads into and over certain limited portions of an adjoining county and thus connect with a road in the latter county. Obviously, such authority, as a matter of fairness, should be conferred and made exercisable, as the statute in question provides, only upon the condition that the county into which such road is to be extended consents to such extension and upon such terms as shall be fair and just, according to the judgment of the Legislature. There is to be found in section 4 of article 11 of the Constitution hereinabove reproduced, no implied, much less an express, inhibition against legislation authorizing such an arrangement between two counties. That section is, of course, mandatory in its terms, and the Legislature is thereby imperatively required to establish, as an essential part of the machinery of the state government and as in aid of the administration thereof, a system of county governments, which shall be uniform throughout the state, which last clause means "an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation." Coulter v. Pool, 187 Cal. 181, 192, 201 Pac. 120; Board v. State, 26 Okl. 366, 109 Pac. 563; State v. Riordan, 24 Wis. 484. This is all that is required of the Legislature by that section of the Constitution in the organization of county governments, but, of course, from the uniformity thus required no departure is permitted, except in such cases only as such departure is specifically authorized by the Constitution itself. Coulter v. Pool, supra. There is nothing in said section which limits or restricts the Legislature in the matter of committing to counties the power to administer such of its own functions and policies as it has the right to delegate or which it is not forbidden so to delegate by some other mandate of the organic law. In other words, said section of the Constitution does not pretend to designate or specify the quantum of the governmental powers of the state which shall be delegated to counties, nor does it point out or purport to declare what particular functions or policies included within the sovereign powers of the state government shall be conferred upon counties. All this is left to the sole discretion and judgment of the state, acting through its lawmaking department, except in so far as the Legislature may be required by other provisions of the Constitution, mandatory in their terms, to invest counties with certain specific powers which otherwise would belong to the sovereignty of the state subject to be conferred upon or withheld from the counties by the Legislature.

It is not necessary to present herein illustrations of the many conceivable instances in which the scheme authorized by subdivision 12 of section 2639 of the Political Code would not only be of immeasurable benefit to the county desiring to extend one of its roads into an adjoining county so as to connect with a road in the latter county, but would be necessary in order to secure that convenient connection with other parts of the state so essential to the full development and maintenance of prosperous business conditions. A road in a particular county with its terminus at a distance of several miles from a line dividing such county from another may serve in full measure all the purposes of the county in which it is situated, and, therefore, there might not exist in such case any reason or motive or desire in the latter county to extend the road to the county line so that it would connect with a road in the adjoining county. What good reason may be suggested why the Legislature should not authorize the one county, with the consent of the other, to extend, at its own expense, one of its roads so as to connect with the road in the adjoining county at the terminus of the latter's road? But, as stated, it is needless to introduce further illustration of the fairness, reasonableness, and the efficacy of such a plan as is contemplated by subdivision 12 of section 2639 of the Political Code. It is sufficient to know that the Legislature has the power to establish such a scheme, that it has done so, and that it appears to involve a reasonable exercise of such power.

[5] We now approach the consideration of the specific points upon which respondent contends this court must rest the conclusion that subdivision 12 of the section under consideration is in conflict with the terms of section 24 of article 4 of the Constitution and of section 11 of article 1 of the Constitution. The contention that said subdivision is in conflict with section 4 of article 11 of

the Constitution has already been sufficiently considered. The provisions of the Constitution with which it is claimed the act in question is in conflict are mandatory, and must be followed with substantial strictness. Section 22, art. 1, Const.; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Law v. S. F. et al., 144 Cal. 384, 77 Pac. 1014. Both sections, however, have often been considered and their meaning and scope construed by the Supreme and Appellate courts of this state. Their meaning and scope have thus been made perfectly clear, and the only difficulty, if difficulty there be, which can present itself in any case where it is charged that the Legislature, in the enactment of some statute, has failed to observe the mandates thereof, is in determining whether the charge may or may not be sustained. There is perhaps no other case, among the many, where the question of the validity of a statute was made determinable by the test prescribed by section 24 of article 4 of the Constitution, in which the purpose, the meaning, and the scope of said section were expounded in language of greater perspicacity than in that of Ex parte Liddell, supra. In that case the title of the act assailed read: "An act to establish a state reform school for juvenile offenders, and to make an appropriation therefor." The act provided, among other things, that any boy or girl between the ages of 10 and 16 years, who has been convicted of an offense, the penalty for which was imprisonment in the county jail or the state penitentiary, may be committed to the state reform school for a term of not less than 1 nor more than 5 years; "provided, however, that if the crime be one punishable by imprisonment in the county jail, the court may, in its discretion, commit the offender to the county jail for the time authorized by law," in such a case. The claim was, as is in reality the same here, that the act embraced more than one subject, but that the title of the act failed fully to express its subject-matter. The court held that the title of said act was not subject to the criticism thus made against it, and gave the following construction of section 24 of article 4:

> "The object of the provision is to prevent legislative abuse—to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the Legislature, as well as the public, against fraud; to guard against the passage of bills the titles of which give no intimation to the members of the Legislature or to the people of the matters contained therein. Cooley's Constitutional Limitations (6th Ed.) 169. * * *
> "In Abeel v. Clark, 84 Cal. 229, we held it was not necessary that the title of the act should embrace an abstract of its contents. The cases cited therein show that such is the view taken by the courts of other states; and, on reflection, it must appear that this conclusion is based upon the soundest principles of constitutional construction. It certainly was not intended that the title should be a repetition of the provisions found in the body of the bill; the object was to prevent deception by the inclusion of matters incongruous with the subject specified in the title. If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms and with the fewest words, and the framers of the Constitution doubtless intended the Legislature to conform to that custom. Mills v. Carleton, 29 Wis. 409; Bright v. McCullough, 27 Ind. 226; People v. Mahaney, 13 Mich. 494. * * * So an act to incorporate a fireman's benevolent association may include provisions for levying a tax upon the income of a foreign insurance company for the benefit of the corporation (Fireman's Benevolent Ass'n v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115); and it is held in many cases that an act entitled in general terms an act to incorporate a certain town may lawfully provide all means necessary for the government of the town, including taxation, courts, definition of misdemeanors, punishment of offenders, municipal improvements, etc. State v. Town of Union, 33 N. J. Law, 350; Cooley's Constitutional Limitation, 172, note 1."

In the case of Law v. San Francisco, supra, the Supreme Court quoted approvingly the following cogently expressed views of a constitutional provision of another state precisely the same as section 24 of article 4 of our Constitution by the United States Circuit Court in Geer v. Commissioners of Ouray County, 97 Fed. 435, 38 C. C. A. 250:

> "The object of this constitutional provision was twofold. It was to prevent surreptitious legislation, the insertion of enactments in bills which were not indicated by their titles, and to forbid the treatment of incongruous subjects in the same act. It never was intended to prevent the Legislature from treating all the various branches of the same general subject in one law, or from inserting in a single act all the legislation germane to its principal subject."

Many other cases to the same effect as the above might be cited, but it is not necessary to do so here.

[6] Tested by the principles enunciated in the cases referred to above, it cannot justly be said that the act in question involves legislation upon any subject not indicated by its title or the "treatment of incongruous subjects." It is clear that there is no subject treated in the act which is not germane to its general subject, to wit: "The powers and duties of boards of supervisors over the roads and highways of the county." Every provision in the act—every subject thereof—relates solely to county roads or highways and the powers which may be exercised over them by the boards of supervisors in the several counties throughout the state. It follows, therefore, that there is nothing deceptive in the title, or, in other words, there is no subject treated in the act which is not

reasonably and fairly indicated by the title thereof.

But it is argued that the title, to the average mind, would indicate that the phrase, "roads and highways of the county," has reference to roads and highways wholly situated and maintained within the territorial limits of each of the counties of the state. The title does not expressly so declare, nor, in view of the constitutional provision expressly authorizing the state, through the board or body to which it has committed such duties to establish a system of "state highways," may it reasonably be held that it so implies. If the title had thus been made to declare, "* * * relating to the powers and duties of boards of supervisors over the roads and highways in (or within) the counties," the argument might then have some foundation for its support. We are authorized to assume, from the phraseology of the title and the provisions of subdivision 12 of section 2639 of the Political Code, between which there appears perfect agreement, that the words "roads and highways of the county" were designedly employed so as to make it clear that the powers of the boards of supervisors were to be limited in their application to county roads and highways as distinguished from state roads and highways over which the state has sole and exclusive jurisdiction. Moreover, it being true, as has herein been shown, that the Legislature may rightfully establish such a scheme or plan as is provided for by said subdivision 12, and the state having done so, that portion of the road in a county constituting the extension by the adjoining county, such extension having been effected in conformity with the requirements of said subdivision, would, in law, be a road "or highway of the county" making the extension, although such portion of said road is not physically located in such county.

[7, 8] Subdivision 12 of section 2639 of the Political Code does not offend section 11 of article 1 of the Constitution. Said subdivision applies without discrimination in any respect to each and every county of the state. Any county, when the public convenience or the exigencies of the situation may justify or demand it, may invoke and act upon the provision of said subdivision. The fact, should it be a fact, there there may be many or some of the counties which may never find occasion to apply the provisions of said subdivision to their own purposes does not render it any the less uniform in its operation, within the meaning or intent of section 11 of article 1 of the Constitution. What is meant by that mandate of the Constitution is that any law of a general nature shall not discriminate as between persons who or things which stand in the same relation to such law "in respect to the privileges and immunities conferred upon it or the acts which it prohibits." The word "uniform" in the section does not mean universal, and, even where a general law applies to all of a class, the classification being a legally proper one, the requirement of uniformity is in such case satisfied if it applies to all of such class alike. 5 Cal. Jur. 818, 819; People ex rel. Smith v. District Court, 17 Cal. 547, 555; Ex parte Smith & Keating, 38 Cal. 702; Selowsky v. Superior Court, etc., 180 Cal. 404, 181 Pac. 652, and the numerous other cases cited in 5 Cal. Jur. pp. 818 et seq.

It is clear that, as to "uniformity of operation," subdivision 12 of section 2639 fully squares with the requirement of section 11 of article 1 of the Constitution as that mandate of our organic law has been uniformly construed by the cases.

[9] There is not, as counsel for the respondent claim is true, any incongruity between said subdivision 12 and those sections of the county government act defining the powers and duties of boards of supervisors with respect to the maintenance of roads and bridges "within their respective counties," nor with certain sections of the Political Code relating to the same subjects. Subdivision 12 of section 2639 merely invests such boards with more extensive powers with respect to the construction and maintenance of county roads and highways than they possessed prior to the passage of the act in question.

It follows from the foregoing views that the motion to strike from the petition certain averments must be denied and the demurrer to the petition overruled, and such is the order. As stated at the outset of this opinion, however, the facts as stated in the petition are controverted by the answer, and by the stipulation of the parties those questions of fact are to be submitted to the determination of the superior court of Yuba county, until which determination and the report of the court of its findings no conclusion upon the question whether the writ shall or shall not issue from this court can be announced.

Accordingly it is ordered that the issues of fact raised by the answer to the petition herein be referred to the superior court of the state of California, in and for the county of Yuba, for trial, and said court is hereby directed to hear and determine the same, and to report and return to this court its findings thereon within 60 days after the date of the filing of this opinion.

We concur: FINCH, P. J.; PLUMMER, J.

67 Cal. App. 325

BISSETT v. SOUTH SAN FRANCISCO BELT RY. CO. (Civ. 4775.)

(District Court of Appeal, First District, Division 2, California. May 17, 1924.)

Railroads ⚷327(1)—Truck driver backing without looking held negligent.

Deceased struck by a train while backing his truck out of a private road onto the railroad track without looking for an oncoming train, it being possible for him to have driven in forward position, and he having unobstructed view of track for a mile, *held* guilty of negligence constituting proximate cause of his death as matter of law.

Appeal from Superior Court, City and County of San Francisco; Ross Campbell, Judge.

Action by Eda Bissett against the South San Francisco Belt Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Reisner & Honey and Leigh S. Deming, all of San Francisco, for appellant.

McKinstry, Haber & Firebaugh, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment entered against her after the court had granted the defendant's motion for a nonsuit at the conclusion of the evidence offered by the plaintiff. This motion was granted upon the ground that the evidence showed contributory negligence as a matter of law on the part of Ulster Bissett, deceased, the son of the plaintiff, for whose death damages were sought by his mother upon the ground that her son's death was caused by the negligence of the defendant.

The Growers Rice Milling Company, hereinafter referred to as the Milling Company, occupied four acres of land at South San Francisco, San Mateo county, California. On the north line of the premises and extending in an easterly and westerly direction about 400 to 500 feet is a picket fence ten feet high. Near the center of the fence is a gate 12 feet wide used for ingress to and egress from the premises. Through this gate extends a dirt road, leading from the inclosure over a railroad track (hereinafter described) and extending to Swift avenue, which is a public thoroughfare. This dirt road is a private road used only for the business of the Milling Company. In front and north of the inclosure is a railroad track owned and operated by the defendant, the south rail of which is 6 feet 2 inches from the fence and the opening of the gate therein. This track crosses the private dirt road of the Milling Company and runs from the Southern Pacific depot to the premises of the Western Meat Company which is located about a quarter of a mile further east than the Milling Company. The railroad had been operating over this track for many years prior to the accident herein discussed, and deceased was familiar with the physical conditions and the operation of the railroad, for it appears that he had been delivering material to the Milling Company for several years, driving into its premises sometimes as often as a dozen times a day.

The railroad track runs in an easterly and westerly direction and from the gate referred to toward the west (the direction from which the train came which is involved here) the track is a perfectly straight one for a distance of a mile. The atmosphere was clear on the afternoon of the accident; and from the gate, the track could be seen, perfectly, for a distance of a mile.

Inside of the picket fence and within the inclosure of the Milling Company, south of said picket fence and west of the dirt road, is an incinerator about 40 feet high with a smokestack about 60 feet high. The north side of the incinerator is about 6 feet south of the fence, and the east side is about 30 feet from the west side of the road. This incinerator is so situated that from a point inside the Milling Company's property one's vision in a northwesterly direction through the openings between the pickets of the fence is obstructed. An object coming from the west along the railroad track could not be seen for a brief period when the incinerator was between it and a person within the inclosure.

Upon the day of the accident the deceased drove an automobile truck from Swift avenue over the dirt road, through the gate and into the premises of the Milling Company, stopping about 45 feet south of the gate. At this point he unloaded his truck, and then, without stopping or looking for a train approaching along the railroad track, he straightened out his truck and backed it in a northerly direction along this private road through the gate and on to the railroad track. When the back of his truck was upon the track the engine of the defendant coming from the west was within a few feet of it and deceased jumped from the truck into the picket fence and died as the result of the injuries which he received in so doing. The engine struck the truck and damaged it. The evidence appears in the record uncontradicted that deceased backed north out of the gate while he was facing south with his hands upon the steering wheel and without stopping and looking for an approaching train, which might have been seen from the gateway.

Fifteen or 20 feet beyond the place where his truck was stopped and just off and to the west of the dirt road is a garage shed 25 or 30 feet wide, open on the east side. The depth of this shed from east to west plus the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

width of the dirt road is about 60 feet. At the time deceased backed his truck out of the gate the garage shed was empty, and he might have run south from the point where he unloaded and turned westerly into the garage shed and then proceeded out of the shed driving forward. Had he done so the accident, most probably, would not have happened, because deceased would have seen the train when he reached the gate, and there were 6 feet between the gate and the nearest rail of the track. It also appears that after unloading his truck deceased could have proceeded 200 feet south and turned his car without reversing his engine and then proceeded out of the gate driving forward.

Under the conditions above narrated the deceased, thoroughly familiar with the physical conditions, backed out of this private road onto a railroad track without making any observations for an oncoming train. The length of the truck was about 16 feet, and the evidence discloses that driving backward, as deceased was doing, seated about 10 feet from the rear of his truck, the truck was upon the railroad track before deceased had reached the gate where a view of the track could be obtained.

It seems that a mere statement of the facts of the case concludes the appellant. Whether or not the defendant company rang a bell or was bound to ring a bell upon crossing this private road becomes immaterial. Herbert v. Southern Pac. Co., 121 Cal. 227, 232, 53 Pac. 651; Pepper v. Southern Pac. Co., 105 Cal. 389, 38 Pac. 974. The only possible conclusion from the evidence is that the negligence of deceased proximately caused his death; that being so, it presented a question of law and the judgment of nonsuit was proper. Murray v. Southern Pac. Co., 177 Cal. 1, 169 Pac. 675.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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67 Cal. App. 282

SIDNEY v. WILSON et al. (Civ. 4022.)

(District Court of Appeal, Second District, Division 1, California. May 15, 1924.)

1. Appeal and error ⇨931(1)—Court findings construed to support judgment where possible.

Where possible, court findings should be construed to support the judgment.

2. Replevin ⇨8(3)—Plaintiff must show right to possession.

To sustain an action in claim and delivery, plaintiff must show, not only possession of the property, but right to possession.

3. Replevin ⇨8(3)—Facts held to show sufficient possession, and right to possession, to maintain claim and delivery action.

Where plaintiff's husband, who purchased automobile with her money, with understanding that it should be her separate property, without her knowledge registered it in his own name under Motor Vehicle Act, and kept it in their garage at home, and later absconded, *held* that plaintiff had sufficient possession and right to possession to maintain an action in claim and delivery against husband's attaching creditor and sheriff.

4. Replevin ⇨72—Findings held to sustain judgment in claim and delivery action.

In an action of claim and delivery for an automobile against the attaching sheriff, court's findings, though not showing right to possession on date of attachment, *held* to support the judgment.

5. Husband and wife ⇨129(3)—Wife held estopped from recovering automobile from attaching creditor of husband.

Under Civ. Code, § 3543, where plaintiff's husband purchased an automobile with her money, and registered it under Motor Vehicle Act in his own name, which plaintiff discovered without protesting, plaintiff was estopped from recovering the car from an attaching creditor of the husband, who extended credit in reliance on the certificate of registration without knowledge of plaintiff's claim.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Nellie Sidney against R. B. Wilson and another. Judgment for plaintiff, and defendants appeal. Reversed with directions.

Swing & Wilson, of San Bernardino, for appellants.

John A. Hadaller and Byron Waters, both of San Bernardino, for respondent.

HOUSER, J. Claim and delivery. Briefly stated, the facts are that plaintiff had intrusted the sum of $600 of her separate property to her husband, E. J. Sidney, for the purpose of having him purchase for plaintiff an automobile, with the understanding between them that the automobile was to remain at all times the separate property of plaintiff, and that in the event of a sale of the automobile the money received therefrom was to be paid to plaintiff as her separate property. The husband bought the automobile, paid the wife's money for it, and attended to the registration of the same under the Motor Vehicle Act of the state of California, but in so doing, without the wife's knowledge or consent at that time, the husband registered the automobile in his own name and wrote his own name on the registration card as the owner thereof. The automobile was kept in a garage at the home occupied by plaintiff and her husband. Some time after the purchase of the automobile, plaintiff's said husband purchased a diamond from the defendant Wilson, for which part cash was paid and credit was given for the balance of the purchase price. In extending credit to the said husband of plaintiff, defendant Wilson relied not only upon statements and representations made to him by the said husband of plaintiff to the effect that he was the owner of the automobile in question and that he had the sum of $1,500 on deposit in the First National Bank of San Bernardino, but as well upon recommendations of the said husband of plaintiff made by other persons. Shortly after the diamond had been purchased, plaintiff's husband absconded, and defendant Wilson brought an action against him to recover the balance due on the diamond, in which action he caused defendant Shay, as sheriff, to attach the said automobile. Thereafter plaintiff brought this action in claim and delivery to recover possession of the automobile. She recovered judgment, and defendants appeal therefrom on the ground that the findings are insufficient to sustain the judgment.

Appellants specifically contend that there is no finding by the court with respect to the ultimate fact either of ownership or of right of possession by the plaintiff at the time the action was commenced; and it is admitted by respondent that, in the absence of either of such findings, in substance or in effect, whether directly stated or to be inferred from the express findings of the court, a reversal of the judgment must follow. In connection with the fact of plaintiff's ownership, or her right to possession of the automobile at the time the action was commenced, the findings contain the following:

> "That the said sum of $600 was the separate property of the plaintiff which she herself had earned in the state of California through her labor during a period of desertion by her said husband; * * * that, prior to the purchase of the said automobile by plaintiff, it was agreed by and between the plaintiff and her husband that plaintiff's separate funds be invested in the said automobile, that the automobile at all times remain her separate property, and that, in the event of a sale of the said automobile by the said husband or either of them, the entire sum so received from the sale should be paid to the plaintiff as her separate property; * * * that the said automobile was taken out of her (plaintiff's) custody on the 30th day of November, 1921, plaintiff's husband having deserted plaintiff on or about October 28, 1921, and absconded from the state of California, by defendant W. A. Shay, as sheriff, who acted at the instance and request of defendant R. B. Wilson, and that such taking * * * was wrongful and without right."

It will thus be seen that there is no direct finding, either of ownership or of right of possession in plaintiff at the time the action was commenced—the only finding in regard to ownership being that the automobile was purchased on September 19, 1921, and that it remained in the custody of plaintiff until November 30, 1921, when it was taken from plaintiff by the sheriff under the writ of attachment. It sufficiently appears that plaintiff was in the actual physical possession of the automobile at the time it was so taken.

[1] It is the rule that where possible the findings of the court should receive a construction which will support the judgment rather than defeat it. It is said in the case of Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257, that:

> "The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and, upon an appeal from that judgment, this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment."

And see, also, Hihn v. Peck, 30 Cal. 286; McCarthy v. Brown, 113 Cal. 17, 45 Pac. 14; Beggs v. Smith, 26 Cal. App. 532, 147 Pac. 585; Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 Pac. 659; Pacific States Corporation v. Arnold, 23 Cal. App. 672, 139 Pac. 239; Ballou v. Sunflower Gold Min. Co., 165 Cal. 557, 132 Pac. 1036.

[2] But, notwithstanding the fact that actual physical possession is thus satisfactorily shown to have been in plaintiff at the time the auto was taken from her custody by the sheriff, and notwithstanding plaintiff's equitable ownership thereof, it is contended by appellants that, in addition thereto, plaintiff must show that she had the legal right to possession.

Section 8 of the Motor Vehicle Act (Stats. 1917, p. 391, as amended, Stats. 1919, p. 199) sets forth the necessary procedure on a transfer of title of an automobile, and, among other things, provides that—

> "Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

[3] Because the record herein does not show that plaintiff was the registered owner of said automobile at the time the action was commenced, it is urged by appellants that under the provisions of said Motor Vehicle Act, as just quoted, plaintiff had not the right to possession of the automobile, and hence was not entitled to maintain an action in claim and delivery. As set forth in the case of Beggs v. Smith, 26 Cal. App. 532, 147 Pac. 585, where many authorities are cited, mere possession of the subject-matter of a

claim and delivery action will not suffice. In order that an action of such character may be sustained, it is necessary, not only that plaintiff show possession of the property, but as well that he is entitled to such possession. The facts of the instant case, as disclosed by the transcript, showing that plaintiff was the equitable owner of the car, coupled with her physical possession thereof at the time it was taken from her custody by defendant Shay, as sheriff, are a sufficient compliance with the rule requiring not merely possession, but a right to possession, in order that the action in claim and delivery may be maintained. In the case of Moody v. Goodwin, 53 Cal. App. 693, 200 Pac. 733, the legal principle is announced (syllabus) that—

> "A person in the actual and rightful possession of an automobile is entitled to maintain an action in replevin or for conversion thereof, even though upon a transfer to him there was a failure to comply with section 8 of the Motor Vehicle Act (Stats. 1917, p. 391)."

To the same effect, see Goodman v. Anglo-California Trust Co. (Cal. App) 217 Pac. 1078; also, Boles v. Stiles, 188 Cal. 304, 204 Pac. 848; Davis v. Cline, 184 Cal. 548, 195 Pac. 42.

[4] With reference to the requirement of right of possession of the automobile at the time the action in claim and delivery was commenced by plaintiff, the findings show that plaintiff gave $600 of her separate property to her husband to purchase the automobile for her, as her separate property; that on September 19, 1921, plaintiff's husband did purchase the automobile as requested, but registered it in his own name, of which fact plaintiff at the time was ignorant, and that she "did not know that her rights to the automobile were in any wise affected thereby"; that on October 28, 1921, plaintiff's husband left the home of plaintiff and absconded from the state of California, leaving said automobile on the premises then and theretofore occupied by plaintiff and her said husband; that the automobile was kept at the home of plaintiff and her husband from the time it was purchased on September 19, 1921, until the 30th day of November, 1921, when defendant Shay, as sheriff, under a writ of attachment, took the automobile from plaintiff's custody. According to the findings, the 30th day of November, 1921, is the last day that plaintiff had possession of the automobile. The action was tried on the allegations contained in an amended complaint and the answer thereto. The transcript of the record does not contain a copy of the original complaint; hence this court is unable to determine the exact date of the commencement of the action. However, the amended complaint contained an allegation "that before the commencement of this action plaintiff, on the 14th day of December, 1921, at the place aforesaid, demanded the possession of the said property of the defendants," from which it may be inferred that the action was not commenced before December 14, 1921. Allowing as a correct conclusion that the findings show that plaintiff was entitled to possession of the automobile on November 30, 1921, still there is no direct finding that at any time thereafter, and especially at the time the action was commenced, such was the case. Between the 30th day of November and the 14th day of December is a space of time for which no accounting is made. For aught that appears by the findings, both the ownership and the right to the possession of the automobile may have been transferred by plaintiff to some other person during such interval; and, if so, under the well-settled rule, ordinarily plaintiff could not maintain the action. In the case of Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434, it was alleged in the complaint, which was filed on July 15th, that on the 14th day of July preceding, the plaintiff was in the possession and entitled to the possession of the property; and it was held that, had not the affirmative allegations of the answer cured the defect in the complaint, no cause of action would have been stated. To the same effect is Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750, where a period of two days existed between the date when right of possession was alleged in plaintiff and the date of the commencement of the action. On the other hand, it is held in the case of Harris v. Smith, 132 Cal. 316, 64 Pac. 409, that (syllabus)—

> "A complaint in an action of claim and delivery, alleging that on a day named before the filing of the complaint, the plaintiff was the owner and entitled to the possession of the property, and was then in possession thereof, and that the defendant then, without plaintiff's consent, and against his will, wrongfully, unlawfully, and by force came into possession thereof, states, in effect, that it was thus taken from his possession, and states a cause of action arising on the day named, which continues until affirmatively shown to be extinguished."

It may be said that in each of the foregoing cases the question before the court was one solely of the sufficiency of the pleadings, and that in the instant case no such question is before the court.

In the case last cited, in referring to a line of cases holding that either ownership or right of possession must be alleged as of the date of the commencement of the action, it is said:

> "The complaint, it is contended, fails to allege ownership or right of possession at the time of the commencement of the action, and hence, under the decisions in this state, is insufficient [citing cases]. In the cases cited, the only allegations of the complaint were, in each case, that at a day named prior to the filing of the complaint, the plaintiff was the owner and entitled to the possession of the property sued for, and that the defendant now wrongfully detains the same, etc. In this case the com-

plaint alleged not only that on the day named the plaintiff was the owner and entitled to the possession of the property, but also that he was in possession of it, and that the defendants, on that day, without the plaintiff's consent, and against his will, wrongfully and unlawfully and by force came into possession of said personal property, and, in effect, that it was thus taken from his possession. The difference is that, in the cases cited, no cause of action is alleged as existing either at the time of the commencement of the suit or at any other time. But in the case at bar a complete cause of action is alleged as arising on the day named; and it may be contended that the obligation of restoration, having been created by the wrongful act of the defendant, it continues—with the action founded on it—until it is affirmatively shown to have been extinguished."

The allegations of the amended complaint herein with reference to the ownership and possession of the automobile are that—

> "Since the date of the purchase of the said automobile, to wit, September 19, 1921, plaintiff was, continued to be and now is the owner of the said automobile; that on November 30, 1921, plaintiff was in the exclusive possession of the said automobile, has ever since been entitled to the exclusive possession of the same, and is now entitled to the exclusive possession thereof."

The allegations of the amended complaint are not criticized; but it is a rule (with but few exceptions, none of which is applicable here) that the findings must cover the material issues. The right of possession of plaintiff in the automobile at the time of the commencement of the action was a material issue upon which there should have been a finding by the court. In the case of Cooke v. Aguirre, 86 Cal. 479, 25 Pac. 5, it is said:

> "The questions whether the plaintiff was entitled to the possession of the property, and whether he was damaged by the taking, were put in issue by the pleadings. Both of these were material issues. One of them, at least, must have been found in favor of the plaintiff, to entitle him to recover. There was no finding as to his right to the possession. For this reason, the judgment is not supported by the findings."

See, also, Banning v. Marleau, 133 Cal. 485; Washburn v. Huntington, 78 Cal. 573; Beggs v. Smith, 26 Cal. App. 532.

Such ruling would seem to settle the question here involved, were it not for the intimation contained in the case of Harris v. Smith, 132 Cal. 316, to which attention has been heretofore directed, and which is to the effect that where right of possession is shown in the plaintiff on a certain day, and on which day the plaintiff was wrongfully dispossessed by the defendant, a cause of action is stated "arising on the day named, which continues until it is affirmatively shown to have been extinguished."

In the instant case no question arises as to the sufficiency of the allegations of the complaint. The findings, after showing plaintiff's equitable ownership and her actual physical possession of the auto, are:

> "That the said automobile was taken out of her custody on the 30th day of November, 1921, plaintiff's husband having deserted plaintiff on or about October 28, 1921, and absconded from the state of California, by defendant W. A. Shay, as sheriff, who acted at the instance and request of defendant R. B. Wilson, and that such taking of the said automobile from the custody of plaintiff was wrongful and without right."

Following the rule, as laid down in Harris v. Smith, supra, it would therefore appear that the findings with respect to plaintiff's right of possession of the automobile support the judgment.

[5] Appellants also urge the defense of estoppel. The court found that defendant Wilson relied upon the appearance of ownership of the automobile in plaintiff's said husband, which was created by virtue of the registration of the automobile and the registration certificate in the name of plaintiff's husband (which registration certificate was exhibited to defendant Wilson), coupled with the additional fact that plaintiff's husband apparently had the use and control of the automobile, and that in consequence thereof defendant Wilson sold the diamond to plaintiff's husband and extended credit to him without any information or knowledge that plaintiff claimed to have or had any interest whatsoever in the automobile. The court further found "that the said plaintiff knew that said automobile was registered in the name of her said husband, E. J. Sidney, and made no protest thereto, and at no time made any effort to secure the registration thereof in her own name," although she had no knowledge regarding the sale of the diamond to her husband by defendant Wilson, nor ever in any manner ratified or approved the purchase thereof.

It is a maxim of jurisprudence that, if one of two innocent persons must necessarily be damaged because of the act of some third person, if it also appear that one of such innocent persons was blamable in that he placed the power in the hands of the third person to commit the wrong through which such injury was suffered, such innocent person must bear the loss. Section 3543, Civ. Code. The facts of this case as heretofore outlined clearly present a basis for the application of the rule announced in the case of McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, that—

> "Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or author-

ity of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance."

In volume 10, p. 641, of California Jurisprudence, the foregoing rule is restated and accompanied by a large list of California cases affirming the doctrine. That the doctrine of estoppel may be invoked where a wife knowingly permits her husband to deal with her personal property as his own, and will prevent her from asserting her ownership therein, as against persons who have extended credit to her husband in reliance upon his apparent ownership of the property, see 21 Corpus Juris, 1179, where, in support of the rule, the following cases, among others, are cited: Norris v. McCanna (C. C.) 29 Fed. 757; Locklin v. Davis, 71 Vt. 321, 45 Atl. 224; Boise Butcher Co. v. Anixdale, 26 Idaho, 480, 144 Pac. 337; Brashear v. Crews, 131 Ark. 593, 199 S. W. 386; McClain v. Abshire, 63 Mo. App. 333; Miller, Watt & Co. v. Mercer, 70 Iowa, 166, 150 N. W. 694; Hamlen v. Bennett, 52 N. J. Eq. 70, 27 Atl. 651; Leete v. State Bank, 115 Mo. 184, 21 S. W. 788. It would, therefore appear from a consideration of the foregoing statement of facts and law that appellants' contention as to the estoppel of plaintiff herein should be sustained.

It follows that the judgment should be reversed. It is so ordered. It is further ordered that on the findings the superior court order judgment to be entered in favor of defendants.

We concur: CONREY, P. J.; CURTIS, J.

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67 Cal. App. 468

ARNHEIM v. FIREMEN'S INS. CO. OF NEWARK, N. J. (Civ. 2748, Sac. 3701.)

(District Court of Appeal, Third District, California. May 24, 1924. Rehearing Denied June 23, 1924. Hearing Denied by Supreme Court July 17, 1924.)

1. Appeal and error 🔑907(3)—No inference can prevail over express findings of trial court.

In appeal on judgment roll alone every intendment is in favor of judgment or order appealed from, and if error does not affirmatively appear it will be sustained if there is any possible ground on which to do so, and hence no inference that insurer did not consent to transfer of interest by insured's cotenant by indorsement of fire policy could arise from fact that copy of policy attached to complaint did not contain such indorsement, where court expressly found that allegations of insurer's answer were untrue.

2. Trial 🔑395(1)—Finding, though not commended, held sufficient.

Finding that all affirmative allegations in answer were untrue except as they are shown by complaint and as specifically found, though not commended, *held* sufficient under facts of case.

On Rehearing.

3. Appeal and error 🔑533(1)—Trial court's opinion is not part of record on appeal.

On appeal on judgment roll alone, trial court's opinion is no part of record and appellate court must look to judgment roll alone to ascertain facts.

On Petition for Hearing in Supreme Court.

4. Appeal and error 🔑907(3)—Presumed findings of fact sustained by evidence in absence of bill of exceptions or transcript.

In absence of bill of exceptions or reporter's transcript, Supreme Court must presume findings of fact were sustained by evidence.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Felice C. Arnheim against the Firemen's Insurance Company of Newark, N. J. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellant.

Edward Myers, of San Francisco, and Duard F. Geis, of Willows, for respondent.

FINCH, P. J. The complaint alleges that at all times therein mentioned the plaintiff was the owner of an undivided one-half interest in a certain building; that on the 11th day of October, 1920, Carrie L. Kahn was the owner of the other half interest; that on that day the defendant "executed and delivered to plaintiff and said Carrie L. Kahn, its certain policy of fire insurance * * * by which said defendant did insure plaintiff and said Carrie L. Kahn for the term of one year from the 1st day of November, 1920, to the 1st day of November, 1921, against all loss or damage by fire, except as in said policy provided, to an amount not exceeding $3,000 on the property" aforesaid; that "on the 11th day of June, 1921, the property * * * was damaged by fire to the extent and amount of $7,987.72"; that "on or about the 18th day of April, 1921, the said Carrie L. Kahn, * * * without the knowledge of plaintiff, sold and conveyed her said one-half interest" in the property. It is then alleged that due proofs of loss were made to the satisfaction of defendant, but that defendant failed and refused to pay the same, and that the proportion of plaintiff's loss for which defendant is liable to her, by reason of her ownership of a half interest in the property, is the sum of $1,196.80, the property having been insured in another company as well as defendant. A copy of the insurance policy was attached to the complaint. The policy contained the following provision:

> "Unless otherwise provided by agreement indorsed hereon or added hereto this company shall not be liable for loss or damage occurring * * * while the interest in, title to or possession of the subject of insurance is changed excepting: (1) By the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or co-owners to others."

In addition to the denial of certain allegations of the complaint, the answer sets up several provisions of the policy, including that above quoted, and alleges that Carrie L. Kahn conveyed her half interest in the property to some one other than plaintiff; "that no agreement or consent of defendant to the foregoing was indorsed upon or added to said policy and that the same thereby became void;" that "defendant at all times after the occurrence of said loss claimed that no liability as to said insured or either of them under said policy existed." There were other affirmative allegations contained in the answer, but they are not material to the determination of this appeal.

The cause came on regularly for trial, but no one appeared for defendant. Evidence was introduced by the plaintiff, and findings were filed and judgment entered in her favor as prayed for in the complaint. The defendant prosecutes this appeal on the judgment roll alone.

In so far as material here, the court found as follows: "I. That all the allegations and averments of the plaintiff's complaint herein are true. II. That all the denials of the defendant in its answer to the complaint herein are untrue. III. That all the affirmative allegations set forth and contained in said answer of the defendant are untrue, except as the same appear by and are shown in the complaint herein; and except that it is true that the defendant at all times after the occurrence of the loss referred to in said complaint claimed that no liability as to the insured, or either of them, under the policy set forth in the complaint existed."

It is admitted by the pleadings, being alleged by both parties, that Carrie L. Kahn had parted with her interest in the property insured before the damage thereto by fire. The complaint is silent as to whether the defendant consented to such transfer and the answer affirmatively alleges "that no agreement or consent of defendant" to the transfer "was indorsed upon or added to said policy." The burden of proving this affirmative allegation was on defendant. 19 Cyc. 936; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86; Rossini v. Saint Paul Fire, etc., Ins. Co., 182 Cal. 415, 188 Pac. 564; Atlas Fire Ins. Co. v. Malone, 99 Ark. 428, 138 S. W. 962, Ann. Cas. 1913B, 210, and note, p. 212.

[1] The court found that all the affirmative allegations of the answer, with certain exceptions of which this is not one, are untrue. Appellant contends that it sufficiently appears "that the insurance company did not consent to such transfer by indorsement on the policy, since the copy of the policy attached to the complaint did not contain such an indorsement." This might be true in the absence of a finding to the contrary, but no such inference can prevail over the express finding that defendant's allegation is untrue. The complaint does not allege that the copy of the policy attached thereto contains the indorsements thereon.

> "In an appeal on the judgment roll alone every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, it will be sustained, if there is any possible ground on which it can be sustained." Myers v. Canepa, 37 Cal. App. 556, 560, 174 Pac. 903, 906.

The foregoing rule is specially applicable to this case because of defendant's failure to appear at the trial or offer any proof of the facts alleged in its answer.

[2] It is contended that the omnibus finding, "that all the affirmative allegations set forth and contained in said answer of the defendant are untrue, except as the same appear by, and are shown in the complaint herein," and except as specifically found, is insufficient to support the judgment. In support of this contention appellant cites Harlan v. Ely, 55 Cal. 340; Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 Pac. 1125; Pinheiro v. Bettencourt, 17 Cal. App. 111, 118 Pac. 941; Hall v. Mitchell, 59 Cal. App. 743, 211 Pac. 853; Imperial Water Co. No. 1 v. Imperial Irr. Dist. (Cal. App.) 217 Pac. 88; Stampfli v. Stampfli, 53 Cal. App. 126, 199 Pac. 829; McAuliffe v. McAuliffe, 53 Cal. App. 352, and Turner v. Turner, 187 Cal. 632, 203 Pac. 109. Of the findings condemned in the foregoing cases, that in Krug v. F. A. Lux Brewing Co. is most nearly like the one here under consideration. It was as follows:

> "That all the allegations of defendant's answer in said action, so far as they are inconsistent with the allegations of said complaint, are not true."

To determine whether one allegation is inconsistent with another may be a difficult problem, involving questions both of law and of fact upon which reasonable men may differ, and therefore it cannot be known what allegations of the answer the trial judge may have considered inconsistent with those of the complaint. The same difficulty is not encountered in determining what allegations of the answer "appear by and are shown in the complaint." The question is easily determined in this case. The only affirmative allegations of the answer which appear in the complaint are of certain provisions of the policy, which is set forth in full by the complaint, and that Carrie L. Kahn had conveyed her interest in the property prior to the fire, which fact is expressly alleged in the complaint. The terms of the policy and the fact of such transfer being admitted by the pleadings, no finding thereon was necessary. From what has been said, it clearly appears that the objection to the sufficiency of the findings is purely technical. While the finding is far from being a model, and is not to be commended, yet, under the particular facts of this case, there is no uncertainty as to the meaning thereof, and it would be unjust to put plaintiff to the expense of a second trial by reason of a technical defect not affecting the substantial rights of the defendant, after it has failed to avail itself of the opportunity to present any defense it may have at the first trial. What has been said applies with equal force to all the affirmative allegations of the answer, which are not contained in the complaint.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

On Rehearing.

PER CURIAM. [3] In appellant's petition for a rehearing it is said that—

> "The case was * * * submitted in the court below upon the admitted facts shown by the plaintiffs and a stipulation of facts."

The opinion of the trial court is appended to the petition. The following language appears in the opinion:

> "In due course a trial was had in which the plaintiff introduced certain evidence, and thereafter a continuance was had and a stipulation filed of record in this case, and the matter submitted to the court for decision. * * * The court * * * has read with marked interest the very voluminous and able briefs filed by counsel upon each side."

The opinion of the trial court is no part of the record on appeal, and this court must look to the judgment roll alone to ascertain the facts. The judgment, which was signed by the trial judge, recites:

> "This cause came on regularly for trial on the 29th day of January, 1922, Duard F. Geis, Esq., appearing as counsel for plaintiff, and no counsel appearing for the defendant. * * * Evidence was introduced by the plaintiff, and the evidence being closed, the cause was submitted to the court for consideration and decision."

There is nothing in the record to show that the defendant appeared at the trial or that the case was submitted upon stipulated facts. It is not important here, however, whether the defendant appeared at the trial, or whether the facts were stipulated, since the stipulation, if any, is not in the record, because the findings are such as to entitle plaintiff to the judgment rendered.

It is conceded in the petition that the burden was on defendant to show a breach of the condition against a transfer of title, but it is contended that, a transfer of the cotenant's title being admitted, the burden was on plaintiff to show that defendant consented to such transfer. The condition, however, was not that no transfer of title should be made, but that no such transfer should be made without defendant's consent indorsed upon or added to the policy. Mere proof of a transfer of title does not establish a breach, but it must further appear that the defendant did not consent thereto in the manner provided in the policy. This question of burden of proof, like that first considered, is of no practical importance, because the defendant alleged that it did not so consent and the court found that such allegation is untrue. The appeal being upon the judgment roll alone, it must be presumed that there was evidence to support the findings.

The petition is denied.

Opinion of the Supreme Court in Bank, Denying Hearing.

PER CURIAM. The petition for a transfer and hearing by this court, after decision by the District Court of Appeal for the Third Appellate District, is denied.

[4] We neither approve nor disapprove the statement in the opinion to the effect that the burden of proof was on the defendant to prove that no agreement or consent of defendant to the transfer of interest was indorsed upon or added to the policy. That statement is unnecessary to the decision, for the reason that, in the absence of a bill of exceptions or reporter's transcript, we must presume that the findings of fact were sustained by the evidence.

67 Cal. App. 799

Felice C. ARNHEIM, Plaintiff and Respondent, v. ÆTNA INS. CO. (a Corporation), Defendant and Appellant. (Civ. 2747.)

(District Court of Appeal, Third District, California. May 24, 1924. Hearing Denied by Supreme Court July 17, 1924.)

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellant.

Edward Myers, of San Francisco, and Duard F. Geis, of Willows, for respondent.

PER CURIAM. The plaintiff was given judgment, on an insurance policy issued by defendant, for damage by fire to the building insured. The facts, except as to parties and amounts recovered, are identical with those involved in Arnheim v. Firemen's Insurance Company of Newark, N. J., 227 Pac. 676. The appeal was submitted on the briefs in that case.

For the reasons stated in the opinion in that case the judgment herein is affirmed.

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67 Cal. App. 432

HOLLENBECK v. LUNDERVILLE et al. (Civ. 2723.)

(District Court of Appeal, Third District, California. May 23, 1924. Hearing Denied by Supreme Court, July 17, 1924.)

1. Appeal and error 🔑1010(1)—Findings of trial court supported by evidence not disturbed because of evidence supporting contrary finding.

Where the findings of the trial court are supported by evidence, the appellate court cannot disturb them merely because of the existence of evidence to sustain a contrary finding.

2. Sales 🔑28—Writing held to constitute binding contract, notwithstanding omission to have notes for deferred payments executed as provided in writing.

Writing containing complete description of property, terms of payment, warranty by seller, and covenants as to what was to be done by respective parties, signed and executed by them, *held* binding contract of sale, notwithstanding failure of seller to require of buyer execution of notes, for deferred payments in consonance with clause to that effect in writing; giving of such notes merely being additional evidence of an existing obligation.

3. New trial 🔑104(1)—Denial of motion, based on newly discovered evidence merely cumulative, held not prejudicial error.

Denial of motion for new trial, based upon newly discovered evidence, *held* not prejudicial error, where affidavits adduced in support of motion showed merely cumulative evidence.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

Action by G. J. Hollenbeck against W. H. Lunderville and others. From a judgment against him, named defendant appeals. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellant.

Meredith, Landis & Chester, of Sacramento, for respondent.

PLUMMER, J. Plaintiff had judgment in the court below against the defendant Lunderville, and from this judgment said defendant appeals.

The action instituted and prosecuted by the plaintiff is based upon a certain contract entered into between the defendants and the Holt Manufacturing Company of the city of Stockton, for the purchase of a certain caterpillar tractor, and assigned to the plaintiff, which contract is in words and figures as follows, to wit:

"Deliveries are subject to the acts or the demands of the government of the United States of America.

"Caterpillar.
"Reg. Trade-Mark U. S.
"Pat. Off.

"Territory: Block 9.

"Shipped Oct. 22, 1919, traction engine No. 20839, order No. G-41421

"Car No W.P.2050 $5,375.00.

"Forty-Five.

"The Holt Manufacturing Company, a corporation, Stockton, California: Manufacture and ship to the undersigned one 'Caterpillar' standard gasoline traction engine motor forty-five H. P. Four cylinders 6x7. Width tract 28.

"Equipped with canopy top and side curtains two speeds forward. Stationary attachment. Lighting system.

"Consign to Johnson Bros. & Lunderville. To be shipped by S. P. to Sacramento station, on or about Oct. 23, 1919, free on board cars or boat at Stockton, California, U. S. A., for which the undersigned agrees to pay fifty-three hundred seventy-five and no/100 dollars as follows: One thousand two hundred fifty and 00/100 dollars * * * with the order; one thousand two hundred fifty and 00/100 dollars * * * 1 month after date of shipment; six hundred and 00/100 dollars 3 months after date of shipment; six hundred and 00/100 dollars 6 months after date of shipment; six hundred and 00/100 dollars 9 months after date of shipment; balance 12 months after date of shipment—with interest from one month after date of shipment until paid, at the rate of eight (8) per cent. per annum.

"Subject to a discount of five (5) per cent. for all cash date of shipment.

"All payments to be made in gold coin, San Francisco or New York exchange, to the Holt Manufacturing Company (a corporation), at its office, Stockton, California.

"Deferred payments as above recited to be evidenced by notes and lease made, executed, and delivered to the Holt Manufacturing Company in the form required by said company on arrival or delivery of said 'Caterpillar' traction engine at destination designated above, but no such note or lease shall be deemed as in payment until the same shall have been actually paid in lawful money.

"Warranty: The 'Caterpillar' traction engine hereinabove specified is warranted to deliver 45 brake horse power, and do the work of 22 average horses under reasonable conditions, at sea level. If inside of six days from date of unloading at destination the said 'Caterpillar' traction engine should prove incapable of meeting this warranty, the undersigned shall give notice, by registered letter or telegram, to the Holt Manufacturing Company at Stockton, California, U. S. A., stating wherein the said 'Caterpillar' traction engine fails, and shall allow a reasonable time for the company to send a man to remedy the cause, if any, the undersigned rendering necessary and friendly assistance. If the said 'Caterpillar' traction engine cannot then be made to meet, substantially, the above warranty, the undersigned shall return the said 'Caterpillar' traction engine f. o. b. cars or boat at shipping point where received, and the Holt Manufacturing Company shall return all notes or money given in payment except freight charges one way, which, when done, shall be a complete settlement of the entire transaction. Failure to give notice as above, or the continued possession or operation of the said 'Caterpillar' traction engine beyond the period of six days, above mentioned, shall be conclusive evidence that the said 'Caterpillar' traction engine fills the warranty.

"Should any parts prove defective within six months from date of delivery, through defective material or inferior workmanship, replacements shall be made by the Holt Manufacturing Company, f. o. b. cars or boat at Stockton, California, U. S. A. The parts claimed to be defective are to be returned prepaid to the Holt Manufacturing Company at its factory in Stockton, California, U. S. A., for inspection, and if found defective as claimed, the charge if made for the new parts shall be remitted.

"It is hereby expressly understood and agreed that the Holt Manufacturing Company shall not in any case or under any circumstances be held liable or responsible for any damages or personal injuries suffered or sustained in the use, operation, or handling of said 'Caterpillar' traction engine or otherwise, no matter how caused or occasioned; nor for any implied warranties; nor for any loss of profits, expenses, or damages resulting to the undersigned by reason of any delays or nonperformance of said 'Caterpillar' traction engine, or from any other causes whatsoever; that all such claims are hereby specifically waived; and that the liability of the Holt Manufacturing Company shall be limited to the warranty as to horse power and to the replacements of such parts shown to be defective under the warranty as above made, and then only in the manner and to the extent hereinabove specified.

"And it is hereby expressly understood and agreed that until the Holt Manufacturing Company does part with the title thereto, as herein provided, the undersigned will keep said 'Caterpillar' traction engine in first class condition, good order, and repair, and will not remove, transport, ship, drive, or take said 'Caterpillar' traction engine or cause or suffer the same to be removed, transported, shipped, driven, or taken from the state to which the same is originally shipped by the Holt Manufacturing Company, without the consent of the Holt Manufacturing Company first had and obtained in writing.

"And it is understood and agreed that the Holt Manufacturing Company does not part with the title to said 'Caterpillar' traction engine, but retains and holds the title and ownership thereof absolutely, until all said deferred payments or notes are fully paid; that time is of the essence of this agreement, and, it being expressly understood that any default in any of the deferred payments or notes, or any of the terms or conditions hereof, shall, at the option of the Holt Manufacturing Company, cause and render all payments or notes to become immediately due and payable; that should the undersigned make default in any of said payments, terms, or conditions, then the Holt Manufacturing Company may at their option, and without notice, terminate this agreement, and with or without legal process take and retain said 'Caterpillar' traction engine wherever it may be situated, and all moneys, paid by the undersigned prior to such default shall be retained by the Holt Manufacturing Company as compensation for the privilege of using said 'Caterpillar' traction engine by the undersigned prior to such default; and should the Holt Manufacturing Company by reason of such default incur any expense, the undersigned agrees to reimburse them the sum total of all such expenses, including reasonable counsel fees.

"The undersigned agrees to pay and discharge all city, county, and state taxes that may be assessed against said 'Caterpillar' traction engine, and also all statutory liens upon said 'Caterpillar' traction engine.

"And it is further understood that no representative or agent has any power to make any additions to or vary the terms and conditions hereof. This offer shall not be binding until it is submitted to and duly accepted by the Holt Manufacturing Company at its office in Stockton, California, U. S. A.; and that when so accepted it shall become a California contract and construed in accordance with the laws of the state of California.

"I herewith declare that I have carefully read the foregoing instrument, and am acquainted with its contents, which I hereby accept.

"Dated the 22 day of Oct., 1919.

"Post office, Courtland; county, Sac.; state, Cal.

"W. H. Lunderville.
"J. C. Johnson.
"H. C. Johnson.

"Read before signing.

"This order sent in by Hollenbeck & Talbot.

"Approved by R. E. Mam, Credit Manager.

"Accepted by the Holt Manufacturing Company this 23d day of October, 1919, by Thores Luke, Manager-Sales Manager.

"(Form 162 8-18)"

(Reverse side.)

"Oct. 23, 1919. Rec'd on within contract $1,250.00

"Stockton, California, October 23, 1919.

"For value received, we assign the within contract unto G. J. Hollenbeck, without recourse to us.

"The Holt Manufacturing Company, Inc.,
"By [Signed] ———, Treasurer."

It appears from the testimony that Walter J. Talbot was the district agent for the Holt Manufacturing Company for the Sacramento district, and that the plaintiff was the special agent acting with him in the selling of tractors. It appears from the transcript that prior to any negotiations concerning the tractor in question, the plaintiff had rented from the Johnson estate 160 acres of land situated in what is known as the by-pass district; that this land was unbroken and was then covered by tules; that at the time the negotiations were first taken up the defendant Lunderville did not have a sufficient acreage of land to justify the purchase of the tractor in question; and that the plaintiff proposed leasing the 160 acres just referred to. On the part of the appellant it is contended that the plaintiff proposed to lease him the 160 acres of land and to sell him a tractor of the kind and capacity mentioned in the agreement set out herein, that he (the plaintiff) would purchase the tractor from the Holt Manufacturing Company, and that the defendant Lunderville was to pay for the tractor out of the proceeds of the crops to be raised upon the premises leased by him from the plaintiff. This contention of appellant is controverted by the plaintiff. The appellant, to support his contention, introduced evidence to the effect that the plaintiff came to his residence near Courtland in the county of Sacramento and there agreed to lease the premises to him upon the terms set out in the transcript and also to make sale of the tractor as above stated, and further testified that at that time the plaintiff produced a blank contract for the purchase of the tractor from the Holt Manufacturing Company and asked the appellant to sign the same, stating that, if the purchase were made in the name of the appellant, the plaintiff would be enabled to obtain a commission for the sale. On the part of the plaintiff there is testimony to the effect that the contract set out herein was signed in the city of Sacramento, was all written by Walter J. Talbot, the district agent of the Holt Manufacturing Company and was signed by the appellant and the defendants, J. C. Johnson and H. C. Johnson, in the presence of said Walter J Talbot; that the plaintiff was not there at the time and was not present during any of the time when the contract was prepared by Talbot, read over to the defendants, and signed by them. Upon the question as to whether Lunderville was acting as the agent of the plaintiff in making purchase of the tractor and whether there was any such agreement between the plaintiff and the defendant Lunderville, as alleged by the defendant, the testimony is in very sharp conflict. The finding of the court is to the effect that no such agreement was ever had. It is further contended by the respondent in this action that testimony as to whether there was or was not such an agreement is not admissible to vary the terms of the written contract. On the part of the appellant it is urged that such testimony went only to the consideration and is admissible under the rule announced and followed in the cases of Tidewater Southern Railway Co. v. Harney, 32 Cal. App. 253, 162 Pac. 664, Robson v. O'Toole, 60 Cal. App. 711, 214 Pac. 278, and Fuller v. McClure, 48 Cal. App. 185, 191 Pac. 1027. The trial court, upon conflicting testimony, having decided that there was no such an agreement, it becomes wholly immaterial as to whether the testimony relating thereto was or was not admissible. The finding of the trial court on this question is in these words:

> "* * * The only understanding or contract or agreement between the parties was and is evidenced by the written contract referred to in plaintiff's complaint. Said tractor when delivered was not delivered to defendant Lunderville or the other defendants as the property of plaintiff or for plaintiff's use or benefit subject to the alleged contract set forth in defendant's answer or otherwise; that said tractor was delivered under the terms and conditions of said contract referred to in plaintiff's complaint."

[1, 2] It is further found that the defendant Lunderville was not, nor were either of the defendants, acting as the representatives or agents of the plaintiff. This disposes of the question as to the agreement alleged by the appellant to have been orally entered into between the plaintiff and the defendant Lunderville concerning the terms and conditions of the purchase of the tractor in question. While the testimony on this subject is all set out in the respective briefs of the parties, and much argument based thereon, this court is bound by the findings of the trial court so long as there appears to be sufficient testimony supporting the findings. There is sufficient testimony in the transcript to have supported a finding to the contrary; yet if the trial court believed the testimony of the plaintiff and of his witnesses, the findings entered by the trial court are sufficiently supported, and we are not at liberty to disturb them simply because there is testimony which would have supported a contrary conclusion. The main argument of appellant is founded upon the theory that the writing executed by the defendants and the Holt Manufacturing Company did not constitute a contract and was only a preliminary offer, in that certain additional papers were provided for and never executed, to wit, notes evidencing deferred payments and a lease. The writing set out herein contains the following paragraph:

> "Deferred payments as above recited to be evidenced by notes and lease made, executed, and delivered to the Holt Manufacturing Company in the form required by said company on arrival or delivery of said 'Caterpillar' traction

engine at destination designated above, but no such note or lease shall be deemed as in payment until the same shall have been actually paid in lawful money."

No notes evidencing the deferred payments were ever made, nor was any lease executed or delivered. It is the theory of the appellant that, by reason of the omission to have notes executed evidencing the deferred payments and a lease signed by the defendants, the instrument heretofore set out never became a binding contract.

An examination of the instrument shows that, in and of itself, it contained a full and complete description of the property, the terms of payment, and warranty by the seller, a reservation of title in the seller until payment should have been fully made and completed, a statement of all of the rights of the respective parties and covenants as to what was to be performed by the respective parties, properly signed and executed by the respective parties, as fully and completely fixing their legal rights as though the notes and lease referred to had been executed and delivered. Nothing additional was to be done by the Holt Manufacturing Company, and no additional rights were to be given or acquired by the defendants. The property was fully described, the terms of payment were fixed, each party could ascertain from the instrument signed by them all of these facts. The paragraph which we have quoted simply provided for giving to the Holt Manufacturing Company additional evidence of the amount of the purchase price and of the title or property interest conveyed to the purchaser and retained by the seller. Under such circumstances, we do not see very well how it can be held that the instrument in question did not become a valid, binding and subsisting contract the very moment it was accepted by the Holt Manufacturing Company. The minds of the parties had met as to the property in question and all the terms and conditions in relation thereto; the fact that the Holt Manufacturing Company, or seller, was entitled to demand some additional evidence of the contract did not in any wise change the character of the contract or prevent the minds of the parties meeting as to its terms and conditions. The property was delivered and at the time of the delivery, according to the contract, the Holt Manufacturing Company might, if it so elected, have demanded additional evidence. This it appears it did not do. This evidence would simply have been supplemental, and we do not see how in any particular it was intended to change any of the terms of the contract which we have set forth herein. This being the case, we think the argument of the appellant based thereon faulty in its premises. We have no quarrel with any of the authorities cited by the appellant, but all those cases have to do with mere proposals or circumstances where an instrument has been orally agreed to be executed or the instrument signed is incomplete and shows a manifest intention of the parties that the minds of the purchaser and seller had not yet met in agreement. The paper signed by the defendant before it had been signed by the Holt Manufacturing Company was not a mere offer. It contained a full statement of all the terms and conditions of the proposed purchase and sale, and also contained a stipulation that upon acceptance by the Holt Manufacturing Company it should become a valid contract. The language thereof is as follows:

> "This offer shall not be binding until it is submitted to and duly accepted by the Holt Manufacturing Company at its office in Stockton, California, U S. A.; and that when so accepted it shall become a California contract and constructed (construed) in accordance with the laws of the state of California."

[3] There is no intimation anywhere that a more formal contract is to be executed. It appears clear that the instrument which we have set out is the contract and the only contract within the contemplation of the parties; that the payments provided for should be evidenced also by promissory notes could in no wise change or alter the terms or conditions of the contract. This is true of any lease that might have been executed. It has been frequently held that, where parties make an agreement which they intend shall be binding from the time it is made, effect will be given to it from that time, though they also intend that it shall be superseded by a more formal written agreement. 2 Wharton on Contracts, 645; Blaney v. Hoke, 14 Ohio St. 292; Long v. Needham, 37 Mont. 408, 96 Pac. 731. The courts uniformly hold that the cause of action on a note for a debt does not discharge the debt unless it is expressly so agreed. In the instrument in question, the contrary is expressly provided for. The authorities are so numerous that we need cite but one which states the general principle. Brewster v. Bours, 8 Cal. 501. The debt was created when the contract was accepted and the tractor delivered, and the giving of a note thereafter would simply be evidencing an obligation already existing. The affidavits presented to the trial court upon the defendant's motion for a new trial based upon newly discovered evidence set forth only that which was cumulative, and we do not think the trial court committed any prejudicial error in denying the defendant's motion based thereon.

The findings of the trial court being supported by the testimony, as we have hereinbefore stated, and viewing the contract as we do, it follows that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

67 Cal. App. 363

MARKART v. ZEIMER et al. (Civ. 2679.)

(District Court of Appeal, Third District, California. May 19, 1924. Hearing Denied by Supreme Court July 17, 1924.)

1. Trial 🔑252(8)—Instructions in action for malpractice without evidence held erroneous.

In an action against surgeons for malpractice, instructions submitting issues as to whether defendants in operating for hernia closed inguinal canal so tightly that it interfered with action of nerves or stopped flow of blood to testicle and whether when wound commenced healing, inner walls grew fast to bowels, *held* error, where there was no evidence that either of such conditions had resulted from operation.

2. Trial 🔑251(8)—Submission of issue of negligence in performing operation held error where complaint charged trespass.

In an action against surgeons for malpractice, where complaint charged defendants with a trespass in removing plaintiff's testicle, submission of the issue of degree of skill and care exercised by defendants in performing operation was error.

3. Physicians and surgeons 🔑14(4)—Degree of skill and care required.

All that is required of a physician in performing an operation is that he have degree of skill ordinarily possessed by reputable physicians or surgeons practicing in his locality.

4. Physicians and surgeons 🔑24(2)—Complaint held to state cause of action for removal of testicle.

In an action against surgeons for malpractice, complaint *held* to state a cause of action for removal of plaintiff's testicle without his consent.

5. Appeal and error 🔑1066—Verdict based on proper and improper issues, in which it cannot be told to what degree they figured in finding, cannot stand.

A verdict cannot be permitted to stand, where a case is submitted on proper and improper issues, and it cannot be told upon which issue verdict was based, or as to what degree they both figure in finding.

6. Physicians and surgeons 🔑15—Physician's admission of "misoperation" and "wrong operation" held not negligence.

Admissions of physicians performing an operation upon patient that operation was a "misoperation" and a "wrong operation" *held* not to show that operation was not performed with reasonable care, or that physicians did not possess and use that reasonable degree of learning and skill ordinarily possessed by their profession in good standing, practicing in their vicinity.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Joseph Markart against Irving S. Zeimer and another. Judgment for plaintiff, and defendants appeal. Reversed.

George F. McNoble, of Stockton, and Hartley F. Peart, of San Francisco, for appellants.

Sawyer & Sawyer, of San Francisco, for respondent.

SHIELDS, Justice pro tem. This is an action for malpractice growing out of the employment of defendants by the plaintiff to perform a surgical operation on him for the cure or removal of a hernia in the region of the right groin.

The complaint was in two counts. The first count charges negligence in these particulars:

> "That the said defendants then and there so negligently, carelessly and unskillfully performed said operation in and upon plaintiff in this, that after they had made an incision, cut into and opened the body of plaintiff that they closed the inguinal canal through which the cord containing the blood vessels and nerves passed connecting the right testicle with the rest of the body so tight and close that it interfered with and stopped the circulation of the blood and the action of the nerves between the said right testicle and other portions of the body, and that they so further performed said operation in such a negligent, careless and unskillful manner that when the wound caused by said incision and operation commenced healing and did heal, the inner walls adhered and grew fast to the bowels of said plaintiff, and the said defendants further so negligently and carelessly handled and controlled the instrument with which they made said incision, and performed said operation, that an incision was made in the right testicle of plaintiff with a sharp instrument, thereby seriously and dangerously wounding and injuring him."

The second count exactly recharged these acts of negligence, and in addition charged that, at a later operation undertaken to relieve plaintiff, the defendants without plaintiff's consent and against his expressed wish and will removed plaintiff's right testicle. The verdict of the jury was for the plaintiff, and from the resulting judgment this appeal is taken. At the trial no evidence was offered tending in any substantial way to show that defendants in performing their surgical operation closed the inguinal canal so tightly that it interfered with the action of nerves or stopped the flow of blood to plaintiff's right testicle, nor was any such evidence offered or given showing that defendants so performed the operation that when the wound commenced healing "the inner walls adhered and grew fast to the bowels of" plaintiff.

[1, 2] Yet these issues were definitely submitted to the jury by the court in giving its instructions. By instruction "H" the jury was told that "if you find from all the evidence that the defendants or either of them, in operating upon the plaintiff for hernia * * * closed the inguinal canal in the plaintiff so tight and close that the natural

circulation of blood or the natural action of the nerves were stopped or interfered with, between plaintiff's right testicle and the rest of his body," then that their verdict should be for the plaintiff. By instruction "I" the jury was told that if they found "from all the evidence and as instructed, that the defendants or either of them in operating upon plaintiff for hernia" from lack of skill and care did so in such a way that "the inner walls of plaintiff's abdomen adhered and grew fast to the bowels of said plaintiff" then that they must find for plaintiff. As stated there was no evidence of either of these conditions or of their having resulted from defendants' work in performing the operation. The submission of these issues to the jury without evidence to support them was error. By instruction "D" the question of the degree of skill and care exercised by defendants in removing plaintiff's testicle was submitted to the jury. This was without the issues. The complaint charged the defendants with a trespass in removing the testicle without his consent and against his expressed direction. No charge was made that the work of removing it was carelessly or unskillfully done. To submit this question to the jury was error.

[3] The instruction that a "physician is responsible for an injury done to a patient through the want of proper skill and care of his assistant, if any," is also incorrect in requiring of a surgeon "proper" skill and care in the performance of an operation. All that is required of him is that he have the degree of skill ordinarily possessed by reputable physicians or surgeons practicing in his locality. Hesler v. Cal. Hospital Company, 178 Cal. 764, 174 Pac. 654.

[4] The contention is made by appellants that the second count of the complaint states no cause of action for the removal of plaintiff's testicle without his consent.

[5] We think that it does and that if this issue alone had been submitted to the jury a finding upon it in favor of plaintiff might have been sustained. But it was submitted in connection with other issues which should not have been submitted. As therefore it cannot be told upon which issue the verdict was based or as to what degree they both figure in the finding, the verdict cannot be permitted to stand. These errors will necessitate a retrial of the case.

Other questions presented by the record may be briefly discussed in so far as they may arise when the case is again tried.

The complaint charged, in addition to the matters about which no evidence was offered, that the defendants in performing the operation on plaintiff did so so negligently "that an incision was made in the right testicle of plaintiff with a sharp instrument, thereby seriously and dangerously wounding and injuring him." Little was made of this specific charge and the only evidence in relation to it was that plaintiff had felt it, and that one of the defendants had admitted the cutting.

The great bulk of plaintiff's testimony was that in performing the first operation the defendants operated so unskillfully and negligently that they cut the spermatic cord or artery which nourished and which supplied circulation to plaintiff's right testicle, by reason of whch it died and had to be removed. This does not appear to be within the issues. Plaintiff contends that the testicle and the cord or artery which connects it with the body are but parts of one physical process and that under the charge that the testicle was wounded he could properly prove that the cord was cut. Any question on this point can so easily be removed by an amendment to the complaint that we need not further discuss it.

The evidence which plaintiff offered upon this point tended to show that plaintiff was afflicted with a hernia on the right side in the region of the groin; that it had existed for about two years; that it was not bothering him any at the time of the operation; and that it had never given him any trouble. After the operation plaintiff's right spermatic artery or spermatic cord was found to be severed, under conditions from which it might properly have been inferred that it had been cut by defendants, while performing the operation. Plaintiff's case is founded upon the claim that the operation was negligently performed. This negligence must be made to appear from the evidence in the case. The facts must establish such a condition as would warrant the jury in saying that as a matter of common knowledge the cutting of the cord complained of was an act of negligence, or it must be shown by expert testimony that this act resulted from the failure of the defendants to possess and use that degree of care and skill ordinarily possessed and used by physicians and surgeons in good standing practicing in the same locality. Perkins v. Trueblood, 180 Cal. 437, 181 Pac. 642; Hesler v. Cal. Hospital Co., 178 Cal. 764, 174 Pac. 654; Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128; Ewing v. Goode (C. C.) 78 Fed. 442; Loudon v. Scott, 58 Mont. 645, 194 Pac. 488, 12 A. L. R. 1487, and note.

Expert evidence is almost universally required in such cases as this. See cases above, also Carson v. Jackson, 281 Fed. 411, 52 App. D. C. 51. But none was offered at the trial. Plaintiff insists that the jury had a right to find without expert testimony that for a surgeon, employed to operate upon what appeared to be a simple hernia, to cut the spermatic cord or artery was so palpably inexcusable as to disclose negligence in itself; that the injury was so unrelated to the operation and so outside of the thing the surgeons were employed to do, that, as a matter of common knowledge, the jury might find that the cutting was unskillful and negligent. Without citing these cases he invokes the

principle announced in Miles v. Hoffman (Wash.) 221 Pac. 316; Cornwell v. Sleicher, 119 Wash. 573, 205 Pac. 1059; Hickerson v. Neely (Ky.) 54 S. W. 842; Evans v. Roberts, 172 Iowa, 653, 154 N. W. 923; Benson v. Dean, 232 N. Y. 52, 133 N. E. 125; Evans v. Munro (R. I.) 83 Atl. 82.

As to whether or not this case comes within the rule of these cases, or as to whether or not the plaintiff's contention in this particular is sound, we make no decision, as on another trial the evidence may be different, or the plaintiff may see fit to put the matter beyond question by producing expert evidence. It might be observed in passing that by his instructions plaintiff did not ask to have his case submitted to the jury on this theory.

[6] Plaintiff's chief contention, however, is that the absence of expert testimony in this case is supplied by evidence of admissions of the defendant given at the trial. The testimony as to what these admissions were, can be briefly stated without omitting any of their substance. The plaintiff testified to a conversation had with defendant Dr. Heppner after the operation in which Dr. Heppner "said to me they had a little trouble by the operation, and injured the cord, but heal all right. If you lose a testicle, one testicle just as good as two." He said that he referred to the spermatic cord. Again the doctor said: "Yes; we had cut or injured the testicle; it heals; it will not hurt me further and will heal up." Continuing, the plaintiff testified that he did not ask them whether they had injured the cord or not. "No; they said it freely, they injured the cord." Question; "Both doctors said that they injured the cord? A. Yes." Again he repeated: "They just said, 'We had a little trouble and injured the cord.'" Asked who said that, he answered: "Dr. Heppner and Dr. Zeimer said, 'We injured the cord, that is we put the injured part back, injured the cord.'" There was other evidence in relation to the tying of the ends of the cord with catgut before returning them to the body and of some matters of detail and apparent aggravation, but not within the pleadings nor of consequence as admissions of lack of skill or care.

A Mrs. Wilkie, a friend of plaintiff, testified to a conversation she had with Dr. Heppner after the operation. To her he said, "Mr. Markart was getting along fine; and further he said that it was a kind of a difficult operation; he said they had some trouble in dissecting, and they injured a cord, he said it would heal up, it would not be of any consequence." This statement was repeated to the witness. "He said again that they injured the cord, and it would heal up."

Another witness, Frank Philippi, testified as to a conversation he had had with Dr. Heppner in which he advised him not to be operated on by any Stockton doctor, and that then, in speaking of the operation on plaintiff, he said: "We made a wrong operation on him." Dr. Heppner said that because of that operation Markart, the plaintiff, had lost his testicle. Continuing he said: "He did not make any statements at all as to why it was removed; he said it was a misoperation, you know."

Giving these statements as testified to by plaintiff and Mrs. Wilkie an implication and a meaning most favorable to the plaintiff, they constituted an admission by the defendants that in performing the operation for hernia, which they were employed to do, the defendants had cut and severed the spermatic cord or artery.

But this adds nothing to plaintiff's case. He had already testified to that fact himself or given evidence from which it might be inferred. What we want to know is whether or not such a mischance is one of the hazards of an operation for hernia such as plaintiff's was, and whether or not, in the exercise of reasonable skill and care as such is ordinarily possessed and exercised by surgeons practicing their profession in the city of Stockton and vicinity, such a cutting or severance would ever occur. The admissions do not go this far.

The admissions testified to by the witness Philippi were likewise insufficient. They related only to Dr. Heppner, and were to the effect that the operation on plaintiff was a "wrong operation." Dr. Heppner "said it was a misoperation, you know." This is not an admission that the operation was carelessly or negligently performed. It is at most an admission that he did not have sufficient skill to perform the operation properly. But it clearly was not an admission that he did not have the degree of skill, care, and learning possessed and used by other surgeons practicing their profession in his locality, and that was all the skill and learning he was called upon to possess. On the contrary, Dr. Heppner impliedly contended that the "wrong operation" was up to the standard of physicians located in his neighborhood, for as part of the very admission testified to by Philippi he advised him "not to be operated on by any Stockton doctor," placing them all in a class with himself and Dr. Zeimer so far as surgical operations were concerned. Dr. Heppner's statement that it was a "misoperation" and a "wrong operation" amounts to no more than an admission that the operation was not properly done, and that is not sufficient to render him liable. Hesler v. California Hospital Co., 178 Cal. 764, 174 Pac. 654. An admission to be sufficient must be an admission of negligence or lack of the skill ordinarily required for the performance of the work undertaken. This "wrong operation" may have been deemed right at the time it was performed. If it was so mistakenly performed as the result of a bona fide judgment by a qualified surgeon, he will not be held liable for the unfortunate results of his mistake. Loudon v. Scott, 58 Mont. 645, 194 Pac. 488, 12 A. L. R. 1487, and note; Carson v. Jackson, 281 Fed. 411, 52 App. D. C. 51; Hesler v. California Hospital Co., 178 Cal. 764, 174 Pac. 654; Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712; Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147; Wells v. Ferry Baker Lumber Co., 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; Coffey v. Tiffany, 192 Mo. App. 455, 182 S. W. 495. For example, an admission by a surgeon that the death of a patient was caused by an anesthetic which he had given him, and that he knew when he administered it that in the weakened condition of the patient it was dangerous to do so, was held insufficient to support a judgment against the physician in Loudon v. Scott, 58 Mont. 645, 194 Pac. 488; see note to this case as reported in 12 A. L. R. 1487. These admissions, therefore, are not admissions that the operation complained of was not performed with reasonable care, or that the defendants did not possess and use that reasonable degree of learning and skill which was ordinarily possessed by the members of their profession in good standing practicing in their vicinity.

As a consequence, while they were competent as evidence of such facts as they admitted, they did not supply the absence of expert testimony in such particulars as expert testimony was otherwise required.

The judgment is reversed with directions to the lower court to permit the plaintiff to amend his complaint in the particulars herein referred to if he should so desire.

We concur: FINCH, P. J.; HART, J.

(67 Cal. App. 456)

SAN FRANCISCO LAUNDRY ASS'N v. RAGON. (Civ. 4773, S. F. 10684.)

(District Court of Appeal, First District, Division 2, California. May 24, 1924. Hearing Denied by Supreme Court in Bank July 19, 1924.)

1. Master and servant ⟹60—Wrongful solicitation of business accomplished without express request.

Wrongful solicitation of business from employer's customers by employee after termination of employment can be accomplished without express verbal or written request therefor.

2. Appeal and error ⟹1010(1)—Judgment properly affirmed, where contrary finding not compelled by evidence.

Where finding contrary to that made the basis of the trial court's judgment would not have been without support in the evidence, but such contrary finding was not compelled by the evidence, judgment was properly affirmed.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for injunction by the San Francisco Laundry Association against Roland L. Ragon, also known as Roy Ragon. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert B. Gaylord, of San Francisco, for appellant.

Thomas J. Ledwich, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment denying its application for an injunction to restrain the defendant from soliciting laundry work from plaintiff's customers, who were formerly served by the defendant while he was in the plaintiff's employ as a driver of one of its laundry wagons.

The trial court found that defendant had not at any time solicited any laundry work from any persons who were former customers of plaintiff, and that said defendant did not ask nor request any of the former customers of plaintiff to give their laundry work to him or to any competitor of plaintiff; but that, on the contrary, each and every one of said persons who was a former customer of said plaintiff, and who since the termination of said defendant's employment with plaintiff had been giving her laundry work to defendant, had done so at her own instance and request, and freely and voluntarily on her part, without any solicitation, inducement, or request whatever directly or indirectly by the defendant, or any of his servants, agents, employees, or any person whatever acting in aid of or in concert with him.

The plaintiff called the defendant as a witness, and he testified that he had never in any manner solicited business from the former customers of plaintiff, and, upon being questioned, in detail, about specific customers, he explained in each instance the circumstances under which he had been requested by such customer to call for her laundry work. The plaintiff then called about 20 of its former customers and questioned them as to the circumstances under which each of them had determined to give her laundry work to defendant rather than to plaintiff after defendant had ceased to be in the employ of defendant. Every one of these witnesses testified, emphatically, that the defendant had not asked for the business or made any advances in the matter, but that in each instance the customer had either met defendant on the street or had telephoned to him or had come in contact with him through some unrelated business or social connection, and had freely and voluntarily decided to give him her laundry work, and in each instance the witness testified that she did not desire to do business with the plaintiff, but wished to give her work to the defendant, either because she had known the defendant for a long time or because she was dissatisfied with the service of the plaintiff.

The defendant offered no testimony in the trial court—and there was no need for him to do so—because every particle of testimony offered by the plaintiff supports the findings of the court to the effect that the defendant had not solicited in any manner, nor interfered with, the business of the plaintiff.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [1, 2] We do not agree with the statement that "every particle of testimony offered by the plaintiff supports the findings * * * that the defendant had not solicited * * * the business of the plaintiff." The wrongful solicitation of business can be accomplished without any express verbal or written request therefor. If the trial court had found that such solicitation was made in this case, the finding would not have been without support in the evidence, but such a finding was not compelled by the evidence herein, and the judgment was therefore properly affirmed. The petition for a transfer and hearing by this court is denied.

STURTEVANT, Justice pro tem., not participating.

(67 Cal. App. 253)

GOEHRING v. ROGERS et al. (Civ. 4777, S. F. 10734.)

(District Court of Appeal, First District, Division 2, California. May 13, 1924. Hearing Denied by Supreme Court July 10, 1924.)

1. Appeal and error 🔑979(2)—Grant of new trial reversed only for gross abuse of trial court's discretion.

Grant of new trial for insufficiency of evidence will be reversed only for gross abuse of trial court's discretion.

2. Trial 🔑194(16)—Instruction as to negligence of driver in failing to decrease speed held to encroach on function of jury.

In action for injuries to automobile passenger from collision at street intersection, instruction that, if a careful and prudent driver would have decreased speed prior to entering street intersection, jury should find passenger's driver negligent *held* to encroach on function of jury, in view of evidence that driver had decreased speed.

3. Trial 🔑191(7)—Instruction as to negligence of automobile driver at street intersection held erroneous as assuming facts in dispute.

Instruction that driver of automobile in which plaintiff was passenger could not excuse excessive speed just prior to collision at street intersection merely because he thought he could thereby avoid accident *held* erroneous as assuming facts in dispute.

On Hearing in Supreme Court.

4. Negligence 🔑140—Instruction on liability of automobile drivers for injuries to passenger of one held correct.

Instruction that, if defendant driving automobile in which plaintiff was passenger was negligent in increasing speed after he saw automobile of codefendant S. approaching street intersection, and such action was sole proximate cause of injury, S. was not liable, even if negligent, if his negligence was not proximate cause of collision, *held* correct.

5. Municipal corporations 🔑705(11)—Automobile driver liable, if negligence is proximate cause of accident.

That automobile was being driven on left side of road would not of itself make driver liable, unless his negligence was proximate cause of accident, irrespective of whether such proximate cause was direct or indirect.

6. Negligence 🔑61(2)—Automobile driver liable for own negligence as to passenger.

Automobile driver's liability for injuries to passenger from collision depends solely on his own negligence proximately causing or contributing to accident, regardless of whether driver of other automobile was also negligent.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Anna Goehring against J. Blaine Rogers and another. Verdict against defendant Rogers and in favor of the other defendant, and from order granting defendant Rogers a new trial plaintiff appeals. Order affirmed.

M. F. McCormick and C. M. Ozias, both of Fresno, for appellant Goehring.

Everts, Ewing, Wild & Everts and S. P. Coy, all of Fresno, for appellant Stjepovich.

Lindsay & Conley and Arthur Allyn, all of Fresno, for respondent Rogers.

NOURSE, J. Plaintiff commenced this action against the two defendants, charging them with joint negligence in the operation of their respective automobiles resulting in serious injuries to the plaintiff, who at the time was a passenger in the machine driven by the defendant Rogers. The cause was tried before a jury, and the plaintiff had a verdict against the defendant Rogers for $13,250. At the same time the jury rendered a verdict in favor of the other defendant, Frank Stjepovich. The defendant Rogers then moved for a new trial on all the legal grounds, including insufficiency of the evidence, and plaintiff moved for a new trial as to the defendant Stjepovich on errors of law alone. Both motions were granted. The plaintiff then appealed from the order granting a new trial as to the defendant Rogers, and the defendant Stjepovich appealed from the order granting plaintiff a new trial as to him. Both appeals were taken under the provisions of section 953a of the Code of Civil Procedure, and by stipulation are presented upon the same record. At this time we will consider the appeal of the plaintiff from the order granting a new trial to Rogers, but will necessarily refer to the other appeal from time to time. To avoid confusion we will refer to the parties before this court as they appeared as plaintiff and defendants in the trial.

A brief statement of the facts will suffice. The plaintiff was riding in an automobile driven by the defendant Rogers, traveling in an easterly direction along Tulare avenue in the city of Fresno at about midnight of the 30th of October, 1921. He was proceeding at a speed under 30 miles an hour. As he approached the intersection of Tulare avenue and Chestnut avenue he noticed the lights of a machine driven by defendant Stjepovich coming southerly on Chestnut avenue. At the time that he first noticed these lights he was about one-eighth of a mile from the point of intersection, and the Stjepovich car was about the same distance north on Chestnut avenue. He testified that when he came to the intersection he first put on his brakes and then speeded up in order to pass the defendant. He turned off to his right as far as he could and put on his brakes. The defendant Stjepovich's car, which was traveling on the left-hand side of the highway, struck the left rear wheel of Rogers' car, turning it completely over and throwing it into the field alongside of the road. There is no evidence that the defendant Rogers, after he reached the intersection, slackened his speed until just about the moment when he was struck, and then he was close to the southeasterly curb, the collision having taken place in the southeastern corner of the intersection.

The motion for a new trial on the part of the defendant Rogers was based upon the ground of the insufficiency of the evidence as well as errors at law. The order of the trial court granting the motion was based upon both these grounds. The plaintiff on these appeals takes the position that the court erred in granting the defendant Rogers a new trial, but insists that, if that order is to be affirmed, she should be entitled to again put the defendant Stjepovich to his defense because of the errors which resulted in his favor.

[1] Appellate courts are loath to reverse an order of a trial court granting a new trial after a verdict by the jury when one of the grounds stated is the insufficiency of the evidence. It is only in cases where the discretion of the trial court in this respect has been grossly abused that the appellate courts will set aside the order. We are not called upon to make an extended review of the evidence for this purpose because we are satisfied that the errors of law occurring during the trial require an affirmance of both orders of the trial court.

[2] The plaintiff practically concedes the correctness of the order owing to the errors in instructions given by the trial court at the request of the defendant Stjepovich. On behalf of the defendant Rogers, in discussing this appeal, it is urged that, although he could not complain of errors favorable to his joint tort-feasor, he nevertheless is entitled to take advantage of errors in instructions of the court which amount to an instruction for a verdict against him. Scarborough v. Urgo (Cal. Sup.) 216 Pac. 584. Following this view it is argued that the court erred to the prejudice of the defendant Rogers when it instructed the jury, in effect, that, if it should find that a careful and prudent driver would have decreased the speed of his automobile prior to entering the intersection of the streets, then it should find the defendant Rogers guilty of negligence. There was some evidence on the part of the defendant Rogers that he did decrease the speed before entering the intersection, and that he increased it when he passed into the intersection and endeavored to get ahead of the other car. The truth of this testimony was a matter for the determination of the jury, and this instruction of the trial court encroached upon that function.

[3] Objection is also made to instruction No. 20 wherein the trial court, at the request of the defendant Stjepovich, instructed the jury that Rogers could not excuse his driving at "an excessive rate of speed just prior to the time of the collision" merely because he thought he could in that way avoid an accident. Here again the court assumed to pass upon the facts which were in dispute.

Particular stress is laid upon the claimed error in instruction No. 26, which reads as follows:

> "You are further instructed that, if you find from the evidence that the defendant Rogers was negligent in the operation of his car after he had seen the car of defendant Stjepovich approaching the intersection of Chestnut street and Tulare avenue, by increasing the speed of his car, and such action of defendant Rogers was the sole proximate cause of the injury, your verdict should be in favor of defendant Stjepovich, even if you should find from the evidence that defendant Stjepovich was negligent, if you find that such negligence of defendant Stjepovich was not the proximate cause of the collision."

The vice of this instruction is that it assumes to be true facts which were in dispute. Each defendant was insisting that he was free of negligence, and that, if any negligence occurred, it was the result of the carelessness of the other. By the instruction under consideration the burden was placed upon the plaintiff and the defendant Rogers to show that the negligence of said defendant in increasing the speed of his car after he had seen the car of the defendant Stjepovich was not the sole proximate cause of the injury, and the jury was instructed that they should find in favor of the defendant Stjepovich, even if they should find that he was negligent, but should find also that his negligence was not the proximate cause of the collision. The plaintiff was proceeding upon the theory that both defendants were negligent. Thus the question of the speed of both cars, the manner of their operation at the intersection, which one had the right of way, and which one had the last clear chance to avoid the collision were all before the jury as bearing upon this question of joint negligence. It was not necessary to find that one defendant was guilty of negligence and the other free from negligence. It was possible under the circumstances for the jury to have found that both defendants were guilty of negligence. But this instruction eliminated that question from the consideration of the jury.

Instruction No. 28 is of similar import, but was far more favorable to the defendant Stjepovich. In this the jury was instructed that, if they found that the defendant Stjepovich was driving his car on the left-hand side of the road, that fact would not in itself be sufficient to hold him liable, but it would be necessary for the jury to further find that such act was the direct and proximate cause of the injury, that the jury must affirmatively find that, "if Mr. Stjepovich had been driving on the right-hand side of the center of the road, the collision would not in fact have occurred." Even if the negligence of defendant Stjepovich had not been the sole proximate cause of the injury, he might still be liable as a joint tort-feasor. In any event, the jury was entitled to draw its own inferences from the facts which were in evidence, and this it was not permitted to do by the instruction under consideration.

Order affirmed.

We concur: LANGDON, P. J; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4-6] The application for a hearing and determination by this court after decision by the District Court of Appeal is denied. We do not, however, approve what is said in the opinion of that court in the discussion of instructions numbered 26 and 28. Neither of those instructions assumed the existence of any facts which were in dispute. Both instructions gave to the jury the rules of law to be applied to the facts as they should be determined by the jury. Instruction No. 26 is a correct statement of the law. It did not place the burden of proof or burden of showing upon the defendant Rogers, and it did not eliminate the question of the negligence of both defendants from the consideration of the jury. Instruction No. 28 is incorrect only to the extent that it requires the jury to find that the negligence of the defendant Stjepovich was "the direct and proximate cause of the injury" in order to return a verdict against the latter. The law does not require that a defendant's negligence be both a direct and proximate cause of the injury in order to render him liable. It is sufficient if such negligence be a proximate cause of the injury, and a proximate cause may be either a direct or an indirect cause. However, even if both of these instructions had been erroneous, in that they were unduly favorable to the defendant Stjepovich, this would not justify the granting of a new trial upon the motion of defendant Rogers. His liability depended solely upon the questions whether he was negligent, and whether or not such negligence, if any, proximately caused or contributed to the injuries complained of. These questions were wholly independent of the question whether or not his codefendant Stjepovich was also liable. We agree with the conclusion of the District Court of Appeal as to the first two instructions discussed in its opinion and that the errors therein justified the granting of the new trial as to the defendant Rogers.

67 Cal. App. 260

GOEHRING v. ROGERS et al. (Civ. 4783, S. F. 10740.)

(District Court of Appeal, First District, Division 2, California. May 13, 1924. Hearing Denied by Supreme Court July 10, 1924.)

1. Evidence 🔑589 — Testimony of one joint defendant called as witness by plaintiff under statute, if material, is evidence for all purposes.

Where one of two or more joint defendants is called under Code Civ. Proc. § 2055, providing for calling adverse party as witness, his testimony, if material, is evidence for all purposes of case, and is binding on himself and codefendants; the statute not limiting effect of such testimony to witness' own case.

On Hearing in Supreme Court.

2. Witnesses 🔑275(8)—Defendant held entitled to cross-examine codefendant called as witness by plaintiff.

Where joint defendants were called as witnesses by plaintiff under Code Civ. Proc. § 2055, each defendant was entitled to cross-examine his codefendant so testifying.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Anna Goehring against J. Blaine Rogers and Frank Stjepovich. Verdict

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

against defendant Rogers and in favor of defendant Stjepovich, and from order granting plaintiff a new trial as to defendant Stjepovich he appeals. Order affirmed.

M. F. McCormick and C. M. Ozias, both of Fresno, for appellant Goehring.

Everts, Ewing, Wild & Everts, of Fresno, for appellant Stjepovich.

Lindsay & Conley and Arthur Allyn, all of Fresno, for respondent Rogers.

NOURSE, J. In the appeal No. 4777, Goehring v. Rogers, 227 Pac. 687, this day decided, we gave a statement of the facts of the case upon which this appeal, brought by the defendant Stjepovich from the order granting the plaintiff a new trial, is based. Reference is hereby made to the opinion filed in that case both for the statement of facts and the errors at law, which apply equally to the present appeal. The instructions considered therein were particularly prejudicial to the defendant Rogers as placing too great a burden upon him as against his joint tortfeasor. The objection to instruction No. 13 which is herein considered was not available to him on that appeal, as he had requested an instruction of similar import.

[1] It is sufficient to add to the errors already noted in the opinion in case No. 4777 that the plaintiff was prejudiced by instruction No. 13, which was given at the request of both defendants separately, and which, in effect, advised the jury that, where the plaintiff called the defendants for examination under section 2055 of the Code of Civil Procedure as an adverse party, all testimony adduced upon such examination was binding only upon that defendant then under examination, and that all such testimony should be wholly disregarded and not taken into consideration as to the other defendant. Putting it in another way, the jury was instructed that the testimony of Rogers while under examination in accordance with the Code section should not be considered as against Stjepovich, and that the testimony of Stjepovich under the same circumstances should not be used against the defendant Rogers.

The essential facts covering the accident were brought before the jury through the testimony of these two defendants called by the plaintiff under section 2055 of the Code of Civil Procedure. The plaintiff consequently relied upon this testimony to prove the important issues in her complaint. In instruction No. 13 the trial court put an unreasonable limitation upon the effect of this testimony. There is nothing new in the Code section except that it provides that a party calling an adverse party as a witness shall not be bound by his testimony and that he may rebut by other evidence the testimony given under such examination. It does not pretend to relieve the party so called from the effect of his testimony. The privileges of the section are limited to the calling of an adverse party, but there is nothing in the section to indicate an intention of the Legislature to limit his testimony to his own case. Thus, where one of two or more joint defendants is called under the section, his testimony, if material to the issues involved, is evidence for all purposes of the case, and is binding upon him as well as upon his codefendants. Figari v. Olcese, 184 Cal. 775, 782, 195 Pac. 425, 15 A. L. R. 192. The error of this instruction was a sufficient ground for the order granting plaintiff a new trial.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] The application for a transfer and determination by this court after decision of the District Court of Appeal is denied. Inasmuch as there is to be a retrial of this case, it should be pointed out that the trial court erred in refusing to permit each of the defendants to cross-examine his codefendant when the latter had been called and examined by the plaintiff under section 2055 of the Code of Civil Procedure. The testimony of each defendant so elicited was substantive evidence in the case for all purposes to which it was relevant, and the codefendant should have been accorded the right of cross-examination thereon.

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67 Cal. App. 1

PEOPLE v. STEFFNER. (Cr. 723.)

(District Court of Appeal, Third District, California. April 29, 1924. Rehearing Denied May 29, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Criminal law 🔑1134(8)—Failure to appeal from order denying motion for new trial held not to preclude review of sufficiency of evidence to support verdict.

Where accused complied with Pen. Code, § 1247, relative to grounds of appeal and points upon which he relies, his failure to appeal from order denying motion for new trial *held* not to preclude a review of the sufficiency of the evidence to support verdict.

2. Criminal law 🔑112(5)—False pretenses is continuing offense, and may be committed in more than one county.

The crime of obtaining money by false pretenses is a continuing one, and may be committed in more than one county.

3. Criminal law 🔑112(5) — False pretenses 🔑12—Deposit of check in bank to accused's credit was equivalent to obtaining money in county where deposited as to venue.

The depositing of a check in a bank to accused's credit was equivalent to securing the money, so that venue was properly laid in county where such credit was made, under Pen. Code, § 781.

4. False pretenses 🔑39—Prosecution held to make prima facie case, and duty devolved on accused to overcome it.

Where the cashed check, on which was based a prosecution for obtaining money by false pretenses, bore a general indorsement, and there was nothing in the record inconsistent with the fact that it was paid in due course, the prosecution made a prima facie case, and if it was not paid the burden was on accused to show that fact, failing which he could not complain.

5. False pretenses 🔑49(5)—Not essential to conviction that person defrauded testify.

It is not essential to a conviction that the person to whom the false pretenses were made shall have expressly testified that it was by reason of such misrepresentations that he was induced to part with his property, nor is it necessary that he testify, since the jury may base their conclusions on the testimony of others and from all the circumstances in the case.

6. False pretenses 🔑9—False representation, materially influencing owner to part with property, held sufficient.

In order to sustain a conviction, it is not necessary that the false pretenses be the sole inducing cause of the owner to part with his money or property; it being sufficient if such false representation had a material influence, though the owner was also induced by other causes.

7. False pretenses 🔑49(5)—Evidence held to sustain implied finding false representation materially induced corporation defrauded to part with its property.

Evidence *held* to justify jury's conclusion, that accused's false representation to a corporation, consisting of his warranty and representations in an assignment to the corporation of a conditional sale contract of an automobile to B., rather than accused's guaranty, materially influenced the corporation in parting with its money, notwithstanding that in the assignment accused warranted full performance of all conditions of the contract between him and B.

8. Criminal law 🔑567 — Corporate existence of party defrauded held inferable from evidence in case.

In prosecution for obtaining money from a corporation by false pretenses, de facto corporate existence of the corporation as the party defrauded, within Pen. Code, § 532, *held* inferable from the evidence in the case.

9. Criminal law 🔑829(1)—Refusal to give requested instructions covered by instructions given held not error.

Refusal to give requested instructions was not error, where the matter embracing those instructions was substantially covered by the instructions given.

10. Witnesses 🔑363(1)—Objection to question whether witness refused to discuss case with counsel for accused held properly sustained.

A witness had the right to refuse to discuss the case with the attorneys for either side, or to have exhibited to them contracts which he was required by a subpœna to produce in court, so that, where he was asked by counsel for defense whether he refused to discuss case, etc., such question being asked to show animus, an objection thereto was properly sustained, since an affirmative answer would have disclosed no prejudice against accused.

11. Criminal law 🔑656(3)—Remarks of court in sustaining objection held not prejudicial.

As to court's remark in sustaining objection, "You [counsel for defense] haven't any right to argue that question; there is a way to get at that, and you probably understand how to do it," *held* not prejudicial.

12. Criminal law 🔑1144(12)—Facts held to justify assumption accused was satisfied with ruling made.

After a ruling adverse to defendant, with reference to which he was given the privilege of reopening the question, if the matter was not again brought to the attention of the court, it must be assumed accused was satisfied with the correctness of the ruling.

13. Criminal law 🔑351(1)—Subsequent acts of accused relative to contracts, other than one on which prosecution for obtaining money under false pretenses was based, held not admissible.

Where prosecution for obtaining money from a corporation by false pretenses was based on an assignment of a certain contract to the corporation, the subsequent acts of accused in relation to other similar contracts assigned to the corporation *held* not admissible.

Appeal from Superior Court, Lassen County; W. I. Redding, Judge.

E. W. Steffner was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Charles C. Holl, Grover C. Julian, of Susanville, and R. L. Waggoner, of Cedarville (Archibald M. Johnson and A. A. De Ligne, both of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

GLENN, Justice pro tem. [1] Defendant was convicted in the superior court of the county of Lassen of the crime of obtaining money by false pretenses. Motion for new trial was made and denied; whereupon judgment was pronounced against defendant. The appeal is from the judgment only. No attack is made upon the sufficiency of the amended information under which the conviction was had. We will dispose, preliminarily, of two points. At the time of the filing of respondent's brief herein, the record did not disclose the fact that appellant had filed with the clerk and presented an application to the trial court stating in general terms the grounds of the appeal and the points upon which appellant relied, as required by section 1247 of the Penal Code. The record has since been amended, showing compliance with that section. Respondent contends, in a supplemental brief, that, as there was no appeal from the order denying motion for new trial, the sufficiency of the evidence to support the verdict cannot be reviewed. The identical point thus raised was carefully considered, and decided by this court adversely to respondent's contention, in the case of People v. Clayton, 33 Cal. App. 357, 165 Pac. 37. The various Code sections applicable to the matter were reviewed in detail. Since that decision, rendered in 1917, several sessions of the Legislature have intervened, and no material changes have been made. Appeals, doubtless, have been taken in reliance on the construction thus placed thereon. No new point has been presented which was not there considered, nor do the cases now cited by respondent throw additional light upon the subject. We see no reason to doubt the correctness of the holding in that case, and adhere to the same.

The amended information charges, in substance, that the defendant, E. W. Steffner, transacting business under the name and style of Steffner Overland Company, with intent to defraud the L. F. Weaver Company, a corporation, and with intent to obtain its money and personal property, fraudulently represented to it that he was the owner of, and had sold and delivered, under a conditional contract of sale, to Charles Baum, a certain automobile therein described; that defendant could and would assign, sell, and convey, and had assigned, sold, and conveyed, said automobile and said contract and the moneys payable thereunder, to said L. F. Weaver Company, a corporation, whereas, in truth and in fact, the said automobile was then and there the property of Anglo-California Trust Company, and had not been sold or delivered to said Charles Baum, and that the conditional contract of sale was fraudulent and void, and that said automobile and the conditional contract therefor could not be sold or assigned by defendant; that said Weaver Company believed said representations, and by reason thereof and on the security of said automobile and said purported and fraudulent assignment of the conditional contract for the sale thereof, it paid over to defendant the sum of $1,300, or thereabouts.

Defendant was an automobile dealer, transacting business at Susanville, Lassen county, Cal., under the name of Steffner Overland Company. On July 1, 1922, he entered into a contract with George A. Leal for the sale to him of the automobile described in the amended information; $800 being paid at the date of the signing of the contract, the balance amounting to $1,253.75, payable in monthly installments, covering a period of 12 months. By the terms of the contract, title to the automobile was retained in the seller. The agreement contains many provisions with reference to the care, possession, and other matters usually dealt with in such contracts, but which need not be detailed. Attached thereto are several documents, designated, respectively, "Purchaser's Statement," "Dealer's Recommendation and Warranty of Title," and "Seller's Assignment and Guaranty." By the terms of the assignment appellant transfers his interest in the contract and the property therein described to the Anglo-California Trust Company, warrants title to the property, his right to assign the same, that it is free and clear of all liens and incumbrances, and guarantees performance by Leal of all the terms of the contract including prompt payment of the purchase price. Thereupon these documents were forwarded by appellant to the Anglo-California Trust Company. The company accepted the assignment, and on July 10, 1922, forwarded to appellant its check for the sum of $1,175.72, being the amount represented by the deferred installments, less discount and other incidental charges. On August 24, 1922, said company was informed by letter from appellant that Leal desired a smaller car, and hence he was selling him a 4-cylinder car, and he was also selling the car originally purchased by Leal to a Mr. Lackey. The letter states, in part:

> "In selling this car to Mr. Lackey we have figured the brokerage as though it were a new car, which it really is. We wish you to take up the balance due on the contract of George Leal, and we believe there will be a refund of brokerage charge and if possible transfer the Leal insurance policy to Lackey. Any way you wish to transfer this contract will meet with our approval, as we are well acquainted with both purchasers and can adjust the matter with them. * * * We have included in the contract the sum of $24 to cover insurance premiums in case you cannot transfer the Leal policy."

Enclosed with the letter was an agreement of sale and purchase between Steffner Overland company, as the seller, and J. W. and W. H. Lackey, as the purchasers, similar in form and substance to the one between the defendant and Leal. This contract recites that the sum of $800 is paid upon the date of signing, leaving a balance due of $1,258.25, payable in monthly installments. It is signed "Steffner Overland Co., by E. W. Steffner, Mg., and J. W. & W. H. Lackey, by J. W. Lackey." Attached thereto is the seller's warranty of title, assignment, and guaranty, similar in substance to the one attached to the contract between appellant and Leal. Conformably to appellant's instructions, the Anglo-California Trust Company, upon receipt of said contract and the assignment thereof, made its usual discount and other incidental charges amounting to $78.02, deducted this sum from the amount unpaid on the contract, as indicated by the deferred installments, leaving a net balance of $1,180.23, which was credited as a payment on the prior contract of George A. Leal covering the same car. On September 23, 1922, appellant wrote to the Anglo-California Trust Company, asking to be advised promptly of any default in payment on the part of Lackey; that if the first payment then past due had not been paid, to wire him, as he had received word that the account should be watched closely, it being his intention to repossess the car in case any payment became delinquent. In answer thereto the appellant was advised that the payment due on the 20th had not been received. During the first week in October, 1922, R. F. Wentworth, a representative of the Anglo-California Trust Company, called on the defendant, and together they went over the various delinquent accounts. The Lackeys being in default, Wentworth and defendant proceeded to Westwood, secured the automobile, and returned with it to Susanville, where it was placed in a garage in the name of the Anglo-California Trust Company. The car was never thereafter in the possession of defendant, having remained in the garage at all times up to the date of the trial, excepting on several occasions when it was taken out by a representative of the said company, but not with reference to any matter with which defendant was concerned. Defendant testified that he had been given to understand by Wentworth, on the trip back from Westwood, that there was no objection to the car being sold by him so long as the company's interests were protected. This was not only denied by Wentworth, but the latter stated that he had told defendant that the automobile must remain in the garage until word was received from the Anglo-California Trust Company to release it to Mr. Lackey. In view of the conflict in this regard the verdict of the jury must be accepted as an implied finding against appellant.

The possession of the automobile and the title thereto thus stood on October 16, 1922. On that date, and unbeknown to the Anglo-California Trust Company, defendant entered into a conditional sales contract with one Charles Baum for the sale to him of the automobile originally contracted to be sold to Leal, the purchase price being $1,985, the contract reciting the payment of $685 at the date thereof, leaving a balance of $1,300, payable in monthly installments. This contract, together with the assignment thereto attached, is in the same general form and substance as the previous contracts and assignments to which reference is made above. Therein defendant affirms that the automobile in the contract described (and being the same automobile originally sold to Leal) has been delivered to Baum; he assigns and conveys to the L. F. Weaver Company all his right, title, and interest in and to the contract, the property therein described, the moneys payable thereunder, and warrants that he has the right to assign the title, and that the same is free from any and all liens and incumbrances. He also guarantees payment by Baum and full performance by the latter of all covenants. These documents were forwarded to the L. F. Weaver Company at San Francisco for discount. The contract and assignment were received and accepted by said company, and, in conformity with the request made in the letters accompanying the same, the L. F. Weaver Company deducted discount and other incidental charges, and mailed its check for the sum of $1,269 to defendant, which was deposited by him to his account in the Lassen Industrial Bank at Susanville. As Baum was unable to secure possession of the automobile, by reason of the fact that it was stored in a garage in the name of the Anglo-California Trust Company, the check given by him to defendant at the time of entering into the contract was ultimately returned.

The alleged false pretenses consisted in the statements made in the contract with Baum, the warranties and representations in the assignment thereof to the Weaver Company, and in the letters of transmittal accompanying the same.

Appellant does not deny the receipt of the check from the Weaver Company and the deposit of the same to his account in the Lassen Industrial Bank, but claims that it was the general custom of himself, as well as other automobile dealers, in cases where contracts had been discounted with banks, to repossess the cars, in case of default in payments thereon, and to resell the same, and to rediscount the contract on the second sale, either to the original financial institution to which it had been assigned, or to other financial firms; that when thus repossessed, resold, and rediscounted, the balance, represented by the deferred payments was handled by either crediting the amount thereof on the first contract, or by permitting the contract to be paid monthly according to its terms, or otherwise caring for the same; and that such had been the custom and manner of his dealing with the Anglo-California Trust Company. In other words, appellant's position is that he was left to deal freely with said automobiles much the same as though he was the absolute owner thereof. For the purpose of substantiating his claim in this regard, a number of transactions were gone into during the course of the trial, but a careful inspection of the record fails to disclose anything in these transactions analogous to the present case or justifying appellant's contention. They were made subject to approval and acceptance by the Anglo-California Trust Company. The new contracts and the assignments thereof were forwarded to it for approval and discount, but in such contingencies no additional advancements were made so far as we have noted. Even if further sums were advanced, the security remained intact. These transactions merely amounted to the substitution of one contract for another, subject to the approval of the Anglo-California Trust Company.

The letters and documents containing the false representations were executed and mailed by appellant in Lassen county, addressed to the Weaver Company at San Francisco. The check in payment for the amount represented by the deferred payments, in the conditional contract of sale between appellant and the purchaser, Charles Baum, was drawn by the Weaver Company on the Anglo and London-Paris National Bank, located at San Francisco, and mailed by said Weaver Company to appellant at Susanville, Lassen county. He indorsed the same and deposited it to his credit in the Lassen Industrial Bank at Susanville. It is indorsed:

> "Steffner Overland Co., E. W. Steffner. Pay to the order of any bank or banker. All prior indorsements guaranteed. October 21, 1922. Lassen Industrial Bank, Susanville, W. G. Culbreth, Cashier."

From these facts it is contended that the superior court of Lassen county lacked jurisdiction, as the crime was neither wholly nor partly committed in said county; that the false pretenses, if any, were made when received by the Weaver Company at San Francisco; that the money, if obtained at all, was received by appellant when the bank in San Francisco upon which it was drawn honored it; hence, it is asserted, also, that the evidence is insufficient to show that the Weaver Company ever parted with its money, or that appellant ever obtained the same. These questions will be considered together. Respondent relies upon the provisions of section 781 of the Penal Code to the effect that, where an offense is partly committed in one county and partly in another, jurisdiction is in either county.

[2, 3] Appellant cites the cases of People v. Griffith, 122 Cal. 212, 54 Pac. 723, People v. Cummings, 123 Cal. 269, 55 Pac. 898, and Golden v. Justice's Court, 23 Cal. 778, 140 Pac. 49, as holding that the representations were made where received. These cases throw little, if any, light on the questions presented here. The crime of obtaining money by false pretenses is a continuing crime, and may be committed in more than one county. People v. Dimick, 107 N. Y. 13, 14 N. E. 178; People v. Boggess, 42 Cal. App. Dec. 558.[1] It is true there is a conflict in some of the authorities as to whether the representations are deemed to have been made where mailed (People v. Arnstein, 157 App. Div. 766, 142 N. Y. Supp. 842; 12 Am. & Enc. of Law [2d Ed.] 848; Reg. v. Holmes, 12 Q. B. D. 23) or where received (State v. Gibson, 132 Iowa, 53, 106 N. W. 270; State v. Smith, 162 Iowa, 336, 144 N. W. 32, 49 L. R. A. [N. S.] 834). The subject is discussed and some of the cases annotated in Ann. Cas. 1917E, pp. 311, 312. But the question of where the fraudulent representations were made is not determinative of this case, for the reason that we are dealing with acts other than the mailing or receipt of the letters and documents. The check sent by Weaver & Co. to appellant was indorsed by him and deposited to his credit in the Lassen Industrial Bank in Lassen county. These were acts in furtherance of the fraudulent design (People v. Boggess, supra), and completed the crime of obtaining money by false pretenses (State v. Smith, 162 Iowa, 336, 144 N. W. 32, 49 L. R. A. [N. S.] 834; also, to the same effect, Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482). The placing of the check in the bank to appellant's credit was the equivalent of securing the money. State v. Mason, 62 Mont. 180, 204 Pac. 358; State v. Smith, supra. But it is argued by appellant that this does not constitute a payment by the Weaver Company, for the reason that the Lassen Industrial Bank was not the agent of the Weaver Company for the payment of the check; that the relation of debtor and creditor, instead of principal and agent, ensued, and for the further reason that the evidence fails to disclose that the check was ever paid by Weaver & Co. or charged against it by the bank on which it was drawn. Respondent cites People v. Whalen, 154 Cal. 472, 98 Pac. 194, and People v. Leavens, 12 Cal. App. 180, 106 Pac. 1103, in answer to these contentions. These cases are not, however, strictly in point. In the former the evidence was sufficient to warrant the jury in finding that the money represented by the check had actually been paid by the prosecuting witness, and in the latter case the check was paid by the bank on which it was drawn; the bank being the agent of the drawer thereof. The identical question as to the effect of the payment by a bank other than the one on which it was drawn, of a check secured by means of false representations, arose in a case decided by the Supreme Court of the state of Iowa, and that court, in an exhaustive and carefully considered decision, held that the securing of the money under such circumstances completed the crime, and that the venue was properly laid where the check was cashed. State v. Smith, 162 Iowa, 336, 144 N. W. 32, 49 L. R. A. (N. S.) 834. To the same effect is the case of Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. The facts in the Smith Case, supra, are not distinguishable

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[1] Rehearing granted by Supreme Court.

from the facts in the present case, excepting that the evidence in that case showed that the check was ultimately paid by the bank on which it was drawn prior to the institution of the prosecution of the case, but the decision does not depend upon that point, and the same may be said with reference to the Burton Case, supra. It would unduly extend this opinion were we to attempt to quote from these cases. They hold, however, that the moment the check is cashed that moment the drawer is defrauded; that had the check been deposited for collection a different question would then arise; but in such a case as the present, where a check is deposited to one's account, or cashed, the relation of debtor and creditor arises, and the title to the check immediately passes to the bank. See, also, Bates v. State, 124 Wis. 612, 103 N. W. 251, 4 Ann. Cas. 365; People v. Ballas, 55 Cal. App. 749, 204 Pac. 401. We see no escape from the logic of these cases. They state the law, in our opinion, applicable to the facts of this case on the questions above suggested.

[4] Before passing this phase of the case it might be well to call attention to the fact that the check bears a general indorsement, and there is nothing in the record inconsistent with the fact that it was paid in due course. The least that can be said, under the circumstances, is that the prosecution made out a prima facie case, and assuming, without deciding, that the defendant might properly make out a defense by showing that the maker was ultimately relieved from payment, the burden to do so, after the prima facie showing on the part of the prosecution, was cast upon him, and, not having done this, he cannot now complain.

[5-7] It is contended that there was no evidence, either direct or circumstantial, that the L. F. Weaver Company was induced, either wholly or in part, by reason of any alleged misrepresentations, to part with its money or property. For aught that appears it may have relied solely upon appellant's guaranty.

The transaction was the ordinary one of an automobile dealer assigning an installment contract for discount, in order to replenish his capital to carry on business. The correspondence indicated that both parties understood that in the assignment of the Baum contract by defendant, and the acceptance thereof by the Weaver Company, it relied upon the security thereby purported to have been transferred to it. Three letters accompanied the contract and assignment. In the first appellant asks that remittance on the contract be mailed direct to him, instead of depositing it in an account in the Anglo-California Trust Company as had been done in the past, showing a purpose to conceal knowledge of the transaction from the Anglo-California Trust Company. The second letter deals with the question of insurance covering the car. Request is made that the same be insured against fire and theft, "together with what other insurance you may require" for $1,500. If appellant understood that the Weaver Company was relying on his guaranty alone, there would be no occasion for him to assume said company would require or be concerned with insurance, other than such as appellant himself might suggest. The third letter contained a financial statement of the transaction, with a request for remittance of the sum of $1,300, less discount charges. Upon receipt of the contract, assignment and letters accompanying same, the secretary of the Weaver Company, not being familiar with the particular transaction, handed the same over to Weaver, who appeared to be in authority. The latter gave his approval thereto, and it was put through in the usual way. In the letter transmitting the check to appellant it was stated that it was sent "in settlement of the contract signed by Charles Baum." There is not a word in the record which suggests or intimates that it was other than by virtue of the contract and the assignment thereof and the reliance thereon by the Weaver Company that appellant obtained the check which was subsequently deposited to his account in the Lassen Industrial Bank; in fact, no such defense was made during the trial. The position then assumed was that appellant had the right to the possession of the automobile and authority to sell and assign the Baum contract to the Weaver Company, and that his title was free and clear of all other claims or liens. We fail to find any justification for the contention that the evidence showed that the warranties in the contract had often been disregarded by the lender (L. F. Weaver Company) in its dealings with appellant. The fact is the record merely shows this one transaction, at least so far as the point now suggested is concerned. In addition to the warranty with reference to the title to the automobile, appellant certified that he had delivered possession to Baum, whereas the real fact was that possession had not been delivered, nor could delivery be made for the reason it stood in a garage in the name and under the control of the Anglo-California Trust Company, with knowledge on the part of appellant that it was to so remain until an order was secured from said company for its release. The order was never secured.

It is not necessary or essential to a conviction that the person to whom the false pretenses were made shall have expressly testified that it was by reason of such misrepresentations that he was induced to part with his property, nor is it indispensable to a conviction that he take the stand.

> "The jury may be fully satisfied on the testimony of others, and from all the circumstances in the case, that the representations did induce him to turn over the property to the defend-

ant." People v. Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096.

Neither is it necessary that the false pretenses be the sole inducing cause of the owner parting with his money or property. It is sufficient if it had a material influence, although he was also induced by other causes. 25 Corpus Juris, 601.

Testing the facts by the above rules, we have no hesitancy in holding that the jury was fully justified in its conclusion that the false representations did have a material influence on the Weaver Company in parting with its property, notwithstanding the fact that in the assignment the appellant does warrant full performance of all the terms and conditions of the contract between him and Baum.

[8] The next point urged by appellant is that—

> "There was no evidence to support the allegation the L. F. Weaver Company was or is a corporation either de facto or de jure, and the verdict of the jury fails of support in this essential."

In this connection it is claimed that the question of the corporate existence of said company was put in issue by his plea of not guilty, and the burden was thereby cast upon the prosecution to prove such fact the same as any other material fact in the case.

Prosecution was had under the provisions of section 532 of the Penal Code. That section provides, in part:

> "Every person who knowingly and designedly, by false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, * * * is punishable in the same manner and to the same extent as for larceny of the money or property so obtained."

It is urged in support of the position that at least the de facto corporate existence of said company must be shown; that the "other person" mentioned in said section (the party defrauded and described in the amended information herein as the L. F. Weaver Company, a corporation) must be the identical person mentioned therein as the victim of the fraud, otherwise a variance would ensue; that in the present case there was not a mere variance, but an utter failure to prove that the "other person" (the alleged defrauded party) existed by reason of the failure to show corporate entity, either de facto or de jure, on the part of said Weaver Company.

Respondent suggests that the corporate existence of said company was treated and assumed throughout the entire case as an admitted fact by both sides. The suggestion of respondent in this regard is not without support, at least so far as the rule in civil cases is concerned. In Lewis v. Bank of Kentucky, 12 Ohio, 132, 40 Am. Dec. 469, it is said:

> "In almost every trial, there are facts necessary to make out the case, which, by the parties, are treated as admitted, without requiring formal proof. To make the absence of express proof, in such cases ground for error, after verdict and judgment, would be unfair, and attended with great inconvenience."

More specific, however, is the language of the court in the recent case of Gilmore v. Caswell (Cal. App.) 224 Pac. 249, wherein it is said:

> "An examination of the cases all show that something was said or done which justified the assumption of the existence of the facts necessary to appear and to be made to appear in order to support the judgment."

We are of the opinion that the corporate existence of the L. F. Weaver Company is to be inferred from the evidence in the case rather than from admissions claimed to have been made by the parties.

It is conceded that in a criminal case, where such fact is an element of the crime (although it is not necessarily such in all character of criminal cases), a mere de facto corporate existence is all that is necessary to be shown. An interesing and illuminating case on the subject is United States v. Amedy, 11 Wheat. 392, 6 L. Ed. 502. We quote therefrom as follows:

> "The next question is whether before the policy of insurance underwritten by the Boston Insurance Company could be given in evidence, it was necessary to prove that the subscription to the stock, and the payment of such subscription, as required by the act of incorporation, had been made. In our opinion it was not. This is not the case where a suit is brought by the corporation to enforce its rights, where, if the fact of its legal existence is put in controversy upon the issue, the corporation may be called upon to establish its existence. The case of Henriquez and Van Moyses v. The Dutch West India Company, cited in 2 Lord Raym. 1535, as decided before Lord King, whatever may be its authority, was of that sort, and therefore carries with it an obvious distinction; nor is this the case of a quo warranto, where the government calls upon the company to establish its legal corporate powers and organization. The case here is of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime. *Under such circumstances we think nothing more was necessary for the government to prove than that the company was de facto organized and acting as an insurance company and corporation. The very procurement of a policy by the prisoner, to be executed by the company, was of itself prima facie evidence for such a purpose.* In cases of the murder of officers, it is not necessary to prove that they are officers by producing their commissions. It is sufficient to show that they act de facto as such. In cases of piracy, it has been held sufficient to establish the proprietary title to the ship by evidence of actual possession of the party claiming to be owner. These are analogous cases, and furnish strong illustra-

tions of the general principal. * * * The next question arises upon the instruction of the court 'that it was not material whether the company was incorporated or not; and it was not material whether the policy were valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy, but upon the question whether he had willfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the actual underwriters.' We think this opinion correct. The act of Congress of the 26th of March 1801, c. 40, on which this indictment is framed, declares 'that if any person shall, on the high seas, willfully and corruptly cast away, etc., any ship or vessel, of which he is owner, etc., with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, etc., the person or persons offending therein, etc., shall suffer death.' The law punishes the act when done with an intent to prejudice, it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has underwritten, or shall underwrite, a policy thereon, which, for aught the prisoner knows, is valid; and does not prescribe that the policy should be valid, so that a recovery could be had thereon. It points to the intended prejudice of an underwriter de facto." (Italics ours.)

In Fleener v. State, 58 Ark. 98, 23 S. W. 1, the court holds that a de facto corporation may be the victim of embezzlement; that evidence of general reputation of corporate existence is sufficient, and adds:

"And, if the same rule is to be applied in criminal as in civil cases, it would seem that one dealing with even an ostensible corporation, as such, is not permitted to deny its corporate capacity."

In Norton v. State, 74 Ind. 337, it is said:

"The court permitted a witness to state that the Terre Haute and Evansville Railroad Company was a corporation. There was no error in this. It was proper to prove that the railroad company was known and acting as a corporation. Wharton Criminal Evidence, § 164a. This conclusion is the logical sequence of the doctrine declared in Smith v. State, 28 Ind. 321. It is indeed doubtful whether it was incumbent upon the state to do more than prove that there was an artificial being assuming and acting under a name indicating and implying a corporation."

In People v. Ah Sam, 41 Cal. 645, it is said:

"The next question is one of greater importance and of much more difficulty. The indictment charges the defendant with feloniously having in possession certain blank and unfinished bills in the form and similitude of a bill for the payment of money, to be issued by an incorporated bank, viz.: The Chartered Bank of India, Australia, and China, a foreign corporation then lawfully organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and then carrying on business as such banking corporation at Hongkong, in China, etc., with intent, etc., to defraud the said the Chartered Bank of India, Australia, and China. On the trial, the prosecution was permitted to prove the existence of the Chartered Bank of India, etc., by reputation, that it was acting as a corporation and as a banking house, and as such issued bank bills, which were received as current in certain countries. The materiality of the evidence, if it be material, arises entirely from the unnecessary allegations of the indictment. It was not necessary to charge that the banking house whose bills were imitated, was an incorporated company. If it were a banking company, actually issuing bank bills, which were current anywhere, it is sufficient. The corporate character of the company is supposed to become material just as, in an indictment for stealing a black horse, though it was unnecessary to aver that the horse was black, yet it being averred it becomes material, in order to establish the identity of the crime. So, here, the fact that the company was incorporated becomes material only as a matter of description, and is not an element of the crime. We do not admit the justice of the comparison. It would be equally an offense whether the company be actually incorporated or not, so it is acting as a corporation and issues bank bills which are current. So, too, as a matter of identity, we think the description is satisfied by proof that the company is known as a corporate company and is acting as such, and as such issues bills which come within the statute. The case is widely different where a suit is pending, in which the legal existence of the corporation may be made an issue. U. S. v. Amedy, 11 Wheat. 392; People v. Frank, 28 Cal. 507."

In People v. Frank, 28 Cal. 507, the defendant was charged with having forged an indorsement on a draft with intent to defraud the Utah Mining Company, alleged to be a corporation, and other persons. One Newby, a witness produced by the prosecution, testified that he had found the draft with the vouchers of the Utah Company; that he was president of said company. The draft was as follows:

"Utah Mining Company, Aurora, N. T., Sept. 18th, 1864. $334.56. Ten days after sight, pay to the order of H. Bloomingdale & Co. three hundred and thirty-four fifty-six one-hundredths dollars, value received, and charge the same as advised. F. J. Baum, Sup't. To M. Frank, Esq., President Utah Mining Company, San Francisco."

This appears to have been all the evidence as to the corporate existence of said company. It was claimed, among other things, that the Utah Mining Company was not a corporation, and therefore could not have been defrauded. As to this the court said:

"Whether the Utah Mining Company was a corporation de jure or not was not an issue in this case. If it was acting as such that was sufficient."

The court added, however:

"But admitting that the Utah Mining Company is not a corporation, the indictment also charges an intent to defraud Howard who certainly had a legal existence."

In the case at bar the facts are much stronger in this regard than in the Frank Case, supra. While it is true there was no direct proof of the de facto corporate existence of the said L. F. Weaver Company, still we are of the opinion that the corporate entity of said company is inferable from the facts and circumstances of the case. We cannot agree with the contention of appellant that, for aught that appears, it may have been a copartnership. All the correspondence from said defendant to said company and from it to him was in the name of said company as an entity. The assignment made by him was to the L. F. Weaver Company. The check procured by defendant was signed "L. F. Weaver Company by Kenton Weaver, Vice President"; and in this connection we direct attention to the language of the court italized by us in United States v. Amedy, supra. A witness testified that he was secretary of said company, stating also the character of the business in which it was engaged. Thus it appears that said company was transacting business, not as an individual or individuals dong business under a trade-name, or as a copartnership, but ostensibly as a corporate entity, operating through its officer. This was a sufficient prima facie showing in a criminal case. There was no proof to the contrary. The defendant's guilt or innocence does not turn upon the question of its corporate entity, the evidence clearly justifying the implied finding of the jury that said company had been defrauded in the manner as charged. The transaction was in no manner changed by the character of proof on the question of corporate existence; the defendant is fully protected against further prosecution for the same offense, and his substantial rights were in no manner adversely affected.

Defendant asserts that, had corporate existence of said company been shown, a chance would have been given him on cross-examination to have ascertained the causal connection, if any, between the alleged false pretenses and the parting with its property by said company; also as to what extent, if any, the corporation, or the person assuming to act for it, had been deceived; and it is also suggested that said company may have purchased the Baum contract on the joint or several responsibility of Baum and the defendant, as to which, so it is claimed, there was no evidence. We have heretofore discussed this feature of the case under another point, and will only add that the evidence showed the names of the representatives of the Weaver Company who handled the transaction on its behalf and authorized its acceptance, together with the surrounding facts and circumstances, and all the other details of the transaction, as fully as if there had been direct proof of either its de jure or de facto corporate existence. As previously stated, one of the witnesses was secretary of said company and testified to that fact; also as to the business conducted by it. The fact that a copy of the articles of incorporation of said company was not introduced, or that no witness was directly interrogated by the prosecution as to its corporate existence, did not prevent defendant, who was party to the entire transaction and conversant therewith, from bringing out on cross-examination, had he so desired, such information as he might have deemed necessary. Under the circumstances, it is but reasonable to infer that defendant was satisfied, during the trial, with those details of the transaction which he now asserts he was prevented from ascertaining by reason of the alleged failure to prove the corporate entity of said company.

The corporate existence of a company, the alleged victim in the commission or attempt to commit a crime, is not, in every criminal case, an element of the crime. Different factors enter into a determination of the question. No general rule on the subject can be laid down as applicable to all criminal cases, although mere excerpts from some might lead to the opposite conclusion. As the views we have expressed render a discussion of the subject unnecessary, we shall refrain from a further reference thereto.

[9] Two instructions proposed by defendant were refused by the court, and the failure to give the same is now assigned as error, although the grounds upon which the contention is based are not set forth. These proposed instructions will be found in the clerk's transcript—the first on page 48, commencing at line 18, and the second on page 51. The first of these is extremely argumentative. Both, however, were substantially covered by instructions given. (Clerk's transcript, page 29, lines 4 to 24; page 31, lines 8 to 16; page 32, lines 3 to 11; pages 33, 36 and 39).

[10, 11] It is claimed the court erred in sustaining objections interposed by the prosecution to two questions asked the witness Stanbury. (The reference given is incorrect. The questions will be found on pages 111 and 112 of the reporter's transcript.) The record discloses the following:

"By Mr. Holl: Q. Did you bring with you the four contracts which you were directed by this subpœna to bring with you?

"By Mr. Hardy: We object to that as immaterial and irrelevant and not proper cross-examination.

"By the Court: I think the objection is good, but I don't see any object in making it. This witness is subpœnaed by the defense. If you insist upon it I will sustain it.

"By Mr. Hardy: The proper place to put that in is in his defense.

"By the Court: I think so too.

"By Mr. Holl: I am going to ask another question. Have you since your arrival here refused to discuss the case in any way with the attorney for the defense, myself, and refused to exhibit such, any contracts in your possession, described in this subpœna? This is for the purpose of showing animus of the witness.

"By Mr. Hardy: Object to that as incompetent, irrelevant, immaterial, and not proper cross-examination.

"By the Court: Objection sustained. This is not the time and place to take that matter up.

"By Mr. Holl: I think in fairness I should say I am offering this to show the animus of the witness, his interest, and the fact that he is opposed mentally to the defendant.

"By the Court: You haven't any right to argue that question. There is a way to get at that, and you probably understand how to do it.

"By Mr. Holl: That is all."

There appears to have been no definite or final ruling on the first question; but, irrespective of this, no claim is made that the contracts referred to were not produced in response to the subpœna, hence the relevancy of the question is not apparent. The objection to the second question was properly sustained. The witness was well within his rights to have refused to discuss the case with the attorneys for either side, or to have exhibited to them documents which he was required by the subpœna to produce in court. An affirmative answer, therefore, under the circumstances, would have disclosed no prejudice. The ruling of the court in sustaining the objection to the last question did not preclude the defendant from a line of questions, answers to which would tend to show whether or not the witness was biased or prejudiced against him. It is claimed, however, that the remarks of the court in sustaining the objection were prejudicial. The remarks of the court, as will be observed, were made in response to a statement by counsel for defendant, after the court had sustained the objection to the question, apparently for the purpose of shutting off further argument and directing attention to the fact that, if it was desired to bring out the facts which counsel claimed to exist, a different line of examination should be pursued.

[12, 13] It is finally urged that the court erred in sustaining an objection by the prosecution to a question, whereby it was sought to elicit from defendant the fact that after the commission of the crime charged he had assigned other contracts to the L. F. Weaver Company; the object of the question being, so it was stated, to show that defendant could have had no intent to defraud in assigning the Baum contract, otherwise he would not have placed additional assets in the hands of said company. There is no merit in the contention. After the objection had been sustained, permission was given defendant to submit authorities and to reopen the question. Thereupon counsel for defendant stated: "All right, I will abandon that now and go on to this matter." If the matter was not again brought to the attention of the court it must be assumed that defendant was satisfied with the correctness of the ruling made. There was no error, however, in the ruling so made. The subsequent acts of defendants in relation to other contracts had no bearing on the issues involved in the charge. Under the circumstances they were not relevant, but would be rather in their nature self-serving, and in no way tend to show the intent of defendant at the time of the commission of the crime charged. In Gardner v State, 4 Ala. App. 131, 58 South. 1001, defendant was charged with obtaining money under the false representation that he was the owner of a certain tract of land. It was claimed the court erred in refusing to permit testimony as to the subsequent conduct of defendant in attempting to perfect his title thereto. The court held:

> "What the defendant did after the commission of the offense was not relevant, and testimony of his subsequent actions or conduct was not admissible, even in mitigation of the offense, and the court properly refused to allow the defendant to make proof of what efforts he afterwards made to perfect title to the land or whether he was prevented from doing so by an injunction."

The foregoing disposes of all the points raised by appellant. In view of the suggestion made that defendant intended no wrong, and was improperly convicted of the offense upon which he was tried, we have gone over the entire record. Without reiterating the facts, we will say the case was fairly tried, the defense was permitted a wide latitude, the Weaver Company was defrauded of a considerable sum by the defendant in the manner charged, and the record amply justifies the conclusion reached by the jury; hence we see no reason for disturbing its verdict.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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PEOPLE v. STEFFNER. (Cr. 720.)

(District Court of Appeal, Third District, California. April 29, 1924. Rehearing Denied May 29, 1924. Hearing Denied by Supreme Court June 26, 1924.)

1. Criminal law ⚷1134(8)—Failure to appeal from order denying motion for new trial held not to preclude review of sufficiency of evidence to support verdict.

Failure to appeal from order denying motion for new trial *held* not to preclude review of question of sufficiency of evidence to support verdict.

2. Embezzlement ⚷32—Charge need not allege particulars of trust relation.

An information charging embezzlement need not allege the particulars of the trust relation.

3. Embezzlement 🔑4—Defined.

"Embezzlement" is larceny after trust.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzle—Embezzlement.]

4. Embezzlement 🔑26—Information held to charge embezzlement.

Information alleging C. intrusted accused with money belonging to C., which accused received, and that while it was so intrusted in his possession accused feloniously and fraudulently embezzled it by appropriating it to his own use, not in the due and lawful execution of the trust, etc., *held* sufficient under Pen. Code, §§ 503, 506, 950, 952.

5. Embezzlement 🔑44(5)—Evidence held to sustain implied finding that accused became trustee of prosecuting witness in receipt of money.

Evidence *held* to sustain finding, implied from verdict that accused became the agent or trustee of prosecuting witness in the receipt of money from witness for a specified purpose.

6. Embezzlement 🔑4—When appropriation of money intrusted is "embezzlement."

If accused was intrusted with money of prosecuting witness, and while acting in such trust capacity fraudulently appropriated the same, he is guilty of embezzlement within Pen. Code, § 503.

7. Embezzlement 🔑10—Accused held estopped from denying he held money of another as trustee.

If, at the time C. turned money over to accused, the understanding between him and accused was that the latter received the money as the agent and trustee of C. for a specific purpose, accused was estopped from denying that fact in a prosecution for embezzlement.

8. Embezzlement 🔑44(5)—Evidence held not to establish creation of agency to collect money.

Evidence *held* not to establish creation of agency within Civ. Code, § 2316, between accused and a trust company to collect money for the latter from a purchaser of a car whose contract was assigned by accused to the trust company.

9. Embezzlement 🔑10—Accused held estopped from asserting agency.

Where C. intrusted money to accused as trustee to remit it to a trust company for a certain purpose, and accused did not communicate to C. that he (accused) believed himself authorized to act as the agent of the trust company to collect such money, and C. was not aware of such belief, accused was estopped, in a prosecution for embezzlement, from claiming agency between himself and trust company.

10. Criminal law 🔑433—Letter which threw light upon those introduced by defense held admissible.

A letter which threw light upon those introduced by defense in support of his theory *held* admissible.

11. Embezzlement 🔑11(1)—Agent to collect money must turn it over to principal within reasonable time.

It was the duty of accused as agent, in making collection from C., to notify the principal of the collection and to turn the money over to it within a reasonable time, in view of Pen. Code, § 506, which makes the fraudulent secreting of property with the fraudulent intent to appropriate it embezzlement.

12. Criminal law 🔑1169(1)—Refusal to strike answer in form of conclusion held not prejudicial.

Where a witness for a company, to which accused assigned a conditional sale contract of an automobile, payable in monthly installments, in response to a question why the trust company did not charge accused's account with the total balance owing on the contract assigned, when buyer of car did not remit installment, answered that there was only one installment due at the time, and that "We had no right to deduct the entire amount of the contract," refusal to strike out the latter part of the answer as calling for conclusion *held* not prejudicial; there being no attempt to state terms of contract.

13. Criminal law 🔑1169(2) — Admission of testimony previously received without objection could not be prejudicial.

The admission of testimony could not be prejudicial, where such testimony was previously received without objection.

14. Criminal law 🔑822(1)—Instructions to be read together.

Instructions are to be read together.

15. Criminal law 🔑823(1) — Instruction on embezzlement held not misleading, in view of other instructions given.

An instruction on embezzlement *held* not misleading, in view of other instructions given.

16. Embezzlement 🔑48(2)—Instruction requested held not to state defensive matter enumerated in statute.

To constitute a defense under Pen. Code, § 511, to a charge of embezzlement, the property must be appropriated openly and avowedly, and under a claim of title preferred in good faith, and an instruction that accused was not guilty of embezzlement, where he converted money to his own use, believing he had a right to do so, was not a statement of the defense authorized by such section.

17. Criminal law 🔑1172(6)—Refusal to give requested, and giving of substituted, instruction, embracing defensive matter to which accused was not entitled, held not prejudicial.

Where accused, charged with embezzlement, was not entitled under the evidence to an instruction embracing the defensive matter enumerated in Pen. Code, § 511, the refusal to give his requested instruction on that subject, and the giving in lieu thereof of another instruction embracing that matter, *held* not prejudicial.

18. Embezzlement 🔑48(2)—Proposed instruction held properly refused as inapplicable.

Where the money on which prosecution for embezzlement was based was either intrusted to accused for C., or was paid to accused as agent for a certain corporation, a proposed instruction that the statutory crime of embezzlement is not a substitute for debt, and cannot be used to punish a party for failure to comply with ordinary obligations to pay money, *held* properly refused as inapplicable.

19. Criminal law ⚷829(1)—Refusal to give requested instructions, covered by instructions given, held not error.

Refusal to give requested instructions, covered by instructions given, *held* not error.

Appeal from Superior Court, Lassen County; W. I. Redding, Judge.

E. W. Steffner was convicted of embezzlement, and he appeals. Affirmed.

Charles C. Holl, Grover C. Julian, of Susanville, and R. L. Waggoner, of Cedarville (Archibald M. Johnson and A. A. DeLigne, both of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

GLENN, Justice pro tem. Defendant was convicted of the crime of embezzlement. A motion for a new trial was duly made and denied. No appeal was taken from this order, the appeal being from the judgment only.

[1] Respondent contends that, as no appeal was taken from the order denying motion for new trial, this court is without power to review the sufficiency of the evidence to support the verdict. The same point was made, and decided adversely to this contention, in the case of People v. Steffner (Crim. No. 723, Cal. App.) 227 Pac. 690, in which an opinion has this day been filed. We refer to that case for our views on the subject.

[2-4] The sufficiency of the information was challenged by defendant, both by demurrer and motion in arrest of judgment. So far as is material to be considered here, the amended information provides:

> "E. W. Steffner is accused by the district attorney of the said county by this amended information of the crime of felony-embezzlement committed as follows:
>
> "The said E. W. Steffner, on or about the 5th day of August, 1922, at the said county of Lassen and before the filing of this amended information, being then and there intrusted by E. J. Craddock with the following described personal property of him the said E. J. Craddock, namely, lawful money of the United States to the amount and value of more than fifty ($50.00) dollars, to wit, the amount of $684.74 or thereabouts, and the said E. W. Steffner then and there received the said property and money in trust as aforesaid, and while so intrusted and in possession of said property, he, the said E. W. Steffner, to wit, on or about the 5th day of August, 1922, at Susanville, in said county of Lassen, state aforesaid, did willfully, unlawfully, feloniously and fraudulently embezzle, convert, and appropriate to his own use the said money, not in the due and lawful execution of said trust as aforesaid, contrary," etc.

It is claimed that the information does not state facts sufficient to constitute a public offense and also that it does not substantially conform to the provisions of sections 950 and 952 of the Penal Code, in that the facts constituting the offense are not pleaded; it being asserted that neither the trust relation relied on, nor the character of the trust, is set forth.

The information alleges that E. J. Craddock "intrusted" the defendant with the said money, and that the said money was the money and personal property of the complaining witness; it also shows the fiduciary relation existing at the time of the appropriation by defendant of the said property of Craddock, for, following the above allegation, it is averred:

> "That the said defendant on said date received the said property and money in trust as aforesaid, and while intrusted and in possession of said property, the said defendant, on or about the 5th day of August, 1922, fraudulently," etc.

Under these allegations it is clear that defendant received and held the money of Craddock as his trustee and for his benefit.

It is uniformly held that it is necessary to state the fiduciary relation existing between the defendant and the owner of the property, as that the defendant was the agent, servant or clerk, or that the property was held by him pursuant to a trust or bailment. 7 Ency. of Plead. & Prac. p. 418.

In People v. Neyce, 86 Cal. 393, 24 Pac. 1091, it is said:

> "The objections raised by the demurrer and motion in arrest of judgment to the sufficiency of the information are not well taken. The main point here made is that appellant is not called in the information 'bailee,' 'trustee,' or 'agent,' or formally put into any of the classes named in the sections of the Code which define embezzlement. But facts constituting the crime were fully stated, and, that being so, it was not necessary to designate the appellant by any particular name (People v. Johnson, 71 Cal. 389), and the information in all other respects was unassailable."

It is not necessary to set forth the particulars of the trust relation. In People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174, the charge being embezzlement, it is said:

> "The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter. Pen. Code, § 503. The origin or particulars of the relation need not be stated. 2 Bishop's Criminal Law, § 323a."

Also, to the same effect, People v. O'Brian, 8 Cal. App. 641, 97 Pac. 679.

In Keys v. State, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63, the defendant was charged with larceny after trust, or embezzlement. In stating the nature of the charge, the court says:

> "The indictment charging, in substance, that the defendant, on January 6, 1898, was intrusted with one $5 bill, lawful money, of the value of $5, by W. J. Biggers, for the use and benefit of the latter, and did on the day and year aforesaid, in the county aforesaid, fraudulently convert the said $5 to his own use, to the injury and without the consent of Biggers, and without paying Biggers the price thereof."

The indictment was upheld. The statute under which that indictment was drawn provided:

> "If any person who has been intrusted by another with any money, * * * or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished by imprisonment," etc. Pen. Code Ga. 1895, § 194.

This section is substantially the same as sections 503 and 506 of our Penal Code. Section 503 reads:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted."

Section 506 is as follows:

> "Every trustee, * * * agent * * * or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, * * * is guilty of embezzlement."

In the indictment in the Keys Case, supra, it is stated that the money was intrusted for the use and benefit of Biggers. The court points out that it is certain a trust of some kind was set out, and that it would have been more definite had it stated the way the accused was to have disposed of the money for the use and benefit of Biggers. But in this regard the court says:

> "In this respect it might have been made more definite, but can it be fairly said that, because of the omission to go further into detail, the accused was not sufficiently informed of the nature of the charge he was called upon to meet? We think not. If, as matter of fact, Biggers did intrust the accused with $5 in money with which he was to do something in behalf of the depositor, and if instead of complying with the obligation thus imposed he fraudulently converted the money to his own use, did he not know well enough what the indictment meant?"

In the instant case, while there is no direct averment to the effect that the money was intrusted for the use and benefit of Craddock, no other deduction is possible from the language used, and therefore to have added these words would have furnished no additional information. Embezzlement is larceny after trust. The information in this case alleges the trust, and, in appropriate language, the larceny thereafter. The information, while not as full and complete as might be desired, substantially complies with the provisions of the Code under which it was drawn, and is therefore sufficient. The trial court was correct in overruling the demurrer and in denying the motion in arrest of judgment.

[5, 6] Appellant contends that, assuming the evidence on the part of the prosecution to be true, it is insufficient to establish an implied finding that defendant became the agent or trustee of the prosecuting witness, E. J. Craddock, in the receipt of the money from him, for the purpose of forwarding it to the Anglo-California Trust Company; that the testimony of the prosecuting witness was so inconsistent with the undisputed facts as to be wholly unsupported; that, on the other hand, it does appear that in receiving the money he was acting exclusively for the bank and himself, and not as the agent of Craddock; that, if appellant was authorized to collect the money for the bank or for himself, or jointly for himself and the bank, immediately upon payment by Craddock he became divested of the title, and any subsequent wrongful conversion by appellant, if such there was, was not of money belonging to Craddock.

Appellant concedes that it is a well-recognized rule that courts of appeal are bound by the verdict of the jury, when supported by proper and sufficient evidence. The rule is stated by the court in People v. Emerson, 130 Cal. 562, 62 Pac. 1069, as follows:

> "For if the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

If the defendant was "intrusted" with the money of the prosecuting witness, and, while acting in such trust capacity, fraudulently appropriated the same, he is guilty of embezzlement. Pen. Code, § 503. The question of whether or not he was so "intrusted" is a question of fact for the jury to determine. As was said in People v. McMahan, 133 Cal. 278, 65 Pac. 571, on this particular subject:

> "Being properly instructed as to the law of the matter, as we presume the jury were, it was for them to say, from all the evidence before them, whether the money was 'intrusted' to the defendant or not. By their verdict of

conviction they found that it was so intrusted. Of course, it is possible in this, as it is in most cases, to take different views of the evidence, but we think the view taken by the jury was a reasonable one."

Is the verdict of the jury justified by the facts of the case? A somewhat extensive review of the evidence will be necessary to determine this question, and, as the testimony of the witness Craddock is of prime importance in this regard, we feel justified in quoting therefrom at length.

Defendant was a retail automobile dealer in Susanville, Lassen county, Cal. On May 20, 1922, defendant, under the name of Steffner Overland Company, entered into an agreement with E. J. Craddock, wherein he agreed to sell, and Craddock agreed to buy, a certain automobile therein described, for the sum of $1,396.70. The contract provided for the payment of $575 at the date of signing, and the balance in monthly installments. This contract was assigned, by an instrument attached thereto, to the Anglo-California Trust Company, executed by Steffner Overland Company, by E. W. Steffner, manager, and dated May 31, 1922. The contract and assignment thereof were mailed by defendant to the Anglo-California Trust Company for discount. It was received by that company on or about June 1st, and a remittance made to the defendant of the sum of $765.50 in payment therefor. Under the terms of the contract the first installment became due on June 27th, and the second, as well as the subsequent installments, were to be paid on the same date in each succeeding month. The first installment was sent direct by Craddock to said company, on or about the date on which it was due. The second installment was likewise sent by him on or about July 27th. On August 5th Craddock paid the full balance owing on the contract, amounting to the sum of $684.74, to the defendant, who applied it to his own use and purpose. The prosecution is for the alleged embezzlement of this sum.

The circumstances surrounding this payment were substantially as follows:

The first conversation between the parties on the subject occurred near the post office in Susanville concerning which the witness Craddock testified:

"Q. Did you have any conversation with him [the defendant] at that time? A. I told him I wanted to pay the balance due on the contract—pay up on the car in full. I had the money, and he said it was perfectly all right to come to the office in about half an hour and we would fix it up."

Pursuant to this conversation, Craddock went to the defendant's office and there paid him the sum of $684.74, $550 of which was represented by a check drawn in Craddock's favor by one G. Orsi, and on which Craddock indorsed his name; the balance of $134.74 being paid in cash. Concerning the payment thus made Craddock testified:

"Q. At that time did you make any payment to Steffner? A. Yes, sir.

"Q. How much? A. I paid Mr. Steffner $684.74.

"Q. Did he say anything at that time about that payment? A. He said he would send it in, and he would have my contract within a few days.

"Q. How did you make that payment—in what way? A. I gave him a check for $550 and the balance in cash; $134.74 in cash.

"Q. Did you get a receipt at that time? A. He gave me a receipt for it, yes."

The receipt given reads:

"No. 90 Aug. 5, 1922.

"Received of E. J. Craddock, six hundred eighty four and 74/100 dollars. Payment on contract covering purchase of Olds roadster $684.74. E. W. Steffner."

The witness testified with reference to the receipt as follows:

"Q. At the time you were in his office you saw him write the receipt, People's Exhibit 2, and deliver it to you at that time? A. Yes, sir.

"Q. What did he say at that time? A. He would send it to the bank and I would get my contract in a few days. That is the best I can remember that he said.

"Q. What bank did he say? A. The Anglo-California Trust Company."

Referring to a conversation between the witness and defendant on August 24th, at the latter's residence, the witness testified:

"Q. At that time what conversation was had between you and Steffner, if any? A. I got a slip showing me my payment had come due and I didn't figure I would have any more and on the 24th of August I got this notice, so I took it up and showed it to Steffner.

"Q. Did Mr. Steffner receive it from you at that time? A. Mr. Steffner took the slip.

"Q. Did he give it back to you? A. No sir.

"Q. What was that?"

At this point there was objection made; after some discussion the objection was overruled. Thereupon the following occurred:

"By Mr. Holl: Further object unless it be shown that the witness knows the contents.

"By the Court: He asked the witness what it was.

"By the Witness: It was a notice showing me my payment was coming due, $74 and some cents.

"By Mr. Nutting: To whom? A. To me.

"Q. It was a payment due to the Anglo-California Trust Company Bank? Was that a payment due from you to them? A. From them to me. It was a payment on my car.

"Q. Was it a demand from them to you to pay an installment on your contract? A. Yes, sir; that is what it was.

"Q. What did you say to Steffner at that time? A. I asked him why that came to me.

"Q. What did he say? A. He said he didn't know. He said I will take it up by wire tomorrow morning and find out why it came back to you. He said he was in San Francisco and just got back a few days ago and this was all marked 'Paid' on the books. He said, 'I seen it myself.'"

Concerning a conversation between defendant and Craddock, held on September 13th, the latter testified:

"Q. What, if anything, did you say to Steffner at that time? A. I asked him why my contract didn't come.

"Q. What did he say? A. He said that he didn't know. He didn't know why it didn't come. He said, 'I will wire tomorrow morning and find out.'

"Q. Did Mr. Steffner say anything else at that time, if you remember? Do you recall anything about his actions or manner? A. He kept stalling me off and acting as if he didn't know me."

In his cross-examination the witness testified:

"Q. In answer to the question by the district attorney, I think his question was, 'What bank?' and you said, 'The Anglo-California Bank,' referring to a time when you paid this money to Mr. Steffner. You don't know whether he mentioned the Anglo-California Bank at all at that time, do you? A. I know he mentioned he would send it to the bank and I would get the contract. I know that.

"Q. You wouldn't attempt to say those were his exact words, would you? A. That is what I understood him to say.

"Q. That is the way you remember it now? A. Yes; if I hadn't, I sure wouldn't have given him the money. * * *

"Q. Did you ask Mr. Steffner in that conversation between you and him in the post office, and when you say it was about half an hour before you went up to pay him, if it would be all right for you to pay the money to him? A. I sure did.

"Q. That is the reason you paid it to him? A. Certainly.

"Q. Because you believed that statement? A. I believed he would send it. He told me he would.

"Q. He didn't tell you at that time he would. A. He sure did.

"Q. He told you half an hour before you went up to the office? A. Yes, sir.

"Q. And again after you got up to the office? A. Yes, sir.

"Q. He told you that in front of the post office? A. Yes, sir.

"Q. And half an hour later he told you that again? A. You bet you. * * *

"Q. Now, why didn't you tell at the preliminary examination that he told you while you were at the post office that if you gave him the money he would send it in? (An objection was here made to the question by the prosecution and overruled by the court.) A. Well, you know you don't always— when you get up on the stand you don't always think of everything the first time. I am quite excitable myself, but that is right, to the best of my knowledge.

"Q. Which is right? That he did or did not tell you at the time in front of the post office? A. That he did tell me that he would send it in.

"Q. At the time you were in front of the post office? A. Yes, sir.

"Q. And again repeated that statement half an hour later in the office? A. Yes, sir; I wouldn't give him the money and think he would keep it for himself. I know what I gave it to him for. That was the understanding when I gave it to him.

"Q. That is what you now believe was the understanding? A. It was the understanding.

"Q. He gave you a receipt saying you had paid the money to him? A. Yes, sir.

"Q. Did you understand that receipt meant what it said at the time? A. Yes, sir.

"Q. It says you paid it to him? A. Yes, sir.

"Q. It doesn't say anything else only that you paid it to him? A. No, sir.

"Q. You understood that is what you were doing, what that receipt shows—paid it to him. A. Certainly, I understood I gave it to him to send in.

"Q. Why didn't you have that written on the receipt? A. Because I thought he was an honest man.

"Q. You thought you were paying it to him? A. Yes; I thought I was paying it to him.

"Q. You wasn't thinking anything about what he would do with it? A. I knew in my own mind he would send it in.

"Q. It says you paid it to him, and you testified that he said it would be all right if you paid it to him? A. Yes, sir. He said it would be just as good as if I paid it to the bank, just the same.

"Q. You thought he had authority from the bank to collect it? (Objection made by the prosecution and overruled.) A. No; I didn't think it."

The wife of the prosecuting witness also testified that defendant had stated he would send the money to the bank. It is admitted defendant retained the amount so paid him by Craddock, at least $550 of which was deposited to his own account on the 7th day of August, 1922, at which time an overdraft existed against him and in favor of a bank in Susanville where his account was kept. Notwithstanding this fact, the testimony shows that on August 24th, and after Craddock had received notice that the third installment due on his contract had not been paid, he sought defendant and inquired as to the reason, and was informed by him, in substance, that he did not know, but that he had just returned from San Francisco, and it was marked "Paid" on the books, adding that he had seen the books so marked. Appellant calls attention to the fact that there was no proof that this latter statement was untrue, and that the uncontradictory documentary evidence showed that the bank had charged the Craddock account against defendant's withholding account. The so-called "withholding" account was not a credit in defendant's favor, and was not used for the purpose of liquidating the Craddock account. Referring to the withholding account, the assistant manager of the contract department of the said trust company testified:

"It is simply a name for the account representing transactions where an automobile contract is submitted to us with a greater balance than the value of the car. We don't discount the entire contract, but in order to take care of the matter we will remit a certain amount on the contract, placing the balance in the withholding account subject to the further discount, provided the purchaser makes the payments promptly and is going to terminate the contract."

He further explained that under certain forms of contracts there was also a withholding for security of 1 per cent. of the balance which was placed in this account. On September 30, 1922, the withholding account represented approximately the sum of $700, which might eventually become a credit in defendant's favor, under the contingencies as above explained. The trust company merely made an entry in the withholding account to prevent withdrawals therefrom. But it is further to be noted that the conversation referred to was held on August 24th. Up until that time, and for some time thereafter, the Anglo-California Trust Company was not aware of the fact that defendant had been paid the amount owing under the contract; in fact he had made an installment payment earlier in the same month, and it was not until the 28th of September that he was informed by said company, by letter, to the effect that Craddock had written that defendant had been paid in full, adding:

> "If Mr. Craddock's statement is correct, and we have no reason for doubting it, you certainly must realize that full payment of the account must be made immediately by you."

If we are correct in this, then the statement of defendant to Craddock with reference to having seen the books marked "Paid" was false. Thus it appears that defendant not only concealed from Craddock the fact that he had not remitted the money paid to him, but concealed also from the trust company, whose agent he claimed to be, the fact that it had been so paid. It is true, as stated by appellant, that Craddock did not testify that it was understood or agreed that defendant should act as his "trustee" or "agent" in receiving and transmitting the money. We do not, however, view this as indicative of the fact that such an understanding was not had. Laymen, in transacting business, do not ordinarily resort to terms used by the legal profession. To determine whether there was such an understanding or agreement between Craddock and the defendant, recourse must be had to the entire transaction. Craddock stated, in answer to a question asked by the defense, that he did not think defendant had the authority from the bank to collect the sum so paid, and which was evidenced by the receipt above set forth. Concerning the giving of the receipt he stated, in effect, that at the time it was signed defendant said the money would be sent to the trust company and that he would receive his contract. While the receipt is not signed by the defendant as agent for Craddock, it is also to be noted that it is not signed in the name of the trust company, by defendant, purporting to be acting for it, nor did the defendant claim to have imparted this information to the complaining witness. That he had made the contract with defendant could not be taken as knowledge on Craddock's part of any authorization of defendant to collect. There is no question of ostensible agency so far as Craddock is concerned.

> "The application of the rule of ostensible agency or authority depends primarily upon the acts or conduct or words of the principal, and not upon the acts or conduct or words of the agent." Wiley B. Allen Co., etc., v. Thama M. Wood, 32 Cal. App. 76, 84, 162 Pac. 121, 124.

It is not claimed Craddock had notice from the trust company of any authority on defendant's part to collect the installments under the contract; in fact his payments had been made, in accordance with the policy of the trust company, direct to it. The contract under consideration also contained a provision to the effect that, in case of assignment thereof, all payments thereunder by the purchaser "shall be paid to such assignee without recoupment, set-off, or counterclaim of any sort whatsoever." Thus there appears from the evidence to have been no source of information from which it can be reasonably said that Craddock had knowledge of any such claim of agency on defendant's part. We are not permitted, of course, to indulge in the supposition that he surmised such to be the fact. Considering these matters, our view is that the verdict of the jury was amply supported by the evidence.

Appellant earnestly insists that, although the Anglo-California Trust Company's policy and desire was to have purchasers remit direct to it, nevertheless there was proof to the effect that it did permit appellant to make collections on its behalf; that appellant was its agent for that purpose, and, if there was a conversion, it was not of the money of Craddock. People v. Van Ewan, 111 Cal. 144, 43 Pac. 520, is cited as sustaining this view. It is also contended:

> "If the rediscounting of the contract is to be considered, as it appears to have been regarded at the trial, to be an absolute sale and transfer of the contract and the car therein described to the bank, then there was actually transferred only a partial interest, although the greater interest therein to the bank, because, as shown by the evidence generally, the bank was entitled only to the amount of the proceeds and returns of the contract sufficient to reimburse itself with its interest and discount. Any overplus belonged to appellant. This constituted the bank and the appellant joint obligees, and payment could have been made to either by Craddock, and his obligation discharged." Hence "Craddock became divested of his title to the money when he paid it to appellant, the bank's joint obligee."

On the other hand, it is asserted that if the transaction be treated as a loan to appellant and a pledge of the contract by him to the bank, then appellant as pledgor had a right to make collection for the benefit of the pledgee and himself.

[7] These various contentions are untenable for several reasons. Assuming there was a conflict in the evidence as to the capacity in which defendant received the money, the jury has determined the question by its verdict adversely to these contentions. People v. Treadwell, 69 Cal. 226, 234, 10 Pac. 502, 507. If the agreement and understanding between Craddock and defendant was to the effect that the money was intrusted to defendant as the agent and trustee of Craddock, defendant is now estopped from denying he was such, or from claiming to have acted in any other capacity. People v. Treadwell, supra; People v. Robertson, 6 Cal. App. 514, 92 Pac. 498.

In the former case it is said:

> "The evidence is overwhelming that Quinn, when he paid his moneys upon the note, acted with the defendant as the attorney and agent of Haneke for the purpose of receiving and forwarding them to Haneke. He so understood it from Haneke and the defendant himself. He knew nothing of the indorsement of the note to Mrs. Wise, for the defendant had not informed him. The defendant was therefore, when he received the money from Quinn, in fact the agent, or acting as the agent, of Haneke, and he is estopped in law from denying that he was the agent."

[8] Appellant strongly urges that the evidence clearly established the fact that he was the agent of the trust company in the collection of the money from Craddock. It is claimed this agency arose through a course of conduct and dealing between the parties. It is true that he had assigned many contracts similar to the one under consideration to the trust company, and the dealings between the parties in relation thereto had extended over a considerable period. The policy of the company required purchasers under these contracts to make payments direct to it. As defendant was a guarantor under the terms of the assignments of the contracts, he was notified from time to time of the delinquency of purchasers, and in such communications was directed to bring the accounts up to date or to see the purchasers and collect the back installments, or some other similar direction was given. Whatever authority may have been contained in these letters was special, not general. In the instant case the amounts payable under the contract had not become due. No similar transaction have we found in the record. Possibly there may have been instances where, by special direction, defendant had been called upon to make some collection on behalf of the trust company, but of course these cases cannot be used as a means of establishing general agency to make collections under all circumstances or in all cases. Defendant did testify that it was his custom to collect money due on contracts and to transmit the same to the company; that sometimes he deposited the money and remitted his check. Apparently these were delinquent collections. We believe these facts are not sufficient to bring the defendant within the provisions of section 2316 of the Civil Code. That section reads:

> "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

[9] But if we assume the defendant did believe himself possessed of authority to act as agent for said company in the Craddock transaction, he did not communicate such fact to the latter, nor was Craddock aware of that fact from any other source of information, and the defendant is now estopped from availing himself of this character of defense. The facts in the Van Ewan Case, supra, are entirely dissimilar to those in the present case. The points which we have discussed were not there referred to.

[10] The court admitted in evidence, over the objection of defendant, a copy of a letter from the Anglo-California Trust Company addressed to him, dated October 23, 1922. The body of the letter is as follows:

> "Notwithstanding the fact that you have heretofore denied that you received full payment on the E. J. Craddock account, we are to-day in receipt of a copy of what purports to be your receipt No. 90, in the sum of $684.74, under date of August 10th. The above-mentioned copy has been forwarded to us by Mr. George E. Gardner, assistant district attorney of Butte county, and we have no reason to doubt that it is an authentic copy. Agreeably to your request of recent date, we forwarded our collection last Friday to the Bank of Lassen County, to cover the balance due us on the Craddock account, and we trust that this draft will be promptly honored upon presentation."

Respondent does not attempt to justify the relevancy of the first portion of the letter, but does contend that the objection made that it was "incompetent, irrelevant, and immaterial" was addressed to the letter as a whole, and, as the latter part was material, the court did not therefore err in its admission. Appellant does not dispute the proposition of law thus advanced, but denies the materiality of the entire letter. Appellant asserts that, as it contained the only reference to any denial of the payment made by Craddock to defendant, proof of that fact would be fatal to the defense that defendant had collected it in the regular course of business and expected to have the same deducted from his funds in the hands of the trust company. Under the theory suggested by appellant, a number of letters from said trust company to him were introduced in an endeavor to show, as we gather therefrom, an implied authority on his part to collect on its behalf from purchasers under contracts assigned to said company, and also to show that it had been the practice of said company to deduct from sums or credits in its hands belonging to defendant the various amounts thus collected by him, and this course of procedure had been relied upon and followed by defendant in the instant case. The latter portion of the letter was a reply to a telegram from defendant, wherein he requested that the Craddock contract be sent to the Bank of Lassen with a sight draft attached. The telegram and the reply thereto negative the theory that either he or the trust company recognized that the Craddock account had been paid, or that the amount thereof had been deducted or withheld from any funds belonging to defendant, or that defendant was then relying on such a custom or practice. The letter was one of a number between the parties throwing light upon those introduced by the defense, and was therefore admissible. The evidence does not disclose a defense along the lines suggested. The defense introduced a letter dated September 28, 1922 (an excerpt from which we have heretofore inserted and which is also included in the portion here referred to), from the Anglo-California Trust Company to defendant, containing, among other things, the following:

"It will no doubt interest you to know that we have received a communication from Mr. E. J. Craddock, indicating that on September 5th he paid to you the total balance due on the account, whereas you but sent to us on September 15th the August 29th installment. If Mr. Craddock's statement is correct, and we have no reason for doubting it, you most certainly must realize that full payment of the account must be made immediately by you. For your information I am inclosing herewith a copy of the letter received from Mr. Craddock, together with my reply." (The money was received by defendant on August 5th, and the error in the letter is explained in the testimony of one of the witnesses.)

[11] It was the duty of the defendant, if it be assumed for the moment he was the agent of the trust company in making the collection from Craddock, to notify his principal and to turn the money so collected over to it within a reasonable time. Fraudulently secreting property with the fraudulent intent to appropriate it is embezzlement. Pen. Code, § 506. The money so collected was never turned over either to Craddock or to the said trust company, but was appropriated to defendant's own use and purpose. The facts fail to substantiate the suggested defense.

[12] On redirect examination the witness Lockhart testified, in answer to questions by the prosecution:

"Q. You testified on cross-examination, I think both yesterday and to-day, that Mr. Steffner had enough money on deposit, or enough credits with the Anglo-California Trust Company to take up the entire Craddock contract. Is that correct? On September 30th? A. Yes, sir.

"Q. You also testified that you didn't take up the Craddock contract by charging Mr. Steffner's account with the amount? A. Yes, sir.

"Q. Why was that not done?

"By Mr. Holl: Object to that as incompetent, irrelevant, and immaterial. It is a self-serving declaration, calling for the conclusion of the witness and not redirect.

"By the Court: To what time does this relate?

"By Mr. Hardy: September 30th. The same date that was mentioned in the question of counsel for defendant.

"By the Court: I will overrule the objection.

"A. There was only one installment due on September 30th. We had no right to deduct the entire amount of the contract."

Thereupon a motion was made to strike out the latter part of the answer as calling for the conclusion of the witness and contradictory of the terms of the contract. The part objected to does seem to be in the nature of a conclusion, but the reasonable construction is, to our minds, that it was an attempt by the witness to state or assign the reason why the trust company had not taken up the Craddock account in the manner suggested, rather than an attempt to state the terms of the contract. Substantially the same matter was brought out by the defense on cross-examination of the same witness.

[13] Complaint is made of the ruling of the court permitting the witness Craddock to testify, over the objection of the defense, to the payment of a draft drawn by the Anglo-California Trust Company against him for the sum of $629. This matter was fully covered, however, without objection of any kind, by the testimony of the witness Lockhart. It is unnecessary, therefore, to determine its admissibility, as no prejudice could have resulted from its reception.

[14, 15] The court gave of its own motion the following instruction:

"The court instructs you that, if any person assumes to act as the agent of another, and in such assumed capacity he is intrusted with, and received into his care and custody, the property of another, for the use of such other person, and thereafter fraudulently and feloniously appropriates and converts such property to his own use, or to any use or purpose not in the due and lawful execution of his trust, he is guilty of embezzlement."

Appellant states that this was inapplicable and confusing, in that it may have misled the jury into the belief that he might have been guilty because of his collecting from Craddock while pretending to be an agent of the Anglo-California Trust Company. It is also stated that there was no evidence that defendant ever assumed to act as the agent of Craddock; hence the instruction was inapplicable. We have previously set forth excerpts from the evidence sufficient to show that the jury was justified in its implied finding that defendant was intrusted with the money of Craddock. We do not think the instruction was confusing, for the reason that all the instructions must be read together. One of the instructions proposed by defendant, and given by the court, was as follows:

> "Steffner, defendant, is charged with embezzling certain property from Craddock. He is not being tried for embezzling anything from the Anglo-California Trust Company. So, unless you are convinced beyond a reasonable doubt and to a moral certainty that he has embezzled from Craddock, you must find him not guilty."

The court also in its charge referred to the information which had theretofore been read to the jury, and instructed the jury that the plea of not guilty put in issue every material allegation of the information, and it therefore became necessary for the people to establish all such allegations to a moral certainty and beyond a reasonable doubt. The information leaves no doubt as to the nature of the charge. Reading these instructions together, it is clear the jury could not have been misled.

[16, 17] The following proposed instruction was offered by defendant and refused:

> "A defendant who has converted money to his own use, believing he had a right to do so, is not guilty of embezzlement, even though he is mistaken, and did not have the right to do so."

The court gave instead thereof the following:

> "You are instructed that if, upon consideration of the whole case, *you are satisfied to a moral certainty and beyond all reasonable doubt* that the appropriation of the money charged in the information to have been embezzled by the defendant was made by the defendant upon the belief, honestly entertained by him, that he had a lawful right to appropriate the money, the act was not criminal."

It is claimed that the refusal to give the one and the giving of the other constituted prejudicial error, as the defendant relied upon the defense outlined in section 511 of the Penal Code. The objection to the instruction given is addressed to the portion italicized. Section 511 of the Penal Code reads:

> "Upon any indictment for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him."

The court was justified in its refusal to give the proposed instruction, for the reason that, to constitute a defense under said section the property must be appropriated "openly and avowedly and under a claim of title preferred in good faith." This provision was not covered by the instruction proposed, to the effect that a defendant is not guilty of embezzlement where he has converted money to his own use, "believing he has a right to do so." Defendant was not entitled, however, to any instruction embracing the principles of law covered by said section of the Penal Code, and therefore the refusal of the one and the giving of the other did not operate to his prejudice.

In the case of People v. Bracklis, 54 Cal. App. 40, 200 Pac. 1062, an instruction following the language of the first provision of said section 511 of the Penal Code was offered and refused. As to this the court says:

> "The defendant did not claim the right to appropriate the property to his own use. If his testimony be true and the inference of his counsel therefrom correct, then appellant was a bailee for Gale Bros., with authority to sell and under obligation to account for the proceeds. Embezzlement of the proceeds of such sale might constitute a different crime from that charged but not an appropriation under a claim of title preferred in good faith. While the proposed instruction states a correct proposition of law, it is not applicable to the evidence."

In the case at bar the prosecution claimed the money was intrusted to defendant for the use and benefit of Craddock, while the defense maintained it was paid to defendant as the agent for the Anglo-California Trust Company. In neither case did he have the right to appropriate the property to his own use; therefore, the instruction given by the court to the effect that, if the jury found "to a moral certainty and beyond all reasonable doubt" that if defendant appropriated the money upon the belief honestly entertained by him that he had a lawful right to do so, the act was not criminal, was not prejudicial to the defendant. That he received the property in trust for some one is admitted; that it was never paid over is not denied. The claim now made that it was appropriated openly and avowedly and in good faith is not supported by the evidence, and under the facts of the case runs counter to the provisions of sections 511 and 512 of the Penal Code; the former section providing as above set forth, and the latter section that intent to restore property embezzled is no defense or ground for mitigation of punishment, if not restored before the information is laid before a magistrate or an indictment found by the grand jury, charging the commission of the offense.

[18] It is claimed the court erred in refusing the following instruction proposed by defendant:

> "The statutory crime of embezzlement is not a substitute for imprionment for debt, and cannot be used to punish a party for failure to

comply with ordinary obligations to pay money."

As previously stated, the money was either intrusted to defendant for Craddock, or, under defendant's theory, was paid to him as agent for the Anglo-California Trust Company. Under neither theory was the proposed instruction applicable. It is not explicit, nor can it be told therefrom to what portion of the evidence it was intended to apply. We find no evidence justifying the giving of the proposed instruction in its present form.

[19] A number of other instructions proposed by defendant, covering various features of the crime of embezzlement, were refused, and the court's refusal is now assigned as error. We are satisfied that the instructions given by the court substantially covered the principles of law contained in those so proposed. It was not error, therefore, to refuse to further instruct on the subject.

Reading the record as a whole, no reasonable doubt can be entertained as to the guilt of the defendant; in fact, there seems to be no substantial evidence to the contrary.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

67 Cal. App. 452

PEOPLE v. LUCAS. (Cr. 742.)

(District Court of Appeal, Third District, California. May 23, 1924.)

1. Forgery 🔑4—May consist of either making a false instrument or passing an instrument known to be false.

Under Pen. Code, § 470, forgery as defined may consist of either of two kinds of acts; making of a false instrument and passing of an instrument known to be false.

2. Criminal law 🔑371(5)—Evidence of other offense limited to question of fraudulent intent held admissible.

In a prosecution for forgery, by making and passing false check, court did not err in admitting evidence of other offense, where it was specially limited to question of fraudulent intent and both transactions were alike.

Appeal from Superior Court, Sarcamento County; Charles O. Busick, Judge.

R. M. Lucas, alias George Chandler, was convicted of forgery, and he appeals. Affirmed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WEYAND, Justice pro tem. Appellant, having been prosecuted and convicted in the superior court of Sacramento county upon an information charging him with the crime of forgery, presents to this court his claims that there was error in the trial court on the part of the prosecution and in the following particulars, to wit: First, that the evidence was insufficient to support the verdict, and, secondly, that the court erred in permitting the introduction of evidence of other crimes.

1. The information upon which the defendant was tried charged the defendant with the crime of forgery, in language as follows:

> That he "did then and there willfully, unlawfully, feloniously, knowingly, falsely, and fraudulently with the intent to prejudice, damage, and injure one H. E. Reedy make, alter, forge, and counterfeit a certain instrument in writing in the words and figures following, to wit: 'Sacramento, Calif., July 5th, 1923, No. 71. Fifth and J Street Branch. United Bank & Trust Company $\frac{90-31}{12}$ of California: Pay to the order of R. N. Lucas $24.50, twenty-four and 50/100 dollars, for labor. L. B. Wilson.'
>
> "And he, the said R. N. Lucas, true name John Chandler, then and there well knowing the same to be false, altered, forged, and counterfeited did then and there, to wit, on the 5th day of July, 1923, at the city of Sacramento, county of Sacramento, state of California, willfully, unlawfully, feloniously, and fraudulently, and with intent to prejudice, damage, and defraud the said H. E. Reedy, utter, publish, and pass the same as genuine and true to the said H. E. Reedy."

Section 470 of the Penal Code, in so far as it is here applicable, provides as follows:

> "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any * * * check, * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any * * * [check] knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person, * * * is guilty of forgery."

[1] It will thus be seen that the crime of forgery, as defined in said section, may consist of either of two different kinds of acts—the making of a false instrument, and the passing of an instrument known to be false.

It is plain that the testimony herein presents a clear case under section 476 of the Penal Code. Why the prosecution was had under section 470 instead of under 476 need not, however, concern us. The testimony taken at the preliminary examination may have left the matter in some doubt. Section 470 of the Penal Code was amended in 1905, and apparently for the purpose of making it sufficiently broad to cover the making of a fictitious check, as well as forged checks.

In People v. Bernard, 21 Cal. App. 56, 130 Pac. 1063, the defendant was prosecuted for the identical offense as here charged, and the proof was substantially as here produced and upon appeal a like objection was made. That case is authority for the right to prosecute under either section 470 or 476 of the Penal Code. A portion of that decision is as follows:

> "Appellant claims that the court erred, for the reason, as he claims, that a prosecution for making a fictitious check should be under section 476 of the Penal Code, and not under section 470, under which this case was prosecuted, citing in support thereof People v. Elliott, 90 Cal. 586, 27 Pac. 433, and People v. Eppinger, 105 Cal. 36, 38 Pac. 538. Since those cases were decided, however, section 470 has been amended to avoid the rule laid down in those cases and so as to cover the case made by the proof in this action, and covered by the instruction given by the court and now challenged by appellant. Stats. 1905, p. 673."

Prosecutions were being had before the 1905 amendment, and many cases failed solely because, upon an information charging forgery, a defendant would cause it to appear that the check was a fictitious check, and thus thwart the prosecution. In 12 Cal. Jur. § 7, it is laid down that a prosecution for forgery, where it is accomplished by passing a fictitious check, may be had under either section 470 or 476 of the Penal Code, since said amendment of 1905.

It may be pertinent to here remark that no demurrer or other motion was made challenging the information.

It will be seen that the defendant was charged, not alone with making a false check, but was by other language charged with passing a false check. Had defendant by demurrer objected to the information on the ground that he had a right to be advised of what the falsity consisted, he would have some standing, but the information was unchallenged. The evidence fully sustained that part of the charge.

[2] 2. Upon a charge of forgery, and indeed upon all the charges of this kind, fraud is the essential element that must be laid at the door of the accused. Fraud, by its nature, is generally conceived in secret. To practice it of very necessity requires secrecy. Hence, the intent with which a false check is passed becomes necessary to be proved. A long line of authorities sustains the introduction of evidence of like crimes, especially when associated with the crime charged, or at or about the same time, to prove intent. Evidence of this second offense was in the instant case specially limited to that issue. See the cases cited in section 14 under the title of Forgery (volume 12, Cal. Jur. 664). Also, see sections 309 and 315, Wigmore on Evidence (2d Ed.) To sustain the text, Wigmore, as usual, collects and clearly distinguishes the cases on this proposition.

The proof here showed the giving of a false check, in payment of room rent, and that the defendant took back a balance in change, over and above the amount of the false check. The other offense, offered to prove intent, showed a payment of a like fraudulent check for board at a restaurant for a week in advance, and the taking back of a similar amount, as change. Both transactions were alike.

The record does not disclose any testimony either in denial of the main testimony or as to that of the similar offense.

There being no substantial error in the record, it is ordered that the judgment and the order be affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

(67 Cal. App. 372)

CLARKSON v. UNITED RAILROADS OF SAN FRANCISCO et al. (Civ. 4877.)

(District Court of Appeal, First District, Division 2, California. May 20, 1924. Hearing Denied by Supreme Court July 17, 1924.)

1. Evidence 🔑595—Jury not bound to draw conclusion from plaintiff's resumption of employment that he was not permanently injured.

In passenger's action for injuries, that plaintiff resumed his former employment was evidence from which jury might draw the conclusion that he had not been permanently injured, but they were not required to do so.

2. Trial 🔑260(1)—Refusal of instruction covered by given instructions held not erroneous.

Instruction was not erroneous where it was completely covered by other given instructions.

3. Witnesses 🔑269(9)—Cross-examination of railroad switchman touching written agreement between railroad and street railroad held improper.

In passenger's action for injuries when street car on which he was riding collided with railroad train, cross-examination of a railroad switchman by street railroad concerning a written agreement between railroad and street railroad, regarding manner in which each should handle its rolling stock at intersection where accident occurred, was improper, where such subject was not touched by railroad in its direct examination of such switchman.

4. Customs and usages 🔑17—Instruction on custom prevailing at street railroad intersection with railroad held not to vary written agreement between parties.

In passenger's action for injuries when street car on which he was riding collided with railroad train, instruction that, if street railroad allowed railroad to have precedence at crossing where accident occurred, railroad had a right to rely on such custom was not erroneous as varying a written agreement between the parties as to precedence at such crossing, since action was based on negligence of parties to written agreement by one who was not a party thereto, and as to each of railroads, issue was negligence or no negligence.

5. Appeal and error ⚷1048(6)—Refusal to permit defendant to cross-examine plaintiff's witness held not prejudicial.

In an action for injuries, refusal to permit defendant to cross-examine a neurologist called as plaintiff's witness was not prejudicial in that it prevented defendant from showing that plaintiff was a malingerer, since defendant was allowed to go into such theory when its own witnesses were upon stand.

6. Damages ⚷128—Verdict will not be deemed excessive, where nothing to show that it was not result of cool and dispassionate consideration of jury.

A verdict will not be deemed excessive, where there is nothing in the record which would justify conclusion that it was not a result of cool and dispassionate consideration of jury.

7. Appeal and error ⚷1067—Refusal of instructions concerning railroad's duty to ring its bell held not reversible error, where such failure would not have relieved street railroad from liability.

In passenger's action for injuries when street car on which he was riding collided with a railroad train, refusal of street railroad's instructions concerning duty of railroad to ring its bell, as required by Civ. Code, § 486, was not reversible error, since railroad's negligence would not have relieved street railroad from liability.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by William H. Clarkson against the United Railroads of San Francisco and another. Judgment for plaintiff against named defendant, and named defendant appeals. Affirmed.

Hearing denied by Supreme Court; Sturtevant, Justice pro tem., not participating.

Wm. M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

E. A. Douthitt and John D. Willard, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff was riding as a passenger on one of the street cars operated by the United Railroads at a time when the street car came in collision with the rear end of a train of freight cars that was being operated by the Western Pacific Railroad Company. He commenced an action against both defendants to recover damages for the injuries which he sustained. The jury brought in a verdict in the plaintiff's favor against the United Railroads but in favor of the Western Pacific Railroad Company. The United Railroads thereafter made a motion for a new trial. The trial court denied the motion on the condition that the plaintiff should waive $5,000 of the amount of the verdict. The plaintiff accepted the condition, and filed his waiver, and from the judgment as modified the United Railroads has appealed, bringing up the judgment roll and a bill of exceptions.

[1] During the trial of the case the plaintiff introduced in evidence the American Experience Mortality Tables; thereafter the court instructed the jury that the tables were admitted merely as a guide to estimate the damages, in the event that the jury should find that the plaintiff had been permanently injured. The gist of the appellant's point in this behalf is that at the time of the accident the plaintiff was an employee of the Pacific Gas & Electric Company as an engineer in one of its stations in San Francisco; that shortly after the accident the plaintiff was able to, and did, resume his former position; and that, at the time of the trial, he was and had been steadily employed in his old position. On these facts the appellant predicates the statement that the plaintiff had not been permanently injured, notwithstanding the fact that several witnesses had given evidence to the effect that under certain conditions it was possible that the plaintiff had been permanently injured. We think that the matter of resuming his former employment was evidence from which the jury might draw the conclusion that the plaintiff had not been permanently injured, but that the jury was not bound to draw that conclusion.

[2] The appellant requested the trial court to instruct the jury that its verdict must be for the United Railroads, if the negligence of the Western Pacific Railroad Company was the sole proximate cause of the collision. As stated by the appellant the instruction is a correct statement of the law. However, by instructions Nos. 82 and 83, the subject-matter was completely covered and the trial court did not commit an error because it did not repeat an instruction on the subject.

[3] On the 4th day of January, 1917, the two railroad companies entered into an agreement in writing, and inserted certain covenants regarding the manner in which each of the contracting parties would handle its rolling stock at the intersection of the streets where the accident occurred. During the trial of the case the Western Pacific Railroad Company called as a witness a switchman, Frank J. Brenenman. On his direct examination that company propounded to him no questions of or concerning the written agreement. When the defendant

United Railroads took up its cross-examination of the witness, certain questions were propounded to the witness of and concerning the written agreement. To each of those questions counsel for the Western Pacific Railroad Company interposed objections. The trial court sustained the objections, and the appellant complains of those rulings. There was no error committed in making the rulings. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 389, 390, 104 Pac. 986.

[4] Acting upon the request of the Western Pacific Railroad Company, the trial court instructed the jury that, if it should find that by usage and custom the agents of the United Railroads allowed the cars or trains of the Western Pacific Railroad Company to have precedence at such crossing, " * * * then the agents, servants, and employees of the defendant, the Western Pacific Railroad Company, at the time of the accident involved in this action, had a right to rely on such usage and custom. * * *." The appellant contends that the ruling did violence to the rule that a contract in writing may not be modified by word of mouth. That contention would be altogether sound in an action between the parties to the written agreement, if the action were based on the written agreement; but this is an action based on the alleged negligence of the parties to the alleged written agreement, and the action is being maintained by one who was not a party to that written agreement. As to each of the defendants the issue in this case was negligence or no negligence. The court instructed the jury:

> "Negligence is failure in the matter of care under the circumstances. Every man is bound to be careful that others take no harm by his conduct or his actions. The measure of his duty is the circumstances of the case. What may be absolutely necessary under some circumstances, to protect others from harm, may not be necessary under other circumstances. Negligence, as I have said, is the lack of care under the circumstances. It is the doing of something which, under the circumstances and in view of his duty to endeavor to protect other people from harm by reason of his conduct, a reasonable and prudent man of ordinary common sense, would not do. * * * "

As stated by this court in a recent decision, Adamson v. City & County of San Francisco, Civil 4732, filed March 20, 1924, (Cal. App.) 225 Pac. 875:

> "Where, as here, a usual practice or custom has obtained, and where, as here, the claim is made that one of the parties has, to the discomfiture of the other, without notice, departed from the usual custom, or practice, the courts have by an unbroken line of decisions held that the question of negligence on the part of the defendant, and the question of contributory negligence on the part of the plaintiff, are both questions for the jury to determine in the light of all of the facts, including the evidence tending to establish the alleged custom or practice and the alleged deviation therefrom."

As between the two defendants in this case we think it is clear that the same rule should apply. The question was not what each of the defendants had agreed to do, but the question distinctly was what custom or practice theretofore had obtained.

Acting upon the request of the plaintiff, the trial court instructed the jury as to its duty if the jury should find that the plaintiff was luetic at the time of the accident. The appellant objected to the giving of each of those instructions. As we understand the appellant on this point, the objection rests mainly upon the contention that there is no evidence in the record that the plaintiff was at that time luetic. However, we think that the appellant overlooks some testimony. The evidence is not at all strong on the point, but we are unable to say that there was no evidence.

[5] The plaintiff called as an expert neurologist Dr. Otto G. Freyermuth. On his examination in chief he was asked many questions and made many answers of and concerning traumatic neurosis. On cross-examination he was asked:

> "Q. Isn't it a fact that traumatic neurosis is commonly known among the medical profession as 'litigant's neurosis' or 'railroad spine,' and is commonly attributed to people who have claims that are being prosecuted against railroad corporations?"

The trial court sustained an objection. Assuming that the trial court erred in its ruling, the ruling was not prejudicial. The appellant claims that the ruling operated to prevent the appellant from showing that the plaintiff was a malingerer. The ruling did not so operate. Thereafter, when some of the witnesses for the appellant were on the stand, the appellant was allowed without any objection to go into the proof of the malingerer theory.

[6] The verdict, as modified by the stipulation of the plaintiff, is attacked by the appellant as being excessive, but there is nothing in the record which will justify the conclusion that the verdict was not a result of the cool and dispassionate consideration of the jury. Kimic v. San Jose-Los Gatos, etc., Ry. Co., supra.

[7] On the trial of the case it was the theory of the plaintiff that the Western Pacific Railroad Company was guilty of negligence in failing to comply with the provisions of section 486 of the Civil Code, and that it should have had a bell on the engine, and that the bell should have been ringing as the train proceeded from a point at least 80 rods distant from the point of crossing Seventeenth street and De Haro street. Neither defendant made an issue between itself and

its codefendant as to culpability. As to the duty of the Western Pacific Railroad Company to ring its bell, the appellant requested the trial court to give three several instructions of and concerning the provisions of section 486 of the Civil Code. If the instructions had been tendered by the plaintiff, it will be conceded they should have been given. But the appellant was interested solely in the issue as to its own negligence or nonnegligence. If the appellant was negligent and its codefendant was also negligent, that fact would not relieve the appellant from liability. In this connection we understand that the very core of the appellant's point is that the instructions in question served to bring out the fact that the appellant was guiltless and that the negligence of the Western Pacific Railroad Company was the sole proximate cause of the accident. But, in reply to this contention, there are two answers. The instructions in question were not addressed to the subject of sole liability. In the second place instructions 82 and 83 were addressed to sole liability, and both of them were, at appellant's request, duly given.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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67 Cal. App. 195

STEINMETZ v. STEINMETZ. (Civ. 4824.)

(District Court of Appeal, First District, Division 2, California. May 10, 1924. Hearing Denied by Supreme Court July 7, 1924.)

Divorce ⚷213—Property settlement agreement does not preclude award of alimony pendente lite.

A property settlement agreement between husband and wife, in accordance with Civ. Code, § 159, being subject to examination and approval by the court, does not deprive the court of power to grant alimony pendente lite, under section 137, nor is it necessary that such contract shall have been adjudged invalid prior to such award.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Suit for divorce by Joseph P. Steinmetz against Zella D. Steinmetz, wherein defendant filed cross-complaint. From order allowing defendant alimony pendente lite, counsel fees, and costs, plaintiff appeals. Affirmed.

Crawford & Mayock, of Gilroy, and Maurice J. Rankin, of San Jose, for appellant.

Rea & Caldwell, of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the county of Santa Clara, state of California, directing the plaintiff to pay to the defendant the sum of $60 a month for her support pending the trial of a divorce action, and the further sum of $10 for costs, and $250 for counsel fees in said action in which defendant had filed a cross-complaint.

In the trial court the plaintiff opposed the granting of the motion for alimony pendente lite, costs, and attorney's fees upon the ground that the parties had entered into a contract for the settlement of their property rights, under which the defendant had received the sum of $1.000 and had relinquished all other claims against the property of the plaintiff and the property of the community. The agreement between the parties with reference to their property rights was offered in evidence at the hearing upon the motion, as were also the pleadings in the divorce action in which the defendant and cross-complainant attacked such agreement as fraudulent and void.

Appellant contends that it is apparent upon its face that said agreement is not objectionable in any way under the decisions dealing with agreements of this character which have been held to be contra bonos mores, and that, unless a hearing was had upon the issue that the same had been obtained by undue influence or fraud and a finding made thereon, it stands as a binding agreement between the parties, and precludes the trial court from making any allowance for alimony and costs contrary to its provisions.

We are thus confronted with the question: Does a contract between husband and wife settling out of court their property rights, in accordance with the provisions of section 159 of the Civil Code, which contract does not show upon its face that it is contra bonos mores, and which contract has not been adjudicated null and void because obtained by fraud, undue influence, or for any other reason, deprive the trial court of its power to grant alimony pendente lite under the provisions of section 137, Civil Code? We think the case of McCahan v. McCahan, 47 Cal. App. 173, 190 Pac. 458, is pertinent. In that case—

"After judgment the defendant moved the court on affidavits showing she was practically destitute and had no means of her own, for an order directing plaintiff to pay her costs and counsel fees on appeal. The plaintiff filed a counter affidavit, in which he alleged the execution of the contract of separation referred to; that it provided for, and he had paid to the defendant, the sum of one hundred dollars for her costs and counsel fees in the action. He objected to making any further payments and interposed the stipulation of the contract as a bar to the granting of the motion. The court overruled the objection, and, refusing to be governed by the provision of the contract relating to counsel fees and costs, made the allowance complained of. The question presented on this appeal is the right of the court to make the order, in view of the provision of the contract. * * *"

It is true that in the above-cited case the opinion states that the portion of the contract of separation which governed the amount to be paid for counsel fees in the event of a divorce was void as contra bonos mores, and therefore of no force and effect; but it expressly said that for another reason the trial court might have disregarded the provisions of said contract relating to counsel fees and costs. The other reason was:

> "Our statute provides that during the pendency of a divorce action the court may, in its discretion, compel the husband to pay the wife any money necessary to prosecute or defend the cause. Civ. Code, § 137. * * * The courts of this state have consistently recognized and upheld the broad discretionary power vested in the trial judges, by the above section of the Code, in these matters. In refusing to sanction an agreement, between an attorney and a plaintiff in a divorce action for a contingent fee, the Supreme Court pointed out that in such cases 'the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. * * * The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorney's fees, and where the reason ceases the rule or law also ceases.' Newman v. Freitas, supra. In yet another case the same court was called upon to construe a contract similar, in effect, to the provision in the agreement we are here considering. It was there said: 'Nor in the case of suit could the agreement control the action of the court in the exercise of its discretion in allowing alimony or attorney's fees.' In re Estate of Sloan, 179 Cal. 393, 177 Pac. 150. Assuming, as claimed by appellant, but not so holding, that it may have been unnecessary for the court, in deciding the case, to have used the language quoted, we consider the statement significant, as being in complete accord with what we conceive to be the consistent policy of the courts of this state in such matters.
>
> "Appellant relies upon the case of Lee v. Lee, 55 Mont. 426, 178 Pac. 173, as fully supporting his contention. While the court there takes a view contrary to that which seems to prevail in this state, we are unwilling to accept it as final authority. We are satisfied it is best to leave the matter of costs and counsel fees, in divorce actions to the discretion of the trial court, in whose exclusive jurisdiction it has been vested by legislative enactment. If it is desirable or expedient to settle these matters out of court, such agreements must be subjected to the examination of the court. Loveren v. Loveren, 106 Cal. 509, 513."

It would seem that the decision from which the foregoing extract is taken rests upon the broad ground that the matter of costs and counsel fees in divorce actions has been exclusively vested in the discretion of the trial court by legislative enactment, and that any agreement made by the parties attempting to settle such matters is subject to the examination and sanction of the court. This was recognized in the later decision of Whiting v. Whiting (Cal. App.) 216 Pac. 92.

In the case of Millar v. Millar, 51 Cal. App. 718, at page 729, 197 Pac. 811, 816, it was said:

> "It cannot be said in any just sense that an allowance for suit money or for temporary alimony involves a claim 'arising upon contract.' It is a matter entirely of statutory regulation and is not affected by any agreement of the parties."

The answer to appellant's position that he has a right to stand upon his contract with the respondent until the same is set aside in a proper proceeding is that under the decisions hereinbefore cited all such contracts must be made subject to the discretion of the trial court vested in it by section 137 of the Civil Code.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

67 Cal. App. 798

Joseph P. STEINMETZ, Plaintiff and Appellant, v. Zella D. STEINMETZ, Defendant and Respondent. (Civ. 4883.)

(District Court of Appeal, First District, Division 2, California. May 10, 1924. Hearing Denied by Supreme Court July 7, 1924.)

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Crawford & Mayock, of Gilroy, and Maurice J. Rankin, of San Jose, for appellant.

Rea & Caldwell and John H. Machado, all of San Jose, for respondent.

LANGDON, P. J. This is an appeal from an order of the superior court of the county of Santa Clara, state of California, dated June 15, 1923, directing the plaintiff to pay to the defendant the sum of $407.80 for attorneys' fees and costs on appeal from an order of said court for alimony, attorneys' fees, and costs pendente lite made in the above-entitled action on May 14, 1923, which last mentioned order was also appealed from and has been affirmed this day by this court. Steinmetz v. Steinmetz (No. 4824 of the records of this court) 227 Pac 713. The legal question involved in the decision of that appeal is the only one involved here, and for the reasons stated in said decision, and upon the authority thereof, the order appealed from is affirmed.

We concur: STURTEVANT, J., NOURSE, J.

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194 Cal. 73

LOCKE-PADDON v. LOCKE-PADDON et al. (S. F. 10921.)

(Supreme Court of California. June 23, 1924. Rehearing Denied July 17, 1924.)

1. Divorce 🔑285—Appeal from allowance of alimony pendente lite held not dismissible.

On appeal from order allowing alimony pendente lite, counsel fees, and costs, where testimony heard on motion for such allowance was not preserved, and consequently not in the record, as required by Code Civ. Proc. § 953a, but, where court had before it typewritten copy of judgment roll, certified by clerk of trial court, the appeal was not dismissible.

2. Husband and wife 🔑278(2)—Parties may competently settle property rights; contract subject to approval of court.

It is competent for husband and wife, pursuant to Civ. Code, § 159, to contract for the purpose of settling their property rights, though such contract is between persons occupying confidential relations and subject to review and approval by the court, under Civ. Code, §§ 158, 2235.

3. Divorce 🔑214(4)—Court in action for has jurisdiction to determine validity of property settlement agreement.

In action for divorce on application for alimony pendente lite, court has jurisdiction to determine validity of property settlement agreement, under Civ. Code, § 159; a separate proceeding to question the validity of such agreement being unnecessary.

4. Divorce 🔑214(4)—Good faith of wife prosecuting action only question considered on application for alimony pendente lite.

On application for alimony pendente lite and costs, in absence of any issue as to the fact of the marriage, good faith of wife prosecuting such action only will be considered, not merits of her claims.

5. Divorce 🔑285, 286—Allowance of alimony pendente lite not reversed, except for abuse of discretion; allowance of alimony pendente not reversed in absence of showing as to evidence heard by court.

Allowance of alimony pendente lite being within the discretion of the court, under Civ. Code, § 137, its action will not be reversed, except for abuse of discretion, nor in absence of showing as to evidence heard by court.

6. Contracts 🔑266(2)—Placing of parties in statu quo not always prerequisite to rescission on ground of fraud.

Rescission of a contract on ground of fraud will not always be denied merely because parties cannot be placed in statu quo.

7. Divorce 🔑209—Wife not required to restore moneys received under property agreement as prerequisite to right to alimony pendente lite, notwithstanding agreement.

A wife alleging fraud in procurement of a property settlement agreement, and seeking an allowance of alimony pendente lite and costs, notwithstanding contract, is not required as a prerequisite to such relief to restore moneys previously received by her.

8. Divorce 🔑284—Appeal from order allowing alimony pendente lite does not defeat power of court to make nunc pro tunc order correcting one appealed from.

After an order allowing alimony pendente lite, costs, and attorney fees, and the taking of an appeal from such order, the court is not without jurisdiction to enter a nunc pro tunc order correcting the order appealed from so as to make it read in accordance with the order actually made.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit for divorce by Una Margaret Locke-Paddon against William Locke-Paddon and others. From order allowing alimony pendente lite, counsel fees, and costs, William Locke-Paddon appeals and moves for diminution of record. Motion to dismiss appeal denied, motion for diminution of record denied, order appealed from affirmed.

J. L. Smith, of San Francisco, for appellant.

Edwin V. McKenzie and Harry A. McKenzie, both of San Francisco, Myron Harris, of

Oakland, and Preston & Duncan and W. A. Andrews, all of San Francisco (Clarence A. Linn, of San Francisco, of counsel), for respondent.

SHENK, J. Defendant has appealed from an order granting to the plaintiff temporary alimony, counsel fees, and costs in an action for divorce. He has also made a motion for diminution of the record. A motion to dismiss the appeal has been made by the plaintiff, which will first be considered.

Upon the filing of the complaint an order was issued requiring the appellant to show cause on November 3, 1922, if any he had, why he should not be required to pay to the respondent reasonable costs and counsel fees for the maintenance and prosecution of the action and alimony pendente lite. A hearing was had on the day appointed, at which the respondent was examined under oath and cross-examined by appellant's counsel. The court thereupon made and entered an order requiring appellant to pay to the respondent $300 per month as temporary alimony, $200 on account of attorney fees, and $100 for costs of suit. The appeal from the order was taken under section 953a et seq., Code of Civil Procedure. The appellant in due time filed with the clerk of the court a notice that he intended to appeal from the order complained of, and requested that a "transcript of all the evidence offered or received, of all the testimony offered or taken, of all the rulings, acts, or statements of the court, of all the minutes of the court, of all the objections and exceptions of counsel, and all matters to which the same relate" be prepared and certified in accordance with the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure. The appellant also requested that there be incorporated in the transcript all proceedings and papers in connection with the hearing on the order to show cause. The appellant thereafter in due time filed his notice of appeal. No transcript of the testimony taken at the hearing was prepared by the stenographic reporter on the order of the court or otherwise, for the reason, as satisfactorily appears from the record, that no reporter was present at the hearing, and consequently no photographic report thereof could be transcribed as required by said section 953a. The motion to dismiss the appeal is made on the ground that the record on appeal does not contain a reporter's transcript of the evidence taken upon the hearing which resulted in the making of the order appealed from nor a bill of exceptions setting forth such testimony. Pursuant to the appellant's notice the clerk of the trial court has certified a typewritten copy of the record, but a transcript of the testimony taken in open court at the time of the hearing is not in the record for the reason above stated. The transcript so presented is also certified by the trial judge, and for all purposes of the appeal may be considered as a judgment roll.

[1] It has been recently decided that on an appeal from a judgment under the alternative method, where there is before the court a typewritten copy of the judgment roll, certified by the clerk of the trial court, the appeal will not be dismissed because of the absence of the testimony at the hearing, such as is designated in section 953a of the Code of Civil Procedure. Ramsay v. Rodgers, 189 Cal. 100, 207 Pac. 516; Beckett v. Stuart, 35 Cal. App. 796, 171 Pac. 107.

A consideration of the merits of the appeal must necessarily be limited to what appears on the face of the judgment roll. The complaint was filed October 30, 1922, wherein it is alleged that the parties intermarried on the 7th day of September, 1904, and have two children, one of whom is a minor; that they separated on or about September 20, 1915; that the appellant and respondent are the owners of real and personal property described in the complaint of the approximate value of $200,000, and which is alleged to be community property; that at the time of the marriage in 1904 the appellant was without any property; that the appellant has a large income from his activities in a real estate and land sales business, the amount of which is unknown to the respondent; that respondent has no income and no separate property under her control, and has no control over the said community property or the business of the appellant. Then follow allegations of extreme cruelty on the part of the appellant which need not here be set forth.

It is also alleged that at all times since the said marriage the appellant represented to the respondent that he had little or no money; that the business transactions with which he had been connected had been failures; that his earnings from all sources amounted to barely enough to support the respondent and himself; that she had no knowledge of his financial status except as acquired by her from his statements; that on December 22, 1919, for the purpose of settling the property interests and rights of the parties hereto and dividing the said community property, an agreement was entered into, a copy of which is annexed to and made a part of the complaint. The agreement recites that by reason of divers disputes and unhappy differences it is impossible for the parties to live together in peace, and it is desired to settle their property rights so that neither shall have any claim upon the other except as therein set forth. The husband then agreed to pay the wife the sum of $10,000, of which $1,250 was payable in cash, a further sum of $1,250 on January 15, 1920, and the balance in installments of not less than $100 per month. In addition, the appellant agreed to pay the respondent $200 per month, commencing February 16, 1920, and ending March 15, 1923, and thereafter

$100 per month until October 15, 1926, at which time all payments should cease and the appellant be forever discharged from supporting or contributing towards the support of the respondent. Upon her part the respondent agreed to assign to appellant all her right, title, claim, or interest in or to any community or separate property theretofore or thereafter acquired by the appellant, "and in case of proceedings for the dissolution of marriage between the parties hereto or any other litigation being instituted between said parties hereto, the said party of the first part (respondent herein) does hereby release, absolve, and discharge said party of the second part from any and all claims for alimony, attorney fees, or costs incurred in such litigation by said party of the first part." It was further agreed that out of the moneys paid by appellant to respondent the latter should at all times support the minor child of the parties until he arrives at the age of 21 years. It was also provided that the agreement was not made with the idea or purpose that either of the parties should get a divorce from the other, but that, should divorce proceedings be instituted by either party, the said agreement might be introduced in evidence as a stipulation of the parties as to what was the fair and equitable settlement of their property rights.

The complaint then alleges that the said agreement was made under the following circumstances: That the appellant represented to respondent that he was possessed of no community property, had no separate property, was bankrupt, and unable to meet his debts; that he would be required to borrow the money to meet the money payments required by the agreement; that when he presented the agreement to her for her signature he stated to her that it would be unnecessary for her to procure legal advice or counsel; that if she had anything to do with attorneys at law they would take from her the sums of money payable under the agreement; that he still loved her and would always consider himself obligated to support her and her children; that these statements were false, were known by the appellant to be false and untrue, and were made for the purpose of defrauding the respondent out of her interest in the said property; that she relied upon said fraudulent representations, and except for the same would not have entered into the agreement; that she is unfamiliar with business matters, and acted solely without legal or other advice; that one of the means employed by appellant to deceive the respondent and conceal from her the true extent of his business transactions was to conduct the same through the medium of corporations such as Small Farms Improvement Company, Great Western Syndicate, Locke-Paddon Land Company, and Locke-Paddon Company—all defendants in said action. The compaint alleges other and numerous allegations of fraud and of false pretenses on the part of the appellant in connection with the execution of said agreement, but sufficient have been noted to indicate the nature of the attack that is made upon the agreement. Respondent prays that the agreement be set aside on account of the alleged fraud practiced upon her; that there be an equitable division of the community property of the parties; that she be granted alimony pendente lite and permanent; that she be awarded counsel fees and court costs and for general relief.

It is the contention of the appellant that the trial court had no power to award alimony pendente lite, counsel fees, and court costs in the face of the contract settling the property rights of the parties, and providing that alimony, counsel fees, and costs shall not be awarded the plaintiff in the event suit for divorce be instituted. It is insisted that the agreement is valid until set aside by a court of competent jurisdiction; that, as there has been no trial on the question of its validity, it is binding upon the parties; and that the agreement cannot be deemed fraudulent merely because the plaintiff charges that it is.

[2] It was competent for the parties hereto to enter into a contract, the purpose of which was to settle their property rights (section 159, Civ. Code); but such a transaction between them was subject to the general rules controlling the actions of persons occupying confidential relations as defined by the title on trusts (sections 158, 2235, Civ. Code). In Estate of Cover, 188 Cal. 133, 204 Pac. 583, this court said:

> "Confidential relations are presumed to exist between husband and wife, and in his dealings with his wife, the husband, if he obtains an advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife and resulting from the marital relation, and, failing in this, he must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained."

[3] The issue as to the validity of the agreement is tendered by the allegations of the complaint, and the court has jurisdiction to determine said issue in the action. In Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801, the appellant contended that the court had no jurisdiction to set aside such an agreement in the action, which was one for divorce, and that an independent action should have been brought for that purpose. It was there said:

> "But the court clearly had jurisdiction to make disposition of the community property (Civ. Code, §§ 146, 147); and, when appellant insisted upon said instrument as providing how said property should be divided, the court necessarily had jurisdiction to consider it and to disregard it if found to be void. * * * 'Such

pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts.' "

In McCahan v. McCahan, 47 Cal. App. 176, 190 Pac. 460, the court stated that, inasmuch as the trial court had jurisdiction of the divorce action, it had authority to make disposition of the community property of the parties, and added:

> "Whenever, therefore it was made to appear that a division of the property had been made in accordance with the terms of the separation agreement, the court necessarily had jurisdiction to consider the instrument, and to affirm it, or to disregard it if it was found to be void."

Even if the agreement be not void, it is subject to the sanction of the court, and does not deprive the court of its power to grant temporary alimony under the statutory authority therefor. Section 137, Civ. Code; Steinmetz v. Steinmetz (Cal. App.) 227 Pac. 713.

Appellant relies on the rule stated in the case of Hogarty v. Hogarty, 188 Cal. 625, 206 Pac. 79, wherein the court said:

> "Such an agreement, when untainted by fraud, collusion, or the like, is valid * * * and when made a part of the decree is binding on the parties as a part thereof."

But there is nothing in that case inconsistent with the converse statement of the rule as contended for by the respondent that, if the agreement be tainted with fraud or be not approved by the court, it is not binding on the parties.

[4, 5] If we assume that it may transpire upon the trial of the case that the allegations, both as to the respondent's right to a divorce and as to the invalidity of the agreement may not be proved, and that the appellant has been compelled to furnish the respondent with means to prosecute an unmeritorious action, it may be said that the duty of the husband to support the wife and to furnish her with the means to have her rights adjudicated is inherent in the marital relation. The sole object of the order complained of is to furnish the wife with the means to show that she is entitled to the relief sought. On the hearing of the application the merits of the case, when there is no issue as to the marriage, and there is none here, will not be considered further than to determine that the wife is prosecuting the action in good faith and not merely for the purpose of obtaining money from the husband. Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877. It is, of course, also necessary for the court to determine that the necessities of the wife warrant the making of the order and that the husband is able to pay. Presumably all of these matters were inquired into by the court on the hearing, and in the absence of the record of such evidence on this appeal the order cannot be reversed. Kellogg v. Kellogg, 170 Cal. 84, 148 Pac. 518. Furthermore, the order of allowance was in the discretion of the court (section 137, Civ. Code), and in the absence of an abuse of discretion the order must stand (Gay v. Gay, 146 Cal. 237, 79 Pac. 885). No abuse of discretion is here shown.

[6, 7] Appellant contends that the allegations of the complaint are insufficient to vest the court with jurisdiction to set aside the agreement on the ground of fraud, for the reason that the respondent has not offered to restore to the appellant the money she has received under the agreement, and relies on the cases of Hite v. Mercantile Trust Co., 156 Cal. 765, 106 Pac. 102, and Estate of Sloan, 179 Cal. 393, 177 Pac. 150, where it was held that an offer to restore was essential to a cause of action to set aside a property settlement agreement on the ground of fraud under the circumstances alleged in those cases. In the case of Hite v. Mercantile Trust Co., supra, the plaintiff brought the action against the administrator of the estate of one James R. Hite to set aside on the ground of fraud a separation agreement by which she had received the sum of $16,000 in consideration of her release of all claims against the deceased and his estate and to set at naught also on the ground of fraud a judgment in a divorce action between the parties wherein it was decided that the plaintiff was not and never had been the wife of deceased. It was held that the complaint was fatally defective, in that it did not contain an offer to restore as required by section 1691 of the Civil Code. In Estate of Sloan, supra, the surviving widow sought to set aside an agreement settling property rights on the ground that the agreement was void, and it was held that the wife had no standing in court in the absence of an offer to restore the property she had received under the agreement. In each of the cases relied on by appellant the point was raised and decided on demurrer. In the case at bar we are not dealing with a ruling of the court on demurrer. So far as the record discloses no pleading has been interposed to the complaint. We are here concerned merely with the propriety of an order made in an ancillary proceeding which is in reality a separate judgment. Millar v. Millar, 51 Cal. App. 718, 724, 197 Pac. 811. For aught that appears in the record it may have been shown before the trial court that the moneys which the respondent has heretofore received were no more than she was entitled to under the law as support from the appellant for the intervening years, and that the monthly allowance to which she was entitled at the time of the hearing was grossly inadequate for her support pending the trial of the action, taking into consideration the circumstances of the parties. It is not an invari-

able rule that a rescission of a contract on the ground of fraud will be denied merely because the parties cannot be placed in statu quo. Green v. Duvergey, 146 Cal. 379, 80 Pac. 234. It would be manifestly unjust to require of the wife, as a prerequisite to maintaining an action to rescind a property settlement agreement on the ground of fraud, that she restore to the husband the moneys received by her under the agreement and used for living expenses and to which under the law she would have been entitled to so receive and use notwithstanding the agreement. Milekovich v. Quinn, 40 Cal. App. 537, 181 Pac. 256.

[8] The order of allowance was made on November 3, 1922. The notice of appeal was filed December 7, 1922. On October 29, 1923, the trial court made and entered a nunc pro tunc order as follows:

> "Amended Minute Order. It having been brought to the attention of the court that in the minute entry of the court's order awarding the above-named plaintiff alimony pendente lite, costs, and counsel fees, which was duly made in the above entitled action on the 3d day of November, 1922, a part of said order as actually made at said time was inadvertently omitted by the clerk, now for the purpose of correcting said inadvertent omission and making the record conform to the actual order of the court made at said time said minute entry of said order is hereby amended and corrected nunc pro tunc as of November 3, 1922, to read as follows."

The order of the court actually made and entered on November 3, 1922, is here repeated, and the nunc pro tunc order continues as follows:

> "The court further orders that in the event that a certain contract made between the plaintiff and defendant dated December 22, 1919, annexed to the complaint and marked Exhibit A, which is sought to be set aside in the action above entitled, and in that certain other action pending between the said parties in said court and numbered on the record thereof 128432, shall be declared a binding agreement in full force and effect, then all such payments as shall have been made to plaintiff on account of alimony pendente lite as aforesaid shall be credited upon the sums payable under the said contract."

It is insisted by appellant that the court had no jurisdiction to make the order of October 29, 1923, for the reason that the appeal had been taken and the whole matter been removed from the jurisdiction of the trial court pending the appeal. Appellant seeks by a motion made in this court for diminution of the record to eliminate such nunc pro tunc order from the certified record. When the clerical omission was discovered, it was proper for the trial court to correct the same by a nunc pro tunc order, and the power of the court to correct such omission was not suspended or impeded by the appeal. Biaggi v. Ramont, 189 Cal. 675, 209 Pac. 892, and cases cited. Furthermore, the order was not prejudicial to the appellant's interest. In fact, it was in his favor. It was an assurance to him that whatever he might pay on account of temporary alimony required by the order would be credited on the same payable under the contract, thus avoiding a duplication of payments on his part.

The motion to dismiss the appeal is denied. The motion for diminution of the record is denied. The order appealed from is affirmed.

We concur: MYERS, C. J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; LAWLOR, J.; WASTE J.

194 Cal. 106

SZOPIERAY v. WEST BERKELEY EXPRESS & DRAYING CO. et al.

(S. F. 10402.)

(Supreme Court of California. July 1, 1924.)

1. Municipal corporations ⚷706(6)—Movement of truck as proximate cause of injury held jury question.

In action for injuries to three year old child by truck, evidence that the proximate cause of injury was the movement of the truck *held* to present jury question.

2. Pleading ⚷364(5)—Striking ordinance, concerning hitching animals, from complaint for personal injuries proper.

In an action for injuries to a three year old child from being run over by truck, striking from the complaint an allegation of an ordinance requiring hitching of animals on public streets was not error, it being admissible without being pleaded, as such cause of action was not a violation of the ordinance.

3. Municipal corporations ⚷706(4)—Ordinance relating to hitching animals on streets held admissible.

In action for injuries to three year old child run over by a truck, excluding from evidence a city ordinance relating to the hitching of animals on public streets was error.

In Bank.

Action by Alexander Szopieray, Jr., by Alexander Szopieray, guardian ad litem, against the West Berkeley Express & Draying Company and others. From a judgment of nonsuit, plaintiff appeals. Reversed.

Ostrander & Carey, of Oakland, for appellant.

George Gelder, Nusbaumer & Bingaman, and Chris B. Fox, all of Oakland, for respondents.

LAWLOR, J. This is an action for damages for personal injuries to a minor, alleged to have been caused by a truck heavily laden and driven by horses passing over the child's left leg, crushing it, and rendering amputation necessary. The complaint was demurred to and an amended complaint filed. Issue was joined on the facts of the accident, contributory negligence was pleaded, and the answer further alleged that the parents of the minor "are guilty of negligence in allowing said child of such tender years to be alone upon said public streets." When the plaintiff rested, a motion for nonsuit was interposed and granted. The plaintiff appeals.

1. Appellant claims the court erred in granting the motion for nonsuit. We quote the specified grounds of the motion:

"We move for a nonsuit on the ground that the plaintiff does not show that the defendants, or either of them, were guilty of any kind of negligence, either in the handling of this team or in doing any affirmative act, or in omitting to do any act, the duty of doing which rested upon them or either of them. We move for a nonsuit on the ground that the evidence does not show that by any act, either of negligence, or otherwise, of these defendants, or either of them, that an injury was inflicted upon or received by this child We again move on the ground that the evidence is entirely silent as to how or in what way this child was injured. We invoke the principle of law where it is not shown how the accident happened the burden of proof is upon the plaintiff show that the defendant was guilty of negligence. The plaintiff fails to show that the defendant was guilty of negligence, not only by no preponderance of evidence, but by any evidence at all. And that we claim is the situation in this case. There is no testimony, no eyewitness saw this accident, so there is no scintilla of evidence here of any kind showing how the accident occurred. And in order to fasten any negligence upon the defendant it must be shown by a preponderance of the evidence that by some act or omission or commission he was negligent. These are the grounds upon which we move for a nonsuit."

It was said in Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 Pac. 388:

"The law governing motions for nonsuit is well settled in this state. In Marron v. Marron, 19 Cal. App. 328 (125 Pac. 914), it was said: 'A motion for nonsuit assumes as true every fact which the evidence, and presumptions fairly deducible therefrom, tend to prove, and which was essential to entitle the plaintiff to recover. Estate of Arnold, 147 Cal. 583 (82 Pac. 252). On such motion the evidence must be taken most strongly against the defendant. Contradictory evidence must be disregarded (In re Daly, 15 Cal. App. 329 [114 Pac. 787]), and the motion denied if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence (Zilmer v. Gerichten, 111 Cal. 73 [43 Pac. 408]; Vermont Co. v. Declez, 135 Cal. 579 [87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057]). The rules as to a nonsuit are the same, whether the trial is by the court or by a jury. Freese v. Hibernia S. & L. Soc., 139 Cal. 394 (73 Pac. 172).'"

[1] The testimony is in substance as follows: At about 9:30 a. m. on September 14, 1917, the plaintiff, a child of three years of age, with the knowledge of its mother, left its home 200 feet from the northeast corner of Addison and Eighth streets in the city of Berkeley to go to the house of his aunt, who lived on the northwest corner of said streets, distant from the Szopieray residence about 200 feet. Mrs. L. T. Wilson, a witness for appellant, on returning from market saw the child sitting on the sidewalk leaning against the fence opposite the horses attached to the truck. She entered her house and after busying herself for about five minutes looked out of the window and saw him playing at the left hind wheel; he was playing "by rubbing his fingers along the spokes of the rear left wheel." About one-third of the truck

was visible to her. She left the window and hearing a scream she walked across to the window and saw the boy sitting on the street about four feet behind the wagon, with a man supporting him. At no time did she observe any driver on, about, or near the wagon. According to this witness the boy was not bleeding but there was blood on the street in front of him, but not where he was sitting. She saw an automobile in that vicinity. Emil Turpin, called as a witness on behalf of the appellant, testified that while at work in his yard he noticed a truck loaded with boxes of grapes, to which two horses were attached, standing on Eighth street north of Addison street, and that the team was not tied. He saw some one taking a bunch of grapes from the truck, and about half an hour later, hearing a cry, he ran to the truck, and saw the teamster holding the child in his arms. He also testified that "the little boy was about two feet behind the left hind wheel, back of the hind wheel." He said he did not see the truck move, but "I had seen the truck before that on that day, prior to that time, standing on Addison street." Frank Sabine, a witness called on behalf of appellant, testified that while at work in the Ramos coal yard he saw the truck standing on Eighth street; that it was there about three-quarters of an hour, during which time the driver was standing inside the coal yard; that some one hollered "Whoa" and every one rushed outside; that there were other horses in the coal yard at the time; and that he was up in the loft, and when he got out the child had been taken to the hospital. The doctor, Julian J. Benton, a witness for appellant, testified that—

> "The thigh, the muscles of the thigh, were crushed and the macadam ground into the muscles, into the leg itself, and the tibia torn from its articulation, I mean the fibula torn from its articulation with the tibia. That means the joint of the small bone of the leg with the large bone at the knee, torn asunder. * * *
>
> "Q. What did you find was the injury with reference to the muscular structure of the leg between the knee and the foot? A. Crushed and torn from the bones entirely; the calf of the leg, what is commonly called the calf on the leg. The skin was torn from the shin bone. Of course, there are no muscles there; the skin was torn away. The skin together with the calf, the muscles composing the calf was torn away from the bones entirely. The whole thing was crushed entirely, entirely severed from the bone, from the bony structure, not only that, but the macadam ground into the muscles and the skin. It was absolutely necessary to amputate it, because it was impossible to get healing without. It was impossible to get healing in the first place, and in the second place gangrene would have set in within twenty-four or forty-eight hours with the accompanying absorption of what is commonly called blood poison later, and besides that he would never have got any cover whatsoever to the part, the skin was so mutilated and the muscular attachment being torn from the leg and the macadam gone into it; amputation was absolutely necessary to save the boy. * * *
>
> "Q. From the nature of those injuries, doctor, could you state whether or not it could be the result or likely to be the result of great weight upon the leg to produce this crushed condition, or could that be done with just dragging? A. It could not be done by dragging, utterly impossible.
>
> "Q. Would it indicate a great weight? A. Absolutely a crushing weight, yes."

Respondent Louis Erickson, called by appellant, testified that the truck loaded with grapes would weigh between five and six tons; that it was not equipped with brakes of any kind; that the reins were equipped with rings, and there was a hook in the dashboard to fasten them on; and that "he had them off and on."

Appellant argues that there was sufficient evidence to support a finding that the injury was caused by the moving of the truck, and that such moving was due to the negligence of the driver.

Respondents argue that, if the chain of evidence is interrupted by a failure to prove a material fact, such as the act or instrumentality which caused the injury, or by an intervening independent or efficient cause, it is the duty of the court to withdraw the case from the jury by granting a motion for nonsuit. It is contended that it has not been shown that any negligent moving of the wagon was the cause of the injury.

It is true there is no direct evidence that the truck moved and that such movement was the cause of the injury. In our view, however, there is sufficient indirect evidence tending to show that the proximate cause of the accident was the passing of the truck over the leg of the child. There is evidence that before the accident the minor was near the left hind wheel passing his fingers over the spokes; that blood stains were found on the roadway, say two feet from the truck and an equal distance from where the child was picked up. The doctor testified that the condition of the leg was caused by "absolutely a crushing weight." No blood was seen where the baby was sitting when the driver reached him. This might indicate that all the blood had been forced from the limb by the heavy weight of the truck. All the flesh was torn from the bone, the limb "was crushed entirely; * * * macadam was ground into the muscles and the skin." Because of the condition of the leg amputation was found necessary. There is no intimation in the evidence that between the time Mrs. Wilson saw the child at the wheel and heard the scream any other vehicle passed along the street or was near the child. According to the physician the injury was not caused by dragging. It is more likely that the baby moved slightly away from the truck after it passed over the leg and before it felt the pain. The testimony is that when the mother reached the baby after Mrs. Wilson informed her of the accident it was not crying. It would be entering the realm of pure speculation to hold that any other vehicle or cause other than the heavy truck injured the child. The jury might under the evidence have concluded that the cry "Whoa" was addressed to the team attached to the truck. This would tend to prove that the horses had moved. Furthermore, only a slight movement of the truck would be sufficient to produce the injury, and it would be almost impossible for the witnesses to have observed such movement from the position of the truck. It may be noted that the driver of the truck was not produced as a witness.

It has been declared that upon a motion for nonsuit "the evidence must be interpreted most strongly against the defendant." Gates v. Pendleton, 184 Cal. 797, 195 Pac. 664. "The motion for a nonsuit being in effect but a demurrer to the evidence received in support of the plaintiff's case, presented for the decision of the trial court purely a question of law, and, therefore, for the purpose of the motion, assumed the truth of all the evidence educed in support of the plaintiff's case. This is the settled and generally well-understood rule, and taking such evidence as true, it was the duty of the trial court, without regard to the conflicts, if any, appearing therein, to adopt only those inferences, reasonable, of course, fairly deducible therefrom, which were most favorable to the plaintiff." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 Pac. 125. "While the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, yet, where the evidence is such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, it is a sufficient answer to a motion for nonsuit." Scheuermann v. Kuetemeyer, 186 Cal. 225, 199 Pac. 13. Taking into account all the testimony in the case, including the inference which the jury might have drawn therefrom, it cannot be held that it was not sufficient as matter of law to justify the jury in concluding that the proximate cause of the injury was the movement of the truck.

[2] 2. Appellant assigns error to the ruling of the court in striking from the complaint the allegation of ordinance No. 107 (N. S.) of the city of Berkeley, regulating, among other things, the hitching and control of horses and mules upon the public streets; "provided, however, any such animal may be securely checked by a rein or line attached by a ring to a hook firmly fastened to the seat of the vehicle drawn by such animals, and by having at the same time a good and sufficient brake attached to such vehicle and firmly set." The motion was granted on the ground that said words are surplusage and redundant. This was not an action for a violation of an ordinance, and, as was said in Martin v. Shea, 182 Cal. 130, 187 Pac. 23, the ordinance "was admissible without being pleaded, since the cause of action was not a violation of the ordinance, but the negligence of the defendant in maintaining the trench without barriers or lights, and the ordinance was evidence of such negligence." See, also, Opitz v. Schenck, 178 Cal. 636, 174 Pac. 40. The ruling was correct.

[3] 3. It is claimed by appellant that the court erred in sustaining objections to the introduction in evidence of said ordinance No. 107 (N. S.). In addition to the conventional objections it was stated that "it does not meet any issue in this case, or any set of facts under which this ordinance may materially be considered." It is claimed in respondents' brief it was not shown that the violation of the ordinance was the proximate cause of the accident. But if the ordinance had been received in evidence, it cannot be said the jury might not have found that the violation thereof contributed to the proximate cause of the injury. The ruling was erroneous.

Judgment reversed.

We concur: MYERS, C. J.; LENNON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; WASTE, J.

193 Cal. 675

WENBAN ESTATE, Inc., v. HEWLETT et al.
(S. F. 10312.)

(Supreme Court of California. June 3, 1924. Rehearing Denied July 3, 1924.)

1. Corporations ⚷519(3)—Evidence held to show that issue of corporate bonds to defendant was authorized.

Evidence of corporation minutes with testimony of corporation owner *held* to show that corporate meetings were held and resolutions regularly passed authorizing issue of corporate bonds to a director.

2. Corporations ⚷398(3)—Corporation organized for sole purpose of operating owner's property held bound by owner's acts.

Where corporation was organized for sole purpose of owning and operating owner's property, her acts and conduct when dealing with director with reference to corporate bonds were the acts and conduct of corporation, and therefore corporation was estopped to complain that the bonds were not issued or delivered by corporation, or that no consideration was received by it from the pledgees or transferees of such bonds.

3. Corporations ⚷1—Fiction of independent corporate existence cast aside to redress fraud and protect rights of third persons.

Generally a corporation is an entity separate from its stockholders, with distinct liabilities and obligations, but when necessary to redress fraud and protect third persons' rights, or prevent a palpable injustice, law and equity will interfere and cast aside legal fiction of corporate existence and deal with corporation and stockholders as identical entities with identical duties and obligations.

4. Corporations ⚷398(3)—Corporation obligated for acts of sole owner either in law or equity as though corporation did not exist.

Upon a showing that a corporation is but an instrumentality through which an individual, who is sole owner of all corporate capital stock, for convenience transacts his business, equity, looking to the substance and law as well, will hold such corporation obligated for acts of sole owner to same extent as though corporation did not exist.

5. Corporations ⚷1—Fiction of separate corporate entity may be disregarded, if refusal to do so would bring about inequitable results.

To disregard fiction of separate corporate entity it is unnecessary that actual fraud be shown; it being sufficient if a refusal to recognize identity of corporation with that of the individual would bring about inequitable results.

6. Corporations ⚷415—Relation of agency to dispose of bonds held to exist between director and owner of corporation and corporation.

Where corporation director was expressly authorized "in his private capacity to mortgage, hypothecate, sell, or trade" corporation's "bonds at his own discretion," in order to create a fund for improvement of corporation's property, he was made agent of sole owner of corporation and corporation to dispose of the bonds.

7. Corporations ⚷425(5)—Corporation estopped to complain that director did not have power to carry into effect his authority to sell its bonds.

Where a corporation, through its sole owner, conferred upon director authority to dispose of its bonds as if they were his own, and bonds as result of such authority came into possession of third parties for value, and in ordinary course of business, corporation was estopped to complain that director did not have power to carry into effect his authority.

8. Corporations ⚷474—Pledgees not deprived of title to bonds by failure to inquire as to agent's authority to dispose.

That pledgees of corporate bonds made no inquiry as to director's authority to pledge same would not deprive them of title or right to possession, where director not only had possession but actual authority to dispose of them.

9. Corporations ⚷415—Consideration received by agent for sale or pledge of corporation's bonds held to inure to corporation's benefit.

Where director was vested with power as corporation's agent to sell or pledge its bonds for corporation's benefit, whatever consideration he received for their sale or pledge became consideration for bonds, as though sale or pledge had been made by corporation itself.

10. Corporations ⚷415—Failure of agent to use money derived from sale of bonds as intended by corporation held not to prevent it from being consideration for bonds.

That director, authorized to dispose of corporation's bonds, did not use the money for purpose for which it was intended by corporation did not prevent it from being consideration for the bonds, since for that breach of trust corporation had its remedy against him for an accounting and settlement.

11. Corporations ⚷316(1)—Agreement between corporation owner and director held presumptive evidence of consideration.

A written agreement between corporation owner and director, which acknowledged delivery of bonds to him in cancellation of past accounts, was presumptive evidence of consideration therefor, in view of Civ. Code, § 1614.

12. Account stated ⚷1—Agreement between corporation owner and director, canceling past indebtedness for transfer of bonds, held to constitute.

An agreement between owner of corporation and director, which purported to cancel all past obligations between parties thereto, and declared that consideration of cancellation was transfer of bonds to director, *held* to constitute an account stated.

13. Account stated ⚷4—Unnecessary to set out mutual or cross accounts or demands between parties to constitute.

That an agreement between corporation owner and director, canceling past accounts in consideration of a transfer of bonds to director, did not set out mutual or cross accounts between the parties, did not prevent instrument from constituting an account stated.

14. Account stated 🔑8—Legal effect not defeated by showing lack of consideration.

While generally expressed consideration of an agreement is not conclusive upon its real consideration, legal effect of an account stated may not be defeated by mere showing of lack of consideration, nor can it be opened by party to whom it was rendered and accepted other than by appropriate pleading and proof of its procurement through fraud, duress, or mistake, or other ground which would appeal to equity in an action for avoidance thereof.

15. Pleading 🔑166, 381(3)—If defendant's answer had tendered an issue of account stated, averment would have been deemed denied, and plaintiffs could show fraud in procurement thereof as if specially pleaded.

In corporation's action to cancel bonds in possession of third parties, where cause of action did not seek to avoid legal effect of an account stated between corporation owner and director, transferring such bonds to director, by any allegation that it was procured through fraud, duress, or mistake, if defendants' answer had tendered such issue, its averments would have constituted new matter, and, under Civ. Code Proc. § 462, would have been deemed denied, and under general issue thus raised corporation would have been permitted to show fraud in procurement of account stated as though such fraud had been specially pleaded.

16. Account stated 🔑1—Adjustment of doubtful right constitutes good consideration therefor.

If an account stated between corporation owner and director was based upon a claim or demand of doubtful validity and value, such adjustment was good consideration, and corporation owner was estopped to complain that the claim or demand upon which it was made was unjust or invalid.

17. Corporations 🔑471—Constitution and statutory requirements for issue of corporation bonds satisfied, if consideration emanating from legitimate transaction inures to corporation's benefit.

If there is some consideration emanating from a legitimate transaction not tainted with fraud and tending to inure to corporation's benefit, constitutional and statutory requirements for issue of corporation bonds, in so far as corporation or its stockholders are concerned, are satisfied.

18. Corporations 🔑316(1)—Acknowledgment of delivery of bonds by corporation director held to constitute a complete delivery.

That at time of a written agreement between director and corporation owner, which acknowledged a delivery of bonds to him, same were already in his possession as an officer of corporation did not prevent an effective delivery; such acknowledgment being inconsistent with supposition that he was continuing in possession of them as a director of corporation.

19. Limitation of actions 🔑39(1)—Action seeking equitable relief held not barred by statute.

Corporation's cause of action to determine adverse claims upon alleged obligations of corporation, made by defendants against corporation, constituted an action for equitable relief under Code Civ. Proc. § 1050, and therefore section 343 embodied only statute of limitations applicable.

20. Pleading 🔑403(2)—Defects in complaint held cured by allegations of answer and cross-complaint.

In corporation's action to determine adverse claims upon alleged obligations of corporation, made by defendants against corporation, if complaint was defective in not affirmatively alleging that any claims or demands were being asserted against corporation on account of such obligations, such defect was cured by answer and cross-complaint, which showed definitely and affirmatively that defendants were asserting or about to assert a claim adverse to corporation upon such obligations.

21. Corporations 🔑513(1)—Failure to allege time of discovery of pledge and transfer of corporate obligations held not fatal.

In corporation's action to determine adverse claims upon corporate obligations, made by defendants against corporation, if it was proper to allege the time of discovery of pledge and transfer by corporate director of such obligations to defendants, failure to do so was not fatal, where no demurrers upon that ground or any other ground were interposed to complaint.

22. Limitation of actions 🔑95(1)—Action to determine adverse claims upon corporate obligations held not barred by statute of limitations.

Corporation's action to determine adverse claims upon corporate obligations, made by several defendants against corporation, which was filed in October 22, 1914, was not barred by statute of limitations, where secretary of corporation never knew of the adverse possession of the bonds until January, 1913, and corporation owner had no knowledge of such adverse possession until she obtained it from secretary.

23. Equity 🔑39(1)—Will dispose of all equities and priorities between several parties to a case to prevent a multiplicity of suits.

Where equity assumes jurisdiction of subject-matter and of parties, it will proceed, in order to prevent a multiplicity of suits, to dispose, as prayed for, of all equities and priorities, if any, existing between the several parties to a case.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by the Wenban Estate, Incorporated, against Eugene E. Hewlett and others, in which Flora Wenban Mills and others filed cross-complaints. Judgment for plaintiffs and cross-complainants, and defendants appeal. Reversed and remanded.

Charles S. Wheeler, of San Francisco, John F. Bowie, of New York City, and Jared How, of San Francisco, for Wenban Estate, Inc.

Haas & Dunnigan, of Los Angeles, and Samuel M. Samter, of San Francisco, for Guaranty Trust & Savings Bank.

A. E. Cooley, of San Francisco, for Eugene E. Hewlett.

McNair & Stoker, of San Francisco, for Mary E. Nelson.

Jefferson P. Chandler, of Los Angeles, and Thomas, Beedy & Lanagan, of San Francisco, for Security Trust & Savings Bank and Louis S. Beedy.

McCutchen, Olney & Willard, of San Francisco, for Flora Wenban Mills, Simeon Mills, Flora Dean Hobart, Walter S. Hobart, Ethel Wenban Hussey, Frederick Hussey, and Caroline Mills Fletcher.

Richard C. Harrison, of San Francisco, for Flora A. Mills.

L. H. Roseberry, of Los Angeles, for Southern Trust Co.

LENNON, J. In this action in equity the plaintiff sought and secured a judgment against the defendants declaring 500 of the plaintiff's first mortgage bonds, of the par value of $500,000, to be null and void, and requiring the defendants to surrender and deliver them up to plaintiff, upon the ground that said bonds were never issued by the corporation plaintiff nor delivered to the defendant Hewlett, who pledged or transferred them to the other defendants, and that no consideration for their issuance and delivery, if any, was ever given or received as required by the fundamental and statutory law of the state, which provides that "no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received. * * *" Const. art. 12, § 11; Civ. Code, § 359.

After the institution of this action, Caroline S. Wenban, who was originally named as a defendant, died, and Flora Wenban Mills, the executrix of her will, was substituted in her place and stead. Mary A. Huntington, also originally named as a defendant in this action, died after the action was instituted. Howard Huntington, the executor of her will, was substituted as a defendant in her place and stead. Since the appeal was taken to this court, Howard Huntington died, and Louis S. Beedy was appointed administrator with the will annexed of Mary A Huntington's estate in the place and stead of Howard Huntington as executor thereof, and said Beedy, as administrator, was in the court below substituted as defendant in his place and stead, and a like order of substitution has been made by this court. Since the appeal was taken, Mary E. Nelson, also named originally as a defendant in this action, died, and W. W. McNair was appointed executor of her will, and as such executor has been substituted as a defendant in her place and stead by orders made in the lower court and in this court.

The plaintiff's complaint consisted of two counts, the first of which only need be considered, with relation to the points presented in support of the appeal, for the reason that no findings were made in response to the issues involved in the second count.

The first cause of action pleaded in plaintiff's complaint alleges, among other things, that on the 19th day of June, 1909, the plaintiff, the Wenban Estate, Incorporated, executed a deed of trust bearing date July 1, 1908, to the Southern Trust Company, Incorporated, of Los Angeles, whereby the plaintiff corporation granted, conveyed, assigned and transferred to said trust company, as trustee, certain property then owned by said plaintiff corporation, to secure, as the same should be issued and delivered by plaintiff, the payment, equally and without priority, of 1,000 bonds, numbered consecutively from 1 to 1,000, both inclusive, bearing date of July 1, 1909. Said deed of trust, it was alleged, was thereafter delivered by the plaintiff corporation to said Southern Trust Company as the trustee therein mentioned, and was on the 11th day of August, 1909, duly recorded in the recorder's office of the city and county of San Francisco.

The plaintiff's complaint further alleges that 500 of said 1,000 bonds, which said trust deed was provided to secure, when the same should be issued and delivered by said plaintiff, were duly issued and delivered by said plaintiff corporation to one Caroline S. Wenban, as part consideration to her for certain property theretofore purchased from her by said plaintiff corporation and theretofore conveyed and transferred and delivered by her to said plaintiff corporation, and that said last-mentioned 500 bonds and all thereof so issued and delivered by said plaintiff corporation to said Caroline S. Wenban were issued and delivered by said plaintiff corporation in good faith for property received by said plaintiff corporation, and that they and each of said bonds became and were, through such issue and delivery, the valid and existing obligations of said plaintiff corporation secured by said deed of trust.

The complaint, however, further alleges that, save and except the 500 bonds issued and delivered to Caroline S. Wenban, none of the 1,000 bonds of said plaintiff described in the deed of trust from the plaintiff to the Southern Trust Company, as trustee, ever was issued or delivered or authorized to be issued or delivered by said plaintiff; and that the plaintiff has never received any consideration whatsoever for said bonds or any thereof; and that any purported issue or delivery of said bonds to any person or persons at any time was and is wholly without authority of this plaintiff and without consideration.

It is further alleged that 51 of such unissued and undelivered bonds are now in the possession of said plaintiff corporation; that 4 of said bonds are in the possession of Hewlett; that 200 of the bonds are in the possession of Mary A. Huntington, and that ownership of said 200 bonds is claimed by her by virtue of a pretended transfer of the same from the defendant Hewlett; that 150 bonds are in the possession of the German-American Trust & Savings Bank, and that this bank claims a right to the possession of said bonds by virtue of a claimed agreement of pledge with Hewlett; that 15 of such bonds are in the possession of the Security Trust & Savings Bank, and this bank claims the right of possession to said bonds by virtue of a claimed agreement of pledge with Hewlett; that 80 of said bonds are in the possession of Mary E. Nelson, right to the possession of which bonds was claimed by her by virtue of a claimed agreement of pledge with Hewlett; and that Mary A. Huntington claims the absolute ownership of an additional 200 of the bonds, some of which are now in the possession of either the plaintiff corporation or of the other defendants.

The complaint also alleges that the defendant Hewlett was during all of the times involved in the controversy in suit a member of the board of directors of the plaintiff corporation, and that all of the defendants had knowledge of this fact at all of the times of entering into the purported transactions by virtue of which they respectively claim ownership or the right of possession to the unissued and undelivered bonds in suit.

The plaintiff's complaint prayed that it be ordered, adjudged, and decreed that the bonds in suit were not valid obligations of the plaintiff corporation; that none of the defendants holding said bonds have any right or lawful claim thereto; that the defendants having possession of said bonds be ordered and directed forthwith to surrender and deliver the same to the plaintiff corporation; that the title to such bonds be quieted in the plaintiff corporation free and clear of all claims of any kind of said defendants; that the rights of the various holders of all of the bonds of the corporation plaintiff issued and outstanding and their priorities and equities between each other, if any such there be, be ascertained and determined.

The plaintiff's complaint, however, proceeded to pray further that, in the event it should be determined that the defendants who are holding any of the bonds in suit or claiming (adversely to the plaintiff corporation) any interest therein are entitled to any rights or equities between themselves, or against any other of the defendants, on account of the possession of such bonds or the manner in which they came into the possession thereof, or otherwise, all necessary accounts or accountings be made to the end that a proper decree be entered adjusting the rights of such several defendants, and the equities and liabilities of the plaintiff corporation; and, further, to the same end, and that a discovery be ordered and an accounting be had of the accounts between Mary A. Huntington and Eugene Hewlett, and between Caroline S. Wenban and Eugene Hewlett, and that the various defendants holding said bonds or any of them as collateral security for the payment of any obligation or indebtedness entered into or incurred by the defendant Hewlett be ordered, directed, and required first to resort to the sale of any other securities held by them respectively as such collateral security for the payment of such indebtedness prior to making any attempted sale of any or all of said bonds.

Only the defendants Hewlett, Howard Huntington, as executor of the will of Mary A. Huntington, deceased, Mary E. Nelson, Guaranty Trust & Savings Bank, formerly the German-American Trust & Savings Bank, and the Security Trust & Savings Bank answered the plaintiff's complaint, and they, separately answering, while admitting the corporate existence of the plaintiff and other formal allegations, generally and specifically denied all other material allegations of the complaint. The defendants Howard Huntington, as executor of the will of Mary A. Huntington, Mary E. Nelson, and the Security Trust & Savings Bank, interposed the statute of limitations as a bar to the action. All of the several last-named defendants, save and except Hewlett, in addition to their answers interposed cross-complaints in which they pleaded in effect that they had acquired the bonds in suit in good faith, for value and without notice of any defect therein or of any adverse claim thereto. They then proceeded to allege, among other things, in substance and effect that at all of the times following the incorporation of the plaintiff, and at all of the times mentioned in the plaintiff's complaint, Caroline S. Wenban was the owner of all of the capital stock of said Wenban Estate, Incorporated, and that at all of the times since the incorporation of the plaintiff she owned in her own right all of its corporate capital stock by reason of the fact that all of the stock originally subscribed for by the other stockholders was indorsed in blank by them and delivered to her for the purpose of vesting in her title thereto; that no person other than the said Caroline S. Wenban paid any money or other thing of value for any of the capital stock of the Wenban Estate, Incorporated; that the directors and officers of said corporation during all of the times mentioned in the complaint carried out her instructions and wishes, and were at all times dominated and controlled in their official corporate acts by her; that during all of the times since the incorporation of said plaintiff the defendant Hewlett was the agent and confidential adviser of said Caroline S. Wenban, and was the agent of said corporation; that the plaintiff was incorporated and organized wholly and solely for the purpose of being and constituting an agency for said Caroline S. Wenban in the care, conduct, and control of her property, and not for any other purpose; that during all of the times mentioned in the complaint said plaintiff acted as the agent and agency of said Caroline S. Wenban in the care, control, and management of her property; that the bonded indebtedness referred to in the plaintiff's complaint, and purporting to have been created by said corporation, to wit, a bonded indebtedness of $1,000,000 represented by 1,000 bonds of the denomination of $1,000 each was created wholly and solely as a means employed on the part of Caroline S. Wenban to more easily and readily manage and control her property, and for the purpose of procuring loans and funds to maintain and carry on the management of said property and pay the taxes and expenses thereof and make improvements thereon; that the corporation plaintiff did create a bonded indebtedness in the sum of $1,000,000 represented by 1,000 bonds of the denomination of $1,000, and numbered from 1 to 1,000, consecutively; that the whole of said 1,000 bonds in plaintiff's complaint referred to were certified to at one time by the Southern Trust Company, the corporation named as trustee in the trust deed which was obtensibly executed to cover the properties of the plaintiff corporation and given to secure the payment of said bonds; that said bonds were issued and executed by the said Caroline S. Wenban, president of, and Flora Wenban Mills, secretary of, the plaintiff corporation and in the name of the said corporation, all at the same time; that the seal of the corporation was impressed upon all of said bonds and at the same time; that for the purposes above stated said Caroline S. Wenban did cause 500 of said bonds, designated and identified by their serial number, to be delivered to the defendant Hewlett, and the remaining 500 of said bonds, designated and identified by their serial number, to be delivered to her, the said Caroline S. Wenban; that said Caroline S. Wenban, acting through said agency, the plaintiff corporation, vested the legal title to the said 500 bonds hereinabove enumerated as delivered to defendant Hewlett in him for the purpose and with the intent of having him sell, mortgage, hypothecate, pledge, or otherwise deal with the same as if the same were his own property, and that he should handle the properties of said Caroline S. Wenban, make investments for her out of the proceeds of said bonds, pay taxes and assessments on her properties, namely, the property, title to which stood in the name of the corporation plaintiff, make improvements thereon, and otherwise deal with her said properties irrespective of the corporation as if the title thereto stood in her name, but using the said corporation as an agency for facilitating the handling of said properties; that said defendant Hewlett did, after receiving the said bonds, claim to be the owner thereof, with the knowledge and consent of said Caroline S. Wenban, and did dispose of a large portion of the same, and did pledge to the defendants and cross-complainants certain of said bonds, and did hold himself out to be the owner thereof, and was at all of the times vested with the ostensible and legal title thereto with the knowledge and with the consent of said Caroline S. Wenban, and did procure from the defendants and cross-complainants as proceeds of said loans large sums of money; that by the acts of said Caroline S. Wenban, so acting through the agency of the said corporation as aforesaid, the cross-complainants were deceived and misled into believing that the defendant Hewlett was the owner of said bonds and entitled to pledge and dispose of the same, and to deal with the same as if they were his own and thereby were induced to make the said loans and to pay to the said Hewlett large sums of money; that but for the acts of the said Caroline S. Wenban as aforesaid defendants and cross-complainants would not have made to defendant Hewlett the said loans, and would not have paid to said Hewlett the said or any sums of money, and, finally, in effect, that, if the relief prayed for be granted to the plaintiff corporation, it would under all the circumstances unjustly inure to and be for the benefit of Caroline S. Wenban and her successors in interest in the corporation plaintiff.

The cross-complainants prayed that it be ordered, adjudged, and decreed that they were the lawful owners and holders of said bonds, and that their title to the same be quieted as against said plaintiff and cross-defendants and for general relief.

Upon the issues thus framed the trial court, among other things, found that "the plaintiff did not at any time issue or deliver, or authorize to be issued or delivered, to any person or persons any bond or bonds" other than a certain lot of 500 bonds which were issued and delivered to Caroline S. Wenban, which bonds, however, were not sought to be surrendered by this action. The trial court further found that "the plaintiff did not at any time receive any consideration by way of money paid, labor done, or property actually received or otherwise or at all for any bond or bonds" sought to be declared void and of no effect by this action.

From these findings the trial court deduced the conclusion of law that the bonds in suit purporting to be secured by a deed of trust, and now in the possession of the defendants Eugene Hewlett, Mary E. Nelson, Guaranty Trust & Savings Bank, formerly German-American Trust & Savings Bank, and Howard Huntington, as the executor of the will of Mary A. Huntington, deceased, "are not the bonds of the plaintiff, and do not represent obligations of the plaintiff, and no one of said instruments is a bond of the plaintiff or represents any obligation of the plaintiff." Accordingly it was adjudged and decreed that the defendants last above mentioned be required to deliver and surrender forthwith to the plaintiff said instruments in writing purporting to be the bonds of plaintiff, and that the said defendants and each of them be enjoined and restrained from at any time asserting against the plaintiff, or against the Southern Trust Company, as trustee under said deed of trust, any claim based upon said instruments in writing, or any of them, or predicated upon any of the matters or things set forth or referred to in any of the cross-complaints and amended or supplemental cross-complaints or any pleading filed by said defendants in the action.

A review of the evidence adduced upon the entire case reveals a series of undisputed facts which, briefly stated, are these:

Prior to April 18, 1906, Caroline S. Wenban was the owner of an apartment house and a residence in San Francisco and some mining properties in the state of Nevada. The apartment house and residence were destroyed by the great fire of that date, which left Mrs. Wenban without any funds and without any income. Eugene Hewlett, attorney at law, a friend of Mrs. Wenban's daughter, Eva Shaw, became Mrs. Wenban's legal and financial adviser. Fire insurance money in the sum of $136,500 was collected by Hewlett upon authorization from Mrs. Wenban. In June, 1908, upon the advice of Hewlett, the corporation was formed for the express purpose of taking over, managing, and developing the properties of Caroline S. Wenban.

At the time the corporation was organized 9,995 shares of its 10,000 shares of corporate capital stock were issued direct to Caroline S. Wenban. The remaining 5 shares were issued in order to qualify directors, 1 share to Caroline S. Wenban, 1 share to her daughter, Eva Shaw, 1 share to her daughter, Flora Wenban Mills, 1 to her business agent, George W. Merrill, and 1 share to defendant Eugene Hewlett. These shares were shortly thereafter indorsed by the persons to whom they were originally issued over to and delivered to Caroline S. Wenban, who has ever since held them as sole owner. She controlled the corporation in all of its actions, and the officers of the corporation, who were members of her family, did whatever she wanted them to do with regard to the corporation.

A resolution dated June 12, 1908, was adopted by the corporation plaintiff authorizing the issuance of 1,000 bonds of the par value of $1,000. Five hundred of these bonds were delivered to Caroline S. Wenban. As a consideration for the transfer to her of all of the shares of the corporation and the delivery to her of the 500 bonds Caroline S. Wenban conveyed and transferred to the corporation plaintiff all of her real property. The remaining 500 bonds came into the possession of defendant Hewlett as managing director of the corporation. Fifty-one of these bonds were returned by Hewlett to the corporation. They were returned, however, as a preliminary step to the cancellation of a certain agreement between defendant Hewlett and Caroline S. Wenban, which agreement, however, was not canceled, and as to these bonds Hewlett claims the right, title, and interest. Four of the bonds are now in the possession of Hewlett. The 80 bonds held by Mary E. Nelson, the 150 bonds held by the Guaranty Trust & Savings Bank, formerly the German-American Trust & Savings Bank, and the 15 bonds held by the Security Trust & Savings Bank are held respectively under a claimed right to possession as security for the payment of indebtedness evidenced by promissory notes of Hewlett. The 200 bonds held by the executor of Mary A. Huntington are held under claim of absolute ownership for the repayment of a debt owing by Hewlett at the time of their transfer to Mary A. Huntington and also for a new consideration advanced to him at that time.

It is the claim of Hewlett, as evidenced by his testimony, that the 500 bonds in suit were issued and delivered to him by the corporation for a valuable consideration, and that by reason thereof he became the absolute owner of said bonds. It is the contention of the plaintiff corporation that Hewlett's claim is disputed and dissipated by the established facts and circumstances preceding, attending, and following the formation of the corporation, and that these facts and circumstances show that Hewlett obtained the manual possession of the bonds merely by reason of his position as managing director of the corporation, and not otherwise, and that the bonds of the corporation now in suit were never in fact issued or delivered to Hewlett, and that no consideration was paid by him for them, and finally, that in reality the bonds never had any existence as valid and existing obligations of the corporation but were mere worthless pieces of paper.

In support of his claim that he became the legal owner of and entitled to the possession of 500 bonds of the plaintiff corporation, Hewlett, in his testimony, narrated the circumstances attending the formation and management of the plaintiff corporation, detailed certain conduct on the part of Caroline S. Wenban, and relied upon certain written agreements between him and Caroline S. Wenban from which he claims the result follows that he did become the legal owner of the bonds.

In this behalf Hewlett testified in substance that shortly after the fire of 1906 an oral agreement was entered into between himself and Caroline S. Wenban whereby he obligated himself to finance a corporation to be formed to operate the properties of Caroline S. Wenban, and to pay out of the earnings of the corporation $1,000 a month to Caroline S. Wenban for her personal use, and, in the event that the corporation did not yield that amount per month, he, Hewlett, was to make good the difference. According to Hewlett at the time of the original oral agreement there was no definite understanding as to what he should receive in return for his services, but later it was worked out and agreed that he should receive for such services 500 of the bonds of the corporation when it was formed.

Whether or not there was actually an oral agreement between Hewlett and Caroline S. Wenban prior to the formation of the corporation is immaterial, inasmuch as such agreement, if any, was, as the record shows, subsequently superseded by a written agreement dated March 16, 1910. Under the well-recognized rule, the written agreement speaks for itself and supersedes any oral negotiations which may have preceded its making. Civ. Code, § 1625.

On June 23, 1908, so Hewlett testified, a meeting of the directors of the corporation was held and a resolution adopted authorizing the delivery of 500 bonds to Hewlett, which action of the directors was on the same day approved by all the owners and holders of the subscribed capital stock of the corporation. A duplicate copy of the minutes of the meeting of the directors, signed by Caroline S. Wenban, Flora Wenban Mills, and Eva Shaw, was offered and received in evidence by defendant Howard Huntington, executor of the will of Mary A. Huntington, who is claiming through Hewlett. Those minutes are as follows:

"Directors' meeting of the Wenban Estate, Incorporated.

"Held on the 23d day of June, 1908, Caroline S. Wenban, president of the board, presiding. The secretary read the minutes of the previous meeting of the board, held on the 19th day of June, 1908, which, on motion duly seconded, were approved.

"E. E. Hewlett delivered the secretary of the company 60 shares of the Southern Trust Company stock, * * * shares of the Riverside Improvement Company stock, deed of boarding house on Hill and Court streets, Los Angeles, an order for 600 shares of Flora Park, Incorporated, stock, a written promise of Howard E. Huntington indorsed over by E. E. Hewlett, of one-fourth of the capital stock of Pacific Annuity Company to be delivered to the Wenban Estate, Incorporated; also vouchers for $86,000.

"On motion duly seconded, the above property was duly accepted by the company by unanimous vote. And upon motion made by Eva J. Shaw, seconded by Flora Wenban Mills, it was unanimously resolved that 500 bonds of the Wenban Estate, Incorporated, be delivered to E. E. Hewlett. * * *

"There being no further business, on motion the meeting adjourned.

"[Signed] Caroline S. Wenban.
"Flora Wenban Mills.
"Eva J. Shaw."

There was also offered and received in evidence the minutes of a shareholders' meeting held on the same day which approved the prior resolution authorizing the delivery of 500 bonds to Hewlett, which minutes are as follows:

"Stockholders' Meeting of the Wenban Estate, Incorporated.

"Held on the 23d day of June, 1908, Caroline S. Wenban, president, and all the owners and holders of the subscribed capital stock of the company were present, namely, Caroline S. Wenban, Eva J. Shaw, Flora Wenban Mills, George W. Merrill, E. E. Hewlett.

"The secretary read the minutes of the previous meeting of the stockholders held on 19th day of June, 1908, which, on motion duly seconded, were approved.

"The secretary was then directed to read the minutes of the directors' meeting of the Wenban Estate, Incorporated, held June 23, 1908; the secretary then read the minutes as were engrossed on the pages of the company's books. Thereupon, on motion of Flora Wenban Mills, seconded by Eva J. Shaw, it was unanimously resolved that the business transacted at said meeting be unanimously ratified and approved.

"There being no further business before the stockholders, on motion the meeting adjourned.

"Caroline S. Wenban.
"Eva J. Shaw.
"Flora Wenban Mills."

The evidence shows, we think, without conflict that a meeting of the corporation was held at which the resolution authorizing the delivery of the bonds to Hewlett was passed and adopted as the act of the plaintiff corporation. This is shown by the duplicate minutes of the two meetings held on June 23, 1908, the one authorizing the delivery of the bonds to Hewlett and the other ratifying that authorization. It is true that Mrs. Mills at the time of the taking of her deposition, which was some three years and six months prior to the trial of the case, testified, "I don't think there was any such meeting. * * * I know it was impossible at that time, * * * owing to the illness of my sister, Mrs. Shaw, in Burlingame. She could not leave the house at all." Mrs. Caroline S. Wenban, however, testified that a meeting had been held at Burlingame, and when asked if she remembered the meeting, replied, "Not very clearly, I do not," but added, "I know something about it." She testified that this meeting had been held in Burlingame because of the illness of her daughter, Mrs. Shaw, and that the condition of Mrs. Shaw's health at that time was such that she could sign the minutes of the meeting. Mrs. Mills, when testifying as a witness at the trial, and when confronted with the signed duplicate of the minutes of the meeting of the directors on June 23, 1908, which in their signed form were not called to her attention when giving her deposition, testified that duplicate minutes were always signed, and that the signatures attached to the minutes of the meeting in question of Caroline S. Wenban, Eva J. Shaw, and herself were genuine. She did not then testify that no such meeting was held. She did say, however, "I don't think I attended any meeting of June 23, 1908," and when asked if the signatures to the minutes of the meeting of June 23, 1908, which she admitted were genuine, did not refresh her memory concerning the time and circumstances under which she signed, she replied, "No, but I know that my sister was very ill. She must have signed it in bed."

It will thus be seen that Flora Wenban Mills based her notion that no corporate meeting was held on June 23, 1908, and that such a meeting was impossible, on the fact that her sister, Mrs. Shaw, was ill in Burlingame at that time. Other evidence, however, as previously indicated, tends to show, and without contradiction, that a corporate meeting was held at Burlingame during the time that Mrs. Shaw was ill, and that she was able at that time to sign the minutes of the meeting. Mrs. Mills fixes the time of the meeting in question at a time when her sister, Mrs. Shaw, was ill, and Caroline S. Wenban, without contradiction, testified that a corporate meeting was held at Burlingame during the time of the illness of Mrs. Shaw. If Mrs. Mills is correct in her recollection of the time and of the place of her sister's illness, evidently such illness did not render a corporate meeting of that date at Burlingame impossible or improbable.

[1] In short, Mrs. Mills' testimony concerning the fact as to whether or not a corporate meeting was held on the date in question is so nebulous and evanescent as to render it nothing more than a mere pretense of evidence (Field v. Shorb, 99 Cal. 661, 666, 34 Pac. 504; In re Wilson, 117 Cal. 262, 269, 49 Pac. 172, 711; Estate of Tibbetts, 137 Cal. 123, 128, 69 Pac. 978; Estate of Morey, 147 Cal. 495, 506, 82 Pac. 57; Houghton v. Loma Prieta Co., 152 Cal. 574, 578, 93 Pac. 377), and therefore it may be said that, as a matter of law, is not any evidence at all. It does not, therefore, contradict or tend to contradict, either directly or by justifiable inference, the positive evidence that such a meeting was held. The positive and unequivocal character of the corporate minutes, coupled with the testimony of Caroline S. Wenban, compels the conclusion that the evidence sufficiently shows that corporate meetings were held on June 23, 1908, and that the resolutions recited in the minutes referred to were regularly passed and adopted as the act of the corporation plaintiff. It follows that the finding of the trial court to the effect that the corporation did not at any time authorize to be issued or delivered to any person all or any of the bonds in suit is not only not supported by the evidence but is contrary to the evidence.

On August 26, 1909, Caroline S. Wenban signed and acknowledged before a notary public a formal assignment conveying 500 of the corporation's bonds to Hewlett. There is no denial by the respondents that such a conveyance was made and executed by Caroline S. Wenban, and it must, therefore, be taken as an admitted fact in the case.

It is to be noted that the bonds of the corporation were not in physical existence at the time of the resolution of the plaintiff corporation authorizing the delivery of the 500 bonds to Hewlett, nor were such bonds in existence at the time of the written conveyance by Caroline S. Wenban to Hewlett of the bonds.

It is not disputed that the total issue of bonds of the corporation was, on February 7, 1910, certified by the Southern Trust Company, as trustee, under the deed of trust, and that at some time between that date and March 16, 1910, Hewlett came into actual physical possession of the bonds.

On March 16, 1910, Caroline S. Wenban entered into a formal written agreement with Hewlett by which Hewlett agreed to "finance" the corporation and to guarantee to Caroline S. Wenban a monthly income of $1,000 during the existence of the bond issue. On her part, by the agreement, Caroline S. Wenban "ratified the conveyance and delivery heretofore made" to Hewlett of 500 bonds of the Wenban Estate, Incorporated. It was provided by this agreement that 400 of the bonds, or an amount of property equivalent to the then value of the bonds, should be held by Hewlett in a separate trust account as security for the performance of his covenants contained in the agreement. This agreement expressly provided that Hewlett might "in his private capacity, mortgage, hypothecate, sell, or trade said bonds at his own discretion." The remaining 100 bonds from 1 to 100 inclusive were, so the agreement reads, "delivered to" Hewlett "in cancellation of past accounts"; that agreement expressly providing further, that "all past obligations between the parties hereto are hereby canceled." The agreement provided that Hewlett should have no charge or obligation against Caroline S. Wenban or the corporation except out of the income of the corporation, and in the event of the cancellation of the agreement Hewlett was not to be paid in money "for work, labor, or services rendered or for interest on the money advanced," but should be allowed in bonds the difference in the value of the 400 bonds above mentioned at the time of the making of the agreement and their value at the time of the cancellation of the agreement.

There is no denial by the plaintiff corporation of the execution of the written agreement of March 16, 1910, by Caroline S. Wenban, and the execution of the agreement must also be taken as an admitted fact in the case.

[2] We are now brought to a consideration of the point primarily presented in support of a reversal of the judgment, viz., that the evidence adduced upon the entire case without substantial conflict was to the effect that Caroline S. Wenban and the corporation were one and the same entity, and that, therefore, the acts and conduct of Caroline S. Wenban when dealing with Hewlett, with reference to the bonds in suit, were the acts and conduct of the corporation plaintiff, and therefore, the corporation plaintiff will not be heard to complain that the bonds in suit were not issued and delivered by the corporation or that no consideration was received by it from all, or any of the defendants, for the pledges or transfers respectively made to them of said bonds. This contention is, we think, well taken.

Upon this phase of the case it is obvious that the trial court, in its findings, endeavored to preserve the integrity and independence of the corporation plaintiff as a separate entity from that of Caroline S. Wenban. While the trial court does not in terms make such a finding, nevertheless it is fairly inferable from its findings, as a whole, that the findings, as made, bearing upon this phase of the case, were predicated only upon the theory that the corporation was not bound by the acts and conduct of Caroline S. Wenban. This, we think, under all of the undisputed evidence bearing upon this phase of the case, could not rightly be done, and that, in so far as it may be implied from the findings of the trial court that Caroline S. Wenban and the corporation were distinct and separate entities, the findings are contrary to the evidence.

That the identity of Caroline S. Wenban and the corporation are the same cannot, under the practically admitted facts of the case, be doubted or disputed. She was at all times following the formation of the corporation the sole owner of all of the shares of the stock of the corporation. Caroline S. Wenban at all times controlled and directed the affairs of the corporation as if she and the corporation were one. She herself testified in effect that all of the corporate stock of the corporation belonged to her, and that she practically controlled the corporation in all of its actions, and that the directors of the corporation, who were members of her family, did whatever she wanted them to do with regard to the corporation, and this testimony stands undisputed. The corporation was organized for the sole purpose of owning and operating Caroline S. Wenban's property. It was created merely as a convenience for the management of her property. There was a complete unity of interest and ownership in the assets of the corporation between Caroline S. Wenban and the corporation. In other words, the corporation was her alter ego. That the corporation was looked upon as the alter ego of Caroline S. Wenban is evidenced by the acquiescence of the other directors of the corporation in her conduct whereby she treated the bonds of the corporation as her own. In such a situation her responsibility as the sole shareholder of the corporation, when dealing with the assets of the corporation, was the corporation's responsibility, and conversely the obligation of the corporation in this particular situation is her obligation.

[3] While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

[4] Accordingly it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 Pac. 986; Commercial Security Company v. Modesto Drug Co., 43 Cal. App. 162, 184 Pac. 964; Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673. Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock will, in conjunction with

a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. Minifie v. Rowley, supra. In such a situation, where, as here, the rights of third persons are involved, the law will have no compunction in holding the contract of the owner of the corporation dealing with the corporate assets to be the contract of the corporation. Porter v. Lassen County Land Co., 127 Cal. 261, 59 Pac. 563; Schuyler v. Pantages, 54 Cal. App. 83, 201 Pac. 137; Swartz v. Burr, 43 Cal. App. 442, 185 Pac. 411.

In Erkenbrecher v. Grant, 187 Cal. 7, 200 Pac. 641, it was held that in order to cast aside the legal fiction of distinct corporate existence it must appear that "they are the 'business conduits and alter ego of one another', and that to recognize their separate entities would aid the consummation of a wrong."

Minifie v. Rowley, supra, states the rule to be:

> "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person * * * has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. * * * It is not necessary * * * that the complaint allege actual fraud; it is sufficient if the facts set forth disclose that the dealings were in form with a corporation but in reality with an individual and that a refusal to recognize this fact will bring about inequitable results."

It is at once apparent, in the instant case, that an adherence to the fiction of independent corporate existence would permit Caroline S. Wenban, despite the fact that she herself ignored the corporate fiction and treated the bonds in suit as her own, to seek shelter behind a corporate existence, which was no more nor less than her individual self, and thereby escape all liability for obligations to third persons incurred by her in her dealings with the assets of the corporation. In short, an adherence to the fiction of independent corporate existence, under the circumstances of the instant case, would permit Caroline S. Wenban to secure an advantage over third persons, through the medium of the corporation, to which she would not be entitled as an individual, and which it would be inequitable to permit her to obtain and retain.

[5] True, there is no showing or claim of fraud in the instant case on the part of Caroline S. Wenban or the corporation plaintiff. Still, as previously indicated, it is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the fact of the identity of the corporate existence with that of the individual would bring about inequitable results. All of the facts and circumstances surrounding the inception of and attending the controversy in suit bring the case clearly within the two requirements declared in Minifie v. Rowley, supra, to be sufficient to constitute the cause of action stated in the cross-complaints of the several appellants.

Although in the instant case it is the corporation which is seeking to have the bonds annulled, such relief, if effected, would obviously be for the benefit of Caroline S. Wenban as sole shareholder. As was said in Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, where a corporation "is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover."

The acts of Caroline S. Wenban being the acts of the corporation, the contract of Caroline S. Wenban of March 16, 1910, is the contract of the corporation and binding upon it. The resolution of the corporation of June 28, 1908, and the written conveyance of Caroline S. Wenban of August 26, 1909, both purporting to convey 500 bonds to Hewlett, are to be read and construed in the light of this ultimate and final agreement between Hewlett and Caroline S. Wenban. This agreement represents the final understanding of the parties thereto, and clarifies and controls the terms of the preceding instruments.

It is evident that the delivery of the 500 bonds, expressly ratified in said agreement, was never intended to be a delivery for the purpose of vesting title to the entire 500 bonds in Hewlett. The agreement does, however, on its face show that title to 100 of the bonds, numbered 1 to 100, inclusive, was intended to be vested in Hewlett in cancellation of past accounts. The mere fact that 100 of the bonds were so segregated as payment for past accounts clearly evidences, when considered in conjunction with the other recitals of the instrument, the fact that the remaining 400 bonds were delivered to him, not for his own personal use and benefit, but for the purpose of financing the affairs of the corporation. Indeed, the contract itself expressly provides that the 400 bonds or the equivalent in property shall be kept in a separate trust fund. Incidentally it may be noted again that the contract provides that for Hewlett's future labor, services, and money advanced he shall be paid in bonds equivalent in value to the difference between the value of the 400 bonds at the time of the agreement and their value at the time of the cancellation. This fact shows that it was not intended to pass title in the 400 bonds to Hewlett at the time of the agreement, for manifestly, if it were the intent of the agreement that he was to be the absolute owner of the bonds, he would be entitled to the full value of the bonds at the time of the cancellation of the agreement. Hewlett, therefore, became the actual and absolute owner of only 100 of the bonds.

[6-7] As to the other 400 bonds, however, he was expressly authorized "in his private capacity to mortgage, hypothecate, sell, or trade the bonds at his own discretion" in order to create a fund for the improvement of the corporation plaintiff's property. By such provision he was made an agent of Caroline S. Wenban, the sole owner of the corporation, and consequently the agent of the corporation to dispose of the bonds. In short, the conclusion is inescapable that the relation of principal and agent existed not only between Caroline S. Wenban and Hewlett but between Hewlett and the corporation as well. The corporation, through its alter ego, having conferred upon Hewlett the power and the authority to dispose of the bonds as if they were his own and the bonds, as a result of such power and authority, having come into the possession of third parties for value, in the ordinary course of business, the corporation will not now be heard to complain that Hewlett did not have the power to carry into effect his authorization. Grange v. Judah Boas Co., 60 Cal. App. 484, 213 Pac. 712.

[8] The fact that the appellants other than Mary Huntington made no inquiry as to Hewlett's right or authority to pledge the bonds will not deprive them of title or the right to possession thereof. Hewlett had not only possession of the bonds but had actual authority to dispose of them. It is the fact of actual authority and not the knowledge of the fact on the part of the pledgees and transferees which is the controlling factor. Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co., 33 Cal. App. 414, 165 Pac. 553; Id. 47 Cal. App. 103, 190 Pac. 194.

[9] Hewlett being vested with power as the corporation's agent to sell or pledge the bonds for the corporation's benefit, it follows that whatever consideration he received for their sale or pledge became consideration for the bonds as effectually as if the sale or pledge had been made by the corporation itself.

The evidence shows without contradiction that the Security Trust & Savings Bank loaned Hewlett $7,500 upon the security of 15 of the bonds; the Guaranty Trust & Savings Bank (formerly German American Trust & Savings Bank) loaned him $50,000 on the security of 150 of the bonds; Mary E. Nelson loaned him $31,500 upon the security of 80 of the bonds; Mary A. Huntington loaned him $200,000 on the security of 200 of the bonds.

[10] All of this money, under the undisputed facts, must be regarded as consideration for the bonds, and did not fail to be such consideration merely because Hewlett did not use the money for the purpose for which it was intended by his principal. For that breach of trust the corporation had its remedy over against Hewlett for an accounting and settlement.

Obviously this case is not analogous to those cases which hold that, where an agent or an employee obtains possession of nonnegotiable instruments merely by reason of the fact that he had access thereto and disposes of them without right, no title could be transferred by such agent or employee.

[11-13] Either, therefore, by reason of the absolute ownership of Hewlett in 100 of the bonds or by reason of his express authority to dispose of the remaining 400 bonds as his own, the appellants herein to whom Hewlett pledged or transferred the bonds have legal title to or right to possession of the bonds which are now in their possession.

Holding, as we do with reference to 400 of the bonds in suit, that Hewlett held the same as the agent of Caroline S. Wenban and that she, when conferring the power of agency upon Hewlett, was, as the sole owner of the corporation, acting for the corporation, and that the consideration which he received from the purchasers and pledgees of the bonds was a consideration to the corporation, eliminates any need for a discussion of the point made that there was no consideration from Hewlett to Caroline S. Wenban, and the corporation plaintiff for the transfer and delivery to him of said 400 bonds. We are still, however, confronted with the contention that there is no evidence of a consideration emanating from Hewlett to Caroline S. Wenban or the corporation plaintiff for the transfer and delivery to him of that lot of bonds in suit numbered 1 to 100. Upon this phase of the case it may be said that the written agreement dated March 16, 1910, which acknowledged a delivery of the 100 bonds immediately under discussion to Hewlett in cancellation of past accounts, being in writing, is itself presumptive evidence of a consideration therefor. Civ. Code, § 1614. Moreover, the agreement, as previously noted, purported to cancel all past obligations between the parties thereto, and, in effect, declared that in consideration of the cancellation of past accounts between said parties the particular bonds last referred to were delivered to the defendant Hewlett. Indeed, it may be said that this agreement, in the particulars referred to, was in the nature of an account stated. True, this agreement does not, in terms or otherwise, set out mutual or cross-accounts or demands between the parties, but this was not necessary in order to make it an account stated. It clearly and unequivocally, we think, expressly acknowledges a pre-existing debt, and marks and measures the compensation which was given and accepted in satisfaction of that debt, and this acknowledgment of the debt was sufficient to form the basis of an account stated. In short, it is a complete account stated because it embodies a signed written acknowledgment of an unqualified indebtedness or liability accompanied by a delivery and acceptance in payment of the indebtedness of the lot of bonds referred to therein as being numbered from 1 to 100, inclusive.

[14] While it is the general rule that the expressed consideration of an agreement is not conclusive upon the question as to what was in fact the real consideration for the agreement, still it is a well settled and recognized exception to this rule that the legal effect of an account stated may not be opened and defeated by a mere showing of a lack of consideration, nor can an account stated be attacked and opened by the party to whom it was rendered and accepted in any other way than by appropriate pleading and proof of its procurement through fraud, duress, or mistake, or other ground which would appeal to a court of equity in an action for the avoidance of the account stated. This is held to be so upon the theory that an attack upon an account stated for lack of consideration is forever foreclosed by the covenants and agreements of the parties, as expressed in the agreement itself. Gardner v. Watson, 170 Cal. 570, 150 Pac. 994.

[15] The plaintiff's first cause of action does not seek to avoid the legal effect of the agreement in question in so far as it purports to be an account stated between Caroline S. Wenban and Hewlett by any allegation in substance or effect that it was procured through fraud, duress, or mistake. If the plaintiff had desired to initiate an opening and an avoidance of the account as stated, in so far as it concerned the bonds still remaining in the possession of the defendant Hewlett, it should have laid the ground therefor by an appropriate pleading. Gardner v. Watson, supra; Merchants' National Bank v. Carmichael, 50 Cal. App. 749, 759, 196 Pac. 76. Of course, it goes without saying, if it had appeared from the answer of the defendant Hewlett that, with reference to these particular bonds, the issue of an account stated was tendered, then the averments of the answer in that behalf would have constituted new matter, and under our system of pleading would have been deemed denied. Code Civ. Proc. § 462. Under the general issue thus raised, on such new matter, the plaintiff would have been permitted to show fraud in the procurement of the account stated just as if such fraud had been specially and specifically pleaded. Sterling v. Smith, 97 Cal. 343, 346, 32 Pac. 320.

While it is true that the allegations of the plaintiff's second cause of action charge the defendant Hewlett with misrepresentations, deceit, abuse of confidential relations and fraud generally in his dealings with Caroline S. Wenban, and particularly with reference to the existence of the agreement of March 16, 1910, which embodies the account stated, this second cause of action does not in terms purport to proceed upon the theory that the account stated in that agreement between Hewlett and her was to be avoided because of fraud in its procurement. Nor did the trial court find that it was conceived and consummated in fraud. Liberally construed, the allegations of the second cause of action might perhaps be rightly considered as a pleading for an opening and an avoidance of the account stated, but even so the plaintiff's allegations of that cause of action are specifically denied by the defendant Hewlett, and the record shows that the issues raised by the pleadings on the second cause of action were never determined by the trial court.

[16] If it be conceded that after events disclosed by the record before us tend to show that the account stated was made and based upon a claim or demand of doubtful validity and value, still the adjustment of a doubtful right is a good consideration for an account stated, and therefore the party aggrieved will not be heard to say, in an endeavor to avoid the result of an account as stated, that the claim or demand upon which it was made and based was unjust and invalid. Gardner v. Watson, supra. It may be safely said, we think, that the recitals of the agreement itself, in addition to the fact that, as a written instrument, it imported a consideration, sufficiently show that at the time of the making of the agreement Hewlett was asserting some claim and making some demand upon Caroline S. Wenban, the justness, if not the legality, of which she recognized and accepted by her formal written agreement.

[17] Apart from the foregoing consideration an inspection of the record before us discloses undisputed facts tending to show that some consideration of value in the form of money, property, and services passed from Hewlett to Caroline S. Wenban and the corporation plaintiff prior to the making of the agreement of March 16, 1910, for the particular lot of 100 bonds immediately under discussion. Thus there is evidence uncontradicted to the effect that the defendant Hewlett agreed to pay and did pay certain designated legitimate obligations of the corporation running into large amounts of money, and that he did, prior to the execution of the agreement of March 16, 1910, perform

certain services for Caroline S. Wenban and the corporation before and after the corporation was organized, which services were rendered in the promotion of the affairs of the corporation, and which inured to the benefit of the corporation itself. That these advances and services were consideration for the transfer to Hewlett of the particular 100 bonds under discussion and specifically designated in the agreement of March 16, 1910, is evidenced, we think, by the fact that Mrs. Caroline S. Wenban, by that agreement, recognized that Hewlett had given some consideration of some value prior to the making of that agreement for the transfer to him of said 100 bonds. And it is the rule that, if there is some consideration emanating from a legitimate transaction, one not tainted with fraud, and intended to redound to the benefit of the corporation, the constitutional and statutory requirements for the issue of corporate bonds, is so far as the corporation or its stockholders are concerned, are satisfied. McKee v. Title Insurance Co., 159 Cal. 206, 113 Pac. 140; California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190.

[18] Some contention is made that there was not an actual manual tradition from either the corporation or from Caroline S. Wenban to Hewlett of the bonds, and that therefore there was no legal delivery. This contention is founded upon the fact that at the time of the written agreement of March 16, 1910, between Hewlett and Caroline S. Wenban, which acknowledged a delivery of the bonds in suit to Hewlett, the same were already in his possession as an officer of the corporation. In such a situation it cannot be said that there was no effective delivery. The law does not require, under the circumstances of the instant case, that in order to constitute a delivery it was necessary for Hewlett to go through the idle and useless ceremony of returning the bonds and delivering up the possession of them to Caroline S. Wenban and then receive them back again in order to constitute a valid delivery. The acknowledgment of the delivery of the bonds already in Hewlett's possession being inconsistent with the supposition that Hewlett was continuing in possession of them in his capacity of managing director of the corporation, was sufficient to constitute a complete delivery. Snider v. Thrall, 56 Wis. 674, 14 N. W. 814.

[19] The plea of the bar of the statute of limitations set forth in the several answers of the defendants was rightly rejected by the trial court. The plaintiff's cause of action is for equitable relief, and therefore, section 343 of the Code of Civil Procedure embodies the only statute of limitation applicable to the case. While the action is one for equitable relief, it is not in its primary purpose nor in the strict sense a mere action for the cancellation of instruments. The gravamen of the plaintiff's cause of action is that the bonds in suit, although existing and outstanding obligations of the corporation, and although apparently valid upon their face, are not and never were the bonded obligations of the corporation plaintiff. In its essence it was an action instituted pursuant to the provisions and permission of section 1050 of the Code of Civil Procedure to determine adverse claims made against the property of the plaintiff corporation, upon an alleged obligation of the plaintiff corporation, and whatever other relief may have been demanded in the prayer of plaintiff's complaint, such as a surrender up of the bonds in suit alleged to be held by appellants, is clearly but a mere incident to the real relief sought by the plaintiff, viz., an adjudication that the plaintiff was not liable for any obligation purporting to emanate from the bonds in suit. The origin and purpose of the above-cited code section are evidently to be found in that principle of equity jurisprudence which confers jurisdiction upon courts for the purpose of administering protective and preventive justice by directing the delivery up of securities or other instruments which, although not void on their face, are alleged, in truth and in fact, to be void and invalid obligations, and which may be vexatiously and injuriously used at a distance of time when the proper evidence to repel the claim may have been lost or obscured, against the person upon whom the obligation is placed.

Equity will assume jurisdiction in such a situation, for, if, as alleged, the securities in suit were not valid obligations of the corporation plaintiff, they ought not to be used or enforced, and, this being so, it would be contrary to conscience to permit the parties holding the securities to retain them, since they could only do so for some sinister purpose. The plaintiff's complaint, although it does not so plead in terms, may be fairly said, when considered in its entirety, to state facts which show a cause of action by the corporation plaintiff against the several defendants to determine adverse claims upon alleged obligations of the corporation plaintiff made by the several defendants against the corporation plaintiff. So considered, the cause of action in the instant case is to be distinguished from that discussed in the case of Gagossian v. Arakelian, 9 Cal. App. 571, 99 Pac. 1113, wherein it was pointed out that the obligation there in suit was that of a third party.

[20] Although no demurrers were interposed in the court below attacking the sufficiency of the complaint upon any grounds, it is now insisted that the corporation plaintiff's complaint does not state a cause of action sufficient to bring it within the purview of section 1050. In this behalf it is argued that the complaint is defective in not affirmatively alleging that any claim or demands were being made or being asserted against the corporation for or on account of the bonds in suit. We think it fairly inferable from all of the allegations of the plaintiff's complaint that the several defendants who were in possession of the bonds in suit were asserting or were about to assert claims against the plaintiff based upon the obligations of said bonds. Moreover, it is apparent from the answers and cross-complaints of the several defendants that whatever defect there may be in the complaint in the particular stated was cured by the allegations of the answers and the cross-complaints, which show definitely and affirmatively that the several defendants were asserting or about to assert a claim adverse to the plaintiff based upon the bonds in suit.

[21, 22] The plaintiff's cause of action as pleaded does not purport to be grounded in fraud, and therefore contains no allegation as to the time of the discovery of the pledge and transfer by Hewlett to the other defendants of the bonds in suit. If it were otherwise proper that such an allegation be made, then let it be noted that no demurrers upon that or any other ground were interposed to the plaintiff's complaint, and, in so far as the plea of the statute of limitations as interposed in the answers of the several defendants may concern or involve the question of the need of notice to the plaintiff of the time when the adverse claims in suit were first asserted, it will suffice to say that the plaintiff's complaint was filed October 22, 1914, and the record shows some evidence to support the trial court's finding on the statute of limitations, to the effect that Flora Wenban Mills, the secretary of the corporation plaintiff, who lived with Caroline S. Wenban and was fully acquainted with the latter's affairs and the affairs of the corporation plaintiff, never heard or knew of the adverse possession of the bonds in suit until the month of January, 1913, and that Caroline S. Wenban herself never heard of any such adverse possession until she obtained the information to that effect from Flora Wenban Mills.

[23] It necessarily follows from what we have said that a reversal of the judgment must be ordered, and, in view of the fact that the case must go back for a new trial, it is proper to note that the action, being one in equity, and equity having assumed jurisdiction of the subject-matter and of the parties, will proceed, to the end of preventing a multiplicity of suits, to dispose, as prayed for, of all of the equities and priorities, if any, existing between the several parties to the case.

The judgment is reversed, and the cause remanded for a new trial.

We concur: RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.; SHENK, J.

MYERS, C. J., deeming himself disqualified, does not for that reason participate.

On Rehearing.

PER CURIAM. The rehearing is denied. It is appropriate, however, to say that the use of the word "loaned" in the statement of the opinion that "Mary A. Huntington loaned him (the defendant Hewlett) $200,000 on the security of 200 of the bonds" is inaccurate. While Mary A. Huntington did not actually loan the defendant Hewlett $200,000 she did assign to him a one-half interest in a note calling for the payment of $400,000. In consideration of this assignment Hewlett was to turn over to her certain stock in the Pacific Ranch & Land Company, and as a guarantee that she would receive $200,000 out of this stock he deposited with her as security the said 200 bonds. While he did not, as he had agreed, turn over to Mary A. Huntington the stock referred to, he did deposit the bonds with her as security when she made the assignment to him of the one-half interest in the note. The opinion upon this particular phase of the case should have read that she held the said 200 bonds as security for the $200,000 which she was to receive from the stock of the Pacific Ranch & Land Company.

All concur, except MYERS, C. J., and STURTEVANT, Justice pro tem., who, deeming themselves disqualified, did not participate herein.

(194 Cal. 93)

MARTIN v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (S. F. 11128.)

ANASTASION v. SAME. (S. F. 11139.)

Ex parte CHAPMAN. (Cr. 2683.)

(Supreme Court of California. June 28, 1924.)

1. Statutes 🔑77(1)—That law does not apply to all persons does not make it special legislation.

A law is not special legislation merely because it does not apply to all persons.

2. Jury 🔑58—Statutes 🔑93(8)—Statute relating to selection of jurors held valid as general law applicable to all objects within class affected.

Code Civ. Proc. § 204, as amended by St. 1923, p. 436, providing that in counties and cities and counties having a population of 90,000 inhabitants or over trial jurors shall be selected by judges of superior court, *held* valid as general law applying equally and uniformly to all persons or things falling within designated class, and as based on a natural and intrinsic distinction justifying classification, and not violative of Const. art. 1, § 11, art. 4, § 25, subds. 3, 8.

3. Constitutional law 🔑208(1)—When Legislature may classify stated.

Legislature may classify for purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to needs of the people.

4. Statutes 🔑68—Subject to certain limitations, law is general if it applies equally to those within class addressed.

Subject to limitation that classification must not be arbitrary, but must be based upon some distinction, natural or intrinsic, or constitutional, a law is general though it operates only upon a class of individuals or things, so long as it applies equally to all within the class.

5. Statutes 🔑66—Legislative power to classify carries with it wide discretion.

Legislative power to classify necessarily carries with it a wide discretion in exercising that power.

6. Constitutional law 🔑70(2)—Legislative decision as to existence of facts justifying classified legislation ordinarily conclusive upon courts.

Authority and duty to ascertain facts which will justify classified legislation rests with Legislature in first instance, whose decision is ordinarily conclusive upon the courts.

7. Constitutional law 🔑48, 70(2)—Legislative classification not disturbed unless palpably arbitrary.

Every presumption is in favor of the validity of a legislative act, and legislative classification will not be disturbed unless it is palpably arbitrary, and neither founded upon nor supported by reason.

8. Statutes 🔑68—When legislative classification will be upheld, though reason does not appear therefrom, stated.

If the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation, and such facts reasonably afford good ground for particular classification, the legislative enactment will be upheld, though the reason therefor does not appear prima facie in the law itself.

9. Constitutional law 🔑47—Court may resort to judicial knowledge of facts in determining propriety of classified legislation.

In determining need and propriety of classified legislation, where same does not appear upon face of legislative enactment, the court may resort to its judicial knowledge of contemporaneous conditions and situation of people, existing economic, sociologic, and civic policy of state, and all other matters of common knowledge.

10. Evidence 🔑12, 43(1)—Large population of certain counties and increased court business resulting judicially noticed.

It is a matter of common knowledge, to be noticed judicially, that there are several counties of the state, each possessing a population many times greater than the population of each of the remaining counties, that such counties have more court business and require more trial jurors, that boards of supervisors have more business to dispose of, and are personally acquainted with less of their constituents, and that superior court judges are well qualified, and doubtless better qualified than supervisors, to select jurors.

11. Constitutional law 🔑70(2)—Legislative selection of limit in classified legislation reviewed only in plain case of abuse.

Where discretion to classify laws is vested in Legislature, selection of limit of class is legislative power which will be judicially reviewed only in plain case of abuse.

12. Constitutional law 🔑205(7)—Statutes 🔑89—Statute providing for appointment of jury commissioner in designated counties held not invalid as disturbing uniformity of county government or granting special privileges.

Code Civ. Proc. §§ 204a–204e, which permits appointment of jury commissioner in certain counties by judges of superior courts, *held* not violative of Const. art. 1, § 21, relative to special privilege or immunities, or article 11, § 4, relative to uniform system of county government; jury commissioner when appointed being adjunct of judicial system.

In Bank.

Three cases, the first two being petitions by James Martin and George Anastasion, respectively, for writs of prohibition directed against the Superior Court of Sacramento County and Charles O. Busick, as Judge thereof; the third case being a petition by Fred W. Chapman for writ of habeas corpus directed against the Sheriff of Sacramento County. Order to show cause in first two cases dismissed, and petitions denied, and preliminary writ of habeas corpus dismissed, and petitioner remanded to custody.

In S. F. 11128:

S. Luke Howe, R. B. Hibbitt, Markham Johnston, O. F. Meldon, and T. A. Farrell, all of Sacramento, for petitioner.

Edward T. Bishop, Co. Counsel, and Roy W. Dowds, Deputy Co. Counsel, both of Los Angeles, amici curiæ in support of petition.

R. Platnauer and Wm. H. Devlin, both of Sacramento, amici curiæ.

In S. F. 11139:

T. A. Farrell, of Sacramento, for petitioner.

Wm. H. Devlin, of Sacramento, amicus curiæ.

In Cr. 2683:

Thomas B. Leeper, of Sacramento, for petitioner.

J. J. Henderson, Dist. Atty., and Wm. V. Cowan, Asst. Dist. Atty., both of Sacramento, for respondents.

Edward T. Bishop, Co. Counsel, and Roy W. Dowds, Deputy Co. Counsel, both of Los Angeles, amici curiæ in support of petition.

Wm. H. Devlin, of Sacramento, amicus curiæ.

LENNON, J. The three above-entitled cases, although differing in the facts which form the basis of the respective petitions, present precisely the same legal questions for decision. Each petition attacks the legality of the procedure provided for the selection and listing of trial jurors in certain counties of the state of which the county of Sacramento is one.

In the matter of the application of Fred W. Chapman, the petitioner seeks his release upon habeas corpus from a judgment adjudging him guilty of contempt of court in refusing to answer a summons to appear and serve as a trial juror and in refusing to act as a trial juror in the superior court of the county of Sacramento. The petitioner, Chapman, was summoned pursuant to the procedure provided by section 204 et seq. of the Code of Civil Procedure.

The petitioners in the Anastasion Case and the Martin Case seek writs of prohibition to have the superior court in and for the county of Sacramento restrained from proceeding to a trial of the causes, in which they are respectively defendants, with a jury composed of persons selected to serve as trial jurors in said court for the year 1924.

In the Anastasion Case the petitioner was charged with unlawfully having in his possession intoxicating liquor in violation of the Wright Act (St. 1921, p. 79) with two prior convictions. Thereafter he was arraigned and pleaded not guilty, and his case was set for trial for the 30th day of April, 1924. The manner and method of listing and selecting the persons to serve as trial jurors in the said superior court and from whom the jurors were to be drawn for the trial of the two last mentioned cases followed the provisions of the Code sections last above referred to.

A discussion and a decision of the facts and the law as applied to the Martin Case will suffice as a basis for the decision in the other two cases.

The petition for a writ of prohibition in the Martin Case is predicated upon the following facts: The petitioner was on the 27th day of November, 1923, indicted by the grand jury of the county of Sacramento for the crime of murder. Thereafter the petitioner was duly arraigned upon said charge, and thereupon pleaded not guilty. Subsequently the cause was set down for trial upon a designated day. Thereafter, at a time some several weeks in advance of the date set for the trial of the cause, a majority of the judges of said superior court made and entered a court order directed to one Matt P. Barnes, as "jury commissioner of Sacramento county," to return to said court within a specified time a list of one hundred qualified persons to act as trial jurors in civil and criminal causes during the ensuing year. Thereafter, pursuant to said order, the said Barnes, as jury commissioner, returned to said court a list of persons qualified to act as jurors. Whereupon the said judges selected each and all of said persons to serve as trial jurors in said court for the ensuing year of 1924. Subsequently the judge of department 1 of said court, wherein the charge of murder was and is pending against the petitioner, made and entered an order directing the clerk of said court to draw from the regular trial jury box of said county, in which were the names, and only the names, of persons returned and selected in the first instance as aforesaid, the names of 75 persons from which would be drawn the names of the persons to serve as trial jurors during the April session of said superior court. Upon said drawing being made the court directed to be issued and placed and there was issued and placed in the hands of the sheriff of the county a venire for the summoning of said persons returnable April 14, 1924. Thereafter the said sheriff returned said venire to said court, together with his return thereon, specifying the names of said jurors so summoned.

Prior to the filing herein of the Martin petition the said superior court, over the objection of the petitioner, declared its intention and purpose to proceed with the trial of the case of the said petitioner, now pending in said court, with the persons so as aforesaid selected to serve as trial jurors in said court.

In support of the petition for the writ of prohibition, it is contended that that portion of section 204 of the Code of Civil Procedure as amended in 1923 (Stats. 1923, c. 195, p. 436), relating to the selection of jurors, which provides that "In counties and cities and counties having a population of ninety thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior court, * * *" is unconstitutional and void, in that it violates those provisions of the state Constitution which provide that:

> (1) "All laws of a general nature shall have a uniform operation." Article 1, § 11.
>
> (2) "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Article 1, § 21.
>
> (3) "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Regulating the practice of courts of justice. * * * Summoning and impaneling grand and petit juries, and providing for their compensation. * * *" Article 4, § 25, subds. 3 and 8.

While the petitioner refers to and relies upon all of the sections of the Constitution above quoted, nevertheless the sum and substance of the argument made in support of the petition is condensed into the one proposition that the law in question is special legislation, in that it does not uniformly apply to and operate upon all persons and things throughout the state.

Section 204 of the Code of Civil Procedure as it existed prior to 1923 provided in substance and effect that the superior court of each county, in the month of January of each year, should designate the estimated number of grand and trial jurors required for the transaction of the business of the court and the trial of causes therein during the ensuing year; that the court should select and list the grand jurors, and that immediately after the making of the order designating the estimated number of trial jurors "the board of supervisors shall select * * * a list of men and women to serve as trial jurors * * * during the ensuing year. * * *" It will be noted that the section in question. as it existed prior to 1923, contained the further provision that—

> "In counties and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior courts."

By the amendment in question, as enacted in 1923, the basis of classification for the purpose of selecting and returning jurors for courts of record was changed from counties and cities and counties having a population of 100,000 inhabitants or over to counties and cities and counties having a population of 90,000 inhabitants or over.

It is conceded, as indeed it must be, that, where a classification of persons or things is distinctive and such distinction is based upon some "constitutional, or natural, or intrinsic distinction," laws may be made applicable to such class alone, providing the act is uniform as to all persons or things within such class. But it is argued in the instant case that there is no "constitutional, or natural or intrinsic distinction" inherent in the procedure and practice requisite for the selection and listing of trial jurors in counties having a population of 90,000 or over and the procedure and practice required for the same purpose in the remaining counties of the state having smaller populations.

[1-3] The amendment under consideration is not, in our opinion, a special law. It is a general law having a uniform operation upon a class of persons or things readily and naturally differentiated from another class of persons or things by reason of the necessities peculiar to the subject-matter of the legislation. A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the Legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. If the law is to bear equally upon all persons, the Legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation. In other words, different persons, different localities, and different governmental organizations and agencies may justly be found by the Legislature to stand in different relations to the law, and if the same law were, in such a situation, to be applied to all alike, it would not bear equally upon each of them. Darcy v. Mayor, etc., of the City of San Jose, 104 Cal. 642, 38 Pac. 500; In re Sumida, 177 Cal. 388, 170 Pac. 823.

[4] The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed. Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Darcy v. Mayor, etc., of San Jose, supra; People v. Central Pacific R. R. Co., 105 Cal. 576, 38 Pac. 905; Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782; Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. 682, 119 Am. St. Rep. 199; Ex parte King, 157 Cal. 161, 106 Pac. 578; Matter of Application of Martin, 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.) 242; Matter of Application of Miller, 162 Cal. 687, 124 Pac. 429; Gridley v. Fellows, 166 Cal. 765, 138 Pac. 355; In re Sumida, supra; In re Morganstern (Cal. App.) 215 Pac. 721.

[5-8] The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason. In the Matter of a Proceeding to Validate the Sutter-Butte By-Pass Assessment No. 6 of the Sacramento and San Joaquin Drainage District (Cal. Sup.) 218 Pac. 27. It follows that in any given case if the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation, and if it may be reasonably said that such facts afford good ground for the making of a particular classification, the legislative enactment will be upheld, although the reason therefor does not appear prima facie in the law itself. Stevenson v. Colgan, 91 Cal. 649,

27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; Grumbach v. Lelande, 154 Cal. 679, 98 Pac. 1059; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; Matter of Application of Martin, supra; Ex parte King, supra; Matter of Petition of Burke, 160 Cal. 300, 116 Pac. 755; In re Sumida, supra; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499.

It cannot be said that the classification made by the Legislature in the instant case is palpably arbitrary and was made merely for the purpose of a classification which bears no relation to the inherent purpose of the law. To the contrary, we are of the opinion that good and sufficient reason existed for the classification. The amendment in question doubtless was enacted in order to facilitate and expedite the work of the superior courts in the more populous counties of the state. Manifestly, the plan of having trial jurors in such counties selected by a majority of the judges of the superior courts rather than by the board of supervisors of the county tends to promote the efficiency and expedition of the business of the courts.

[9, 10] In determining the need and propriety of classified legislation, where the same does not appear upon the face of the legislative enactment, the court may resort to its judicial knowledge of the contemporaneous conditions and situation of the people, the existing economic, sociologic and civic policy of the state, and all other matters of common knowledge. It is a matter of common knowledge, to be noticed judicially, that there are several counties of the state each possessing a population many times greater than the population of each of the remaining counties of the state; that the counties with the greater populations have vastly more court business and consequently require many more trial jurors than the less populous counties; that the boards of supervisors of the counties of the greater population have a larger, more continuous and complicated volume of official business to deal with and dispose of than do the boards of supervisors of the many less populous counties; that the boards of supervisors of the more populous counties are personally acquainted with only a comparatively small percentage of their constituents, and therefore less qualified to determine who, among their constituents, possess the degree of moral and intellectual fitness requisite for jurors, than are the boards of supervisors of the less populous counties who are ordinarily in closer communication with their constituents; that the judges of the superior courts, coming, as they do, constantly in contact with the personnel of trial jurors, are, by reason of their observation and experience, well qualified to perform the duties of selecting and listing persons to serve as trial jurors; and that, in a situation where the persons to be selected as trial jurors in the more populous counties are not personally known to the boards of supervisors, the judges of the superior court, doubtless, are better qualified to make the required selection than the boards of supervisors, who, because of their multitudinous duties incidental to the government of such counties, cannot be expected to give the time and thought requisite to the selection of trial jurors. From the foregoing facts the conclusion is readily deducible, and doubtless was deduced by the Legislature when enacting the legislation in question, that in counties having a small population the boards of supervisors have both the requisite time and frequent opportunity for observation requisite to the selection of the limited number of trial jurors required to serve the needs of the courts in these counties, and that the boards of supervisors of the more populous counties have not the requisite opportunity because of their other multitudinous duties and lack of personal acquaintance to personally and properly select the large number of trial jurors required in the more populous counties, and for that reason it may be said that the distinction which the Legislature drew between the known situation existing in counties having a population of 90,000 and over and counties having a lesser population was a natural and intrinsic distinction which amply justified the legislation complained of. In short, there is good reason for the distinction made by the amendment and a most natural one. The classification being permissible, it is not and cannot be denied that the law purports to, and undoubtedly does, in its operation and effect, apply equally and uniformly to all persons and things falling within the designated class.

The case of Ex Parte Brady (Cal. App.) 224 Pac. 252, cited and relied upon in support of the contention that the Legislature had no power to make the classification complained of in the instant case, is not in conflict with anything decided here. There the court had under consideration the question of whether or not an amendment to the Code of Civil Procedure (sections 73 and 142, Stats. 1923, c. 42, p. 78) which provided that one session of the superior court should be held in each city containing a population of not less than 50,000, located in counties of the first class, whose city hall was not less than 15 miles distant from the site of the county courthouse, was unconstitutional in that it was special legislation. The court there, speaking through Mr. Justice Houser, recognized and reaffirmed the settled rule that a statute even though it does not purport to apply to all of the people of the state, is not special legislation and therefore unconstitutional if it applies to and affects all individuals and things embraced within a proper classification, and then held that the classification made by the Legislature in that case was not a proper classification, for the reason that, having in mind the purpose of the statute, no constitutional, natural, or intrinsic distinction existed between cities containing a population of not less than 50,000 located in counties of the first class, and cities containing a population of not less than 50,000 located in counties not of the first class. We are satisfied that the conclusion reached in the case last cited is correct, and we are in substantial accord with the reasoning upon which that conclusion is based. Obviously, the situation presented in the instant case is distinctly different from the situation presented in the Brady Case in this, that in the instant case a natural and intrinsic difference as a basis for the classification is readily discernible, whereas in the Brady Case no sufficient reason existed or could be conceived for the classification there held to be unconstitutional.

[11] The point is suggested rather than argued that the legislation in question is special legislation in that the numerical basis of classification was reduced from 100,000 to 90,000 for the express purpose of admitting Sacramento county into the group of larger counties. It will suffice to say that it does not appear upon the face of the legislation that this was the purpose of the Legislature, and while it may, nevertheless, well be argued that that was the legislative purpose and intent, still the fact remains that the power of determining the numerical basis of the classification rested with the Legislature, and, having the power to fix the limit of population at 100,000, to which, in the first instance, the legislation applied, there can be no doubt, it seems to us, that the Legislature had the power to reasonably reduce the numerical limits of population whenever, in the exercise of a wise discretion, the exigencies of a given situation so required. In other words, "where the discretion so to classify is vested in the Legislature, the selection of a limit is a legislative power which will be judicially reviewed only in a plain case of abuse." Matter of the Petition of Burke, supra.

[12] Incidental to the main point presented in support of the petition, it is argued that sections 204a to 204e of the Code of Civil Procedure are violative of article 1, § 21, of the Constitution, in that the appointment of a jury commissioner and the listing of juries by him is made optional with the judges of the superior courts in the various counties wherein the provisions of these sections purport to have operation and effect. The constitutional provision last above referred to has to do and deals only with special privileges or immunities, and we fail to perceive, and counsel for the petitioner has not pointed out, how or in what manner the appointment of a jury commissioner as a part of the judicial system of the state to serve certain designated courts can be construed and counted a special privilege or immunity within the meaning of those constitutional provisions. The most that we can make out of the contention of the petitioner in this particular is that the creation of the office of jury commissioner is tantamount to the creation of a county office, and, being optional with the judges of the courts wherein such appointment may be made, runs counter to the uniformity of the system of county government prevailing throughout the state. The case of Coulter v. Pool, 187 Cal. 181, 201 Pac. 120, is cited in support of the contention thus apparently made. That case is readily distinguishable from and has no application to the situation here. There it was held in effect that a legislative enactment giving to boards of supervisors the power, at their option, to appoint a county engineer in the place and stead of the county surveyor permitted the creation of a county office contrary to the constitutional provisions (article 11, § 4), which contemplate and command a uniform system of county government. The provision of the statute under consideration in the instant case which provides for and permits the appointment of a jury commissioner, in certain designated counties, to assist the judges of the superior courts of those counties in making selections of trial and grand jurors, does not create a state or county office, and the jury commissioner, when appointed, like other attachés of the judicial system of the state, is no more than an adjunct of that system acting in the capacity of a mere employee to enable the court to transact its judicial work in an orderly and expeditious manner, and is an adjunct "which the Legislature, we do not doubt, has the right to provide for when it deems necessary." Noel v. Lewis, 35 Cal. App. 658, 662, 170 Pac. 857, 859.

The writ of habeas corpus heretofore issued in the Chapman Case is dismissed, and the petitioner remanded to the custody from whence he came.

The order to show cause heretofore issued in the Anastasion Case is dismissed, and the petition for a peremptory writ of prohibition is denied.

The order to show cause heretofore issued in the Martin Case is dismissed, and the petition for a peremptory writ of prohibition is denied.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.

193 Cal. 740

RILEY, State Controller, v. FORBES et al., State Board of Accountancy.
(S. F. 10947.)

(Supreme Court of California. June 7, 1924.)

1. States 🔑62—Act prohibiting payment of accountancy board's expenses from state treasury held not repealed or modified.

St. 1905, p. 382, § 1, amending St. 1899, p. 110, § 1, did not repeal or modify St. 1901, p. 645, § 2, subdivision 4 of which prohibits payment of accountancy board's expenses from state treasury, so as to require board to pay fees collected by it into state treasury on controller's demand, in view of Pol. Code, § 454.

2. Statutes 🔑219—Contemporaneous construction by executive officers persuasive.

Contemporaneous construction of statutes by officers charged with duty of executing them is persuasive.

3. Statutes 🔑162, 225½—General held not to repeal prior special act, unless irreconcilably inconsistent; special act prevails as against later general act treating of same subject.

General statute, treating of same subject as prior special statute, will not be held to have repealed latter, unless irreconcilably inconsistent, but special act will prevail, so far as subject-matter is within its particular provisions.

4. States 🔑76—Fees collected by state board of accountancy held not "moneys belonging to state" within act requiring payment into state treasury; "public moneys."

Moneys collected and disbursed by state board of accountancy under St. 1901, p. 645, § 2, subds. 4, 7, for expenses, are not "moneys belonging to the state" required to be paid into state treasury by St. 1905, p. 382, amending St. 1899, p. 110, § 1, though they are "public moneys" in sense that they cannot be charged or collected without legislative authority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Money.]

5. States 🔑58—Act authorizing state board of accountancy to charge and collect fees held not impliedly repealed.

Budget amendment (Const. art. 4, § 34), and St. 1923, pp. 242, 247, § 1, appropriating money for support of state board of accountancy, and providing that amounts therein appropriated shall govern, did not impliedly repeal St. 1901, p. 645, § 2, subdivision 4 of which authorizes board to charge and collect fees to meet expenses which must be paid from current receipts.

6. States 🔑132—Appropriation for support of state accountancy board held not available to it.

As budget bill (St. 1923, pp. 242, 247, § 1), appropriating sum for support of state board of accountancy, did not repeal or disturb operations of board as self-supporting board under St. 1901, p. 645, creating it, such appropriation from general funds of state is not available to such board.

In Bank.

Application by Ray L. Riley, as State Controller, for writ of mandate to compel John F. Forbes and others, as members of and constituting State Board of Accountancy, to pay money into state treasury. Peremptory writ denied.

Ralph W. Smith and Wesley E. Marten, both of Sacramento, and Louis B. Diavila, of Oakland, for petitioner.

Allen G. Wright, of San Francisco (Wright & Wright & Stetson, of San Francisco, of counsel), for respondents.

SHENK, J. The petitioner, as controller of the state of California, instituted this proceeding in mandate to compel the respondents, as members of and constituting the state board of accountancy, to account to the petitioner for and to pay into the state treasury all moneys received by the respondents and alleged by the petitioner to be moneys belonging to the state during the months of July, August, September, October, and November, 1923.

There is no dispute as to the facts. The only question for determination is as to the legal obligation of the respondents to account for the moneys so received and to pay the same over as demanded. The petitioner bases his claim first on the provisions of section 1 of an act of March 17, 1899 (Stats. 1899, p. 110), as amended in 1905 (Stats. 1905, p. 382). The section as originally enacted required that—

> "All moneys belonging to the state, received from any source whatever, by any commission or commissioner, by the board of trustees, board of managers, board of directors, or executive officer, as the case may be, of any state hospital, asylum, prison, school, or harbor, supported by or under the control of the state, shall be accounted for at the close of each month to the state controller, in such form as the controller may prescribe, and at the same time, on the order of the controller, be paid into the state treasury, and credited to a fund to be known as the contingent fund of the particular institution from which such moneys are received, and the same shall be expended under the same laws and provisions as now govern the expenditure of moneys appropriated for the support of such institutions. * * *"

As amended in 1905 (Stats. 1905, p. 382), the foregoing section was made to read as follows:

> "All moneys belonging to the state received from any source whatever by any officer, commission or commissioner, board of trustees, board of managers or board of directors, shall be accounted for at the close of each month to the state controller, in such form as the controller may prescribe, and at the same time, on the order of the controller, be paid into

the state treasury; provided, in the case of any state hospital, asylum, prison, school or harbor, supported by or under control of the state said money shall be credited to a fund to be known as the contingent fund of the particular institution from which such money is received, and may be expended under the same laws and provisions that govern the expenditure of money appropriated for the support of such institutions. * * *"

This section was again amended in 1906 (Stats. 1906, p. 43), but in no way affecting the questions now under consideration. It is contended by the petitioner that the general language of the amendment of 1905 brought the respondent board within the scope of its provisions.

The respondent board was created by an act approved March 23, 1901 (Stats. 1901, p. 645). Section 1 of the act provides for the appointment of five members of the board by the Governor. In section 2 it is provided that the board shall have its offices in the city and county of San Francisco, and prescribes its powers and duties in examining and certifying applicants to practice as certified public accountants. Subdivision 4 of this section provides that the board shall have power, and it shall be its duty, "to charge and collect from all applicants such fee, not exceeding twenty-five dollars, as may be necessary to meet the expenses of examination, issuance of certificates and conducting its office; provided, that all such expenses, including not exceeding five dollars per day for each member while attending the sessions of the board or conducting examinations, must be paid from the current receipts, and no portion thereof shall ever be paid from the state treasury." Subdivision 7 of the section requires the board "to report annually to the Governor, on or before the first day of December, all such certificates issued or renewed, together with a detailed statement of receipts and disbursements; provided, that any balance remaining in excess of the expenses incurred may be retained by the board and used in defraying the future expenses thereof." The respondent board was organized pursuant to the provisions of said act of 1901, and has continued to function as such thereunder. It has received and disbursed its own funds, and has made its annual report to the Governor as required. No demand was made upon the respondent to account to the controller for moneys received and pay the same into the state treasury until after the enactment of the budget bill in 1923.

[1] It is apparent from the general language of the act of 1899 as amended in 1905 that the Legislature did not intend to reach out and commit to the general funds of the state the revenues of the respondent board under the act of 1901. There is no provision of that amendment which would permit the payment of such revenues into any but the general fund of the state. The general fund consists of moneys received into the treasury and not specially appropriated to any other fund. Section 454, Pol. Code. The amendment of 1905 makes specific provision for crediting moneys received from any state "hospital, asylum, prison, school or harbor" to a special or contingent fund for the support of the particular institution mentioned, and a familiar rule of construction would exclude the creation of special funds under the act for the support of other boards or institutions paying money into the treasury under the general terms of the act. If the respondent board had complied with the requirements of the act of 1905 from the time of its enactment, and paid the moneys received by it into the state treasury, we find no provision of law by virtue of which such moneys could have been withdrawn for the support of the respondent board. Furthermore, the terms of the act of 1901, in language appropriate to the subject, would have precluded such payment, for it is provided in subdivision 4 of section 2 of the act that all expenses of the board must be paid from its current receipts, "and no portion thereof shall be paid from the state treasury." In other words, if the respondent board had acceded to the requirements of the general language of the amendment of 1905 from and after its enactment, and had paid its revenues into the state treasury, and had sought a controller's warrant on the treasury of the state for its expenses, the controller would have been confronted with the specific inhibition of the statute against any payment for such purposes from the state treasury. We cannot conclude that the general language of the amendment of 1905 had the effect of repealing or modifying the act of 1901, as contended by petitioner.

[2] This construction of the statutes in question seems to have been followed by both the respondent board and by the state controller during all the time from 1905 to 1923, a period of over eighteen years. Such contemporaneous construction is persuasive in support of the contention of the respondent. In United States v. Philbrick, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559, it was said:

> "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned."

To the same effect see United States v. Johnston, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389; Railroad Comm'rs v. Market Street Ry. Co., 132 Cal. 677, 64 Pac. 1065; and Comstock v. Davis, 44 Cal. App. 275, 186 Pac. 380.

[3] The evident purpose of the act creating the respondent board was to make it self-supporting. It treats of but one subject,

and as against the general language of the amendment of 1905 the respondents have invoked, and we think properly so, the rule of construction that, "where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions." Bateman v. Colgan, 111 Cal. 580, 44 Pac. 238; Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Matter of Petition of Johnson, 167 Cal. 142, 138 Pac. 740. We find no irreconcilable inconsistency between the two acts. When read together they would mean that under the general language of the amendment of 1905 all state departments and agencies properly coming within its terms and receiving money belonging to the state shall account for and pay the same into the state treasury, but as to the state board of accountancy the expenses for its maintenance and support and compensation to its members for official services rendered shall be paid from fees collected from applicants for certificates to practice as certified public accountants, and none of said expenses shall ever be paid from the state treasury. Judge Cooley has stated the rule thus:

> "The repugnancy between two statutes should be very clear to warrant a court holding that the one later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect." Cooley's Constitutional Limitations (6th Ed.) p. 182.

[4] It is also insisted by the respondent that the amendment of 1905 is not applicable to the board for the reason that the moneys collected and disbursed by it under the act of 1901 are not "moneys belonging to the state," in the sense in which this phrase is there used. The petitioner resists this contention, but cites no authority in support of his position. On the other hand, the respondents have called attention to several cases in other jurisdictions which seem to be directly in point. In Ex parte Lucas, 160 Mo. 218, 61 S. W. 218, the Supreme Court of Missouri had under consideration an act of the Legislature creating a board of examiners for barbers, providing for the issuance of licenses to barbers upon the payment to the board of certain specified fees, and providing that the members of the board should receive a compensation of $3 per day and railroad and traveling expenses to be paid out of any moneys in the hands of the treasurer of the board. The petitioner in that case was arrested for engaging in the occupation of a barber without a license, and on habeas corpus proceedings contended that the act in question was in violation of the provisions of section 43 of article 4 of the Constitution of Missouri, which provided that all moneys received by the state from any source whatever should go into the state treasury and not be withdrawn therefrom except pursuant to a regular appropriation under the law. The contention was held not well founded for the reason, as stated by the court, "that section 43 of article 4, applies only to money provided for and received by the state. The money authorized to be collected under this act is not state revenue, but is simply a provision to make the board of examiners self-supporting."

In State v. Clausen, 51 Wash. 548, 99 Pac. 743, the Supreme Court of the state of Washington had under consideration an act passed by the Legislature of that state in 1891 providing for the location and maintenance of the state college of Washington. The institution derived its revenues in part from the general and state governments, in part from the students for rent, and in part from the sale of agricultural products. During the year 1908 the treasurer of the board of regents lawfully received from sources other than the general and state governments something over $7,000 which he deposited in the state treasury under the belief that he was required to do so. The respondent state auditor refused to honor the demand on behalf of the regents of the college to withdraw the sum so deposited, basing his refusal on an act of 1907 (Laws 1907, p. 179), which provided in part as follows:

> "That it shall be the duty of each state officer or other person (other than county treasurers) who is authorized by law to collect or receive moneys belonging to the state or to any department or institution thereof, to transmit to the treasurer of the state each day, all moneys collected by him on the preceding day, together with a statement of the source from which each item of said money was derived, and to transmit to the state auditor a duplicate of said statement." Section 1.

The question involved was whether such funds were "the finances of the state" or "moneys belonging to the state," as contemplated by the act of 1907. It was held that, while the "finances of the state in its broad sense would probably include the money deposited by the college with the state treasury," still it was "apparent that the Legislature did not intend by this general language to reach out and include the fund in controversy."

In People v. Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344, the Court of Appeals of New York decided that an act of the Legislature of that state providing that two-thirds of the revenues derived from licenses authorized to be issued under the act should belong to the city or town in which the same was collected, to be used in defraying the expenses of the local government, was not an appropriation of "public moneys," and did not violate the provisions of the state Constitution forbidding the appropriation of such moneys for local purposes without a two-thirds vote of the Legislature.

It may well be assumed that the moneys collected by the respondent board are "public moneys" in the broad sense of the term. They are funds over which the Legislature has control in the first instance; that is to say, they may not be charged or collected without legislative authority. But, when the Legislature has acted with reference thereto, and has directed that the same shall be collected and disbursed in a particular way for a particular purpose under the circumstances here shown, and not in accordance with the general statutes concerning the collection and disbursement of funds paid into the state treasury, it may reasonably be concluded that the Legislature intended that such funds should be devoted to the support of the respondent board until otherwise specifically ordered by the lawmaking power, and should not be deemed "moneys belonging to the state," as contemplated by the general language of the amendment of 1905.

[5] It is next contended by petitioner that, even if the act of 1905 did not disturb the operation of the respondent board under the act of 1901, the adoption of the budget amendment to the Constitution (Const., art. 4, § 34) and the provisions of the budget bill (Stats. 1923, p. 242) had the effect of repealing the act of 1901 in so far as the latter act constituted an authorization to the respondent board to retain and disburse such revenues in accordance with its provisions.

The budget amendment to the Constitution requires the Governor to submit to the Legislature a budget containing a complete plan and itemized statement of all proposed expenditures of the state provided by existing law or recommended by him "of all its institutions, departments, boards, bureaus, commissions, officers, employees and other agencies, and of all estimated revenues," and to submit with the budget an appropriation bill covering the proposed expenditures. The budget bill enacted pursuant to the constitutional amendment contains an appropriation relating to the state board of accountancy in the following language: "For support, state board of accountancy, five thousand thirty dollars." Stats. 1923, p. 247. The budget bill contains the following language relative to the effect of appropriations therein contained on existing statutory provisions for items of salary or support included in the act: "In all cases in which statutory provisions or appropriations have been made for items of salary or of support included in this act the amounts herein appropriated shall govern, and such other appropriations shall not be deemed in addition hereto," (section 1) and it is contended by petitioner that, inasmuch as the Legislature has made the appropriation hereinbefore referred to, all authority for expenditures for compensation to the members of the board and expenses provided for by the act of 1901 has been abrogated. This contention is not well taken unless a repeal of said act, either expressly or by necessary implication, has been accomplished by the budget bill. It is not contended that an express repeal has taken place, but it is insisted that there is such a conflict between the budget bill and the act of 1901 as to constitute a repeal of the latter by implication. The effect of the budget amendment and the provisions of the budget bill on certain existing statutes providing for the disposition of moneys collected and disbursed under the authority of such statutes has been construed by this court in numerous so-called "budget cases." Railroad Commission v. Riley, 218 Pac. 415; Keiser v. State Board of Control, 218 Pac. 1016; Jamme v. Riley, 218 Pac. 578; Western Shore Lumber Co. v. Riley, 218 Pac. 761; Board of Osteopathic Examiners v. Riley, 218 Pac. 1018.

It was held in Railroad Commission v. Riley, supra, that the budget constitutional amendment did not repeal by implication any prior appropriation bill validly enacted by a previous Legislature, and that the budget bill did not operate as an implied repeal of all appropriations provided for by statutes preceding the budget bill nor do away with all special funds and convert such funds into a part of the general funds of the state. It was said in that case:

> "In the absence of some specific provision in the budget bill requiring that the special funds be transferred to the general fund, it would seem that the legislative intention is clearly shown to be that such special funds shall remain intact as special funds."

This construction of the constitutional amendment and of the budget bill was followed and approved in the other budget cases above cited.

The situation here presented is still stronger for respondent. Here we are not dealing with any special fund in the state treasury but with a fund of a self-supporting agency of the state concerning which the Legislature in effect has stated in the act of 1901 shall not be paid into the state treasury.

[6] It is urged by the petitioner that, if the respondent board is to continue, notwithstanding the budget bill, to collect and disburse the funds as provided for in the act of 1901, the said board "would not be limited for its operating expenses, charges and salaries to the fees and commissions alone, but would also receive the fund set apart in the budget bill for materials, supplies, services and expenses." But, since the

provisions of the budget bill did not repeal or disturb the operations of the respondent board as a self-supporting board under the act of 1901, we conclude that the items of appropriation in the budget bill purporting to set apart moneys from the general funds of the state for the support of the respondent board are not available to said board so long as it continued to function under its own act. It should be said, however, that in this proceeding we are not called upon to consider or determine the question of whether or not the amounts specified in the budget bill and relating to the respondent board constitute a limitation upon the expenditures which said board may make during the fiscal years mentioned in said budget bill.

The peremptory writ is denied.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, Justice pro tem.

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193 Cal. 773

RILEY, State Controller, v. THOMPSON et al., Board of Pilot Commissioners.

(S. F. 10946.)

(Supreme Court of California. June 10, 1924.)

1. Pilots 🔑4—Percentage of pilots' fees paid to pilot commissioners not "moneys belonging to the state" to be accounted for and paid into state treasury.

While members of board of pilot commissioners are state officers (Pol. Code, § 368), and authorized to license pilots (section 2457), fees collected by licensed pilots, as authorized by sections 2465, 2466, and percentage paid to commissioners, as required by section 2460, are not "moneys belonging to the state," within St. 1899, p. 110, § 1, as amended by St. 1905, p. 382, § 1, requiring that all such moneys be accounted for and paid into state treasury.

2. Statutes 🔑219—Contemporaneous construction by executive officers entitled to great weight.

Contemporaneous construction of statutes by officers charged with duty of executing them for many years is entitled to great weight, and should not be overturned, unless clearly erroneous.

3. Pilots 🔑4—Act requiring payment of part of fees to board of pilot commissioners for salaries and expenses held not impliedly repealed.

Pol. Code, § 2460, requiring licensed pilots to pay 5 per cent. of fees collected to board of pilot commissioners for payment of salaries of employees and members and incidental expenses, was not impliedly repealed by budget amendment to Constitution (Const. art. 4, § 34) or budget bill (St. 1923, p. 247, § 1), appropriating money for salaries of employees and support of such board.

In Bank.

Application by Ray L. Riley, as State Controller, for writ of mandate to compel Andrew Thompson and others, as Commissioners and Board of Pilot Commissioners for Ports of San Francisco, Mare Island, and Benicia, to account for money received. Writ denied.

Ralph W. Smith and Wesley E. Marten, both of Sacramento, and Louis B. Diavila, of Oakland, for petitioner.

Pillsbury, Madison & Sutro, of San Francisco (F. D. Madison and M. D. L. Fuller, both of San Francisco, of counsel), for respondents.

SHENK, J. The petitioner seeks a writ of mandate to compel the respondents, as members of and constituting the board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia, to account to him as controller of the state of California for and to pay into the state treasury all moneys received by the respondents pursuant to section 2460 of the Political Code during the months of September, October, and November, 1923.

The respondent board was created by an act of the Legislature approved March 22, 1870 (Stats. 1869–70, p. 344). In 1872 this act in all its essential respects was codified and is found in sections 2429–2470 of the Political Code. Section 12 of the act was substantially re-enacted in section 2460 of the Political Code, the pertinent part of which is as follows:

> "Every pilot of the harbor of San Francisco, Mare Island, Vallejo, and Benicia must, once in each month, upon blanks to be furnished them by the board of pilot commissioners, render a verified account to the board of all moneys received by him, or by any other person for him, or on his account, and pay five per cent. thereof to the board, in full compensation for its official services, for the services of its secretary and treasurer, and all incidental expenses. * * *"

This section was amended in 1899 (Stats. 1899, p. 6), but in no way affecting this controversy. For nearly 53 years the respondent board has received these moneys from pilots in accordance with the provisions of said statute, and has disbursed the funds so received for expenses and for compensation to the members of the board for official services rendered.

After the adoption of the budget amendment (article 4, & 34, Const.), and the enactment of the budget bill (Stats. 1923, p. 242), the petitioner made demand on the respondents to render an account to petitioner of the moneys received from pilots as provided in said section 2460 of the Political Code. The petitioner bases his right to such accounting on section 1 of an act approved March 17, 1899 (Stats. 1899, p. 110), as amended on

March 20, 1905 (Stats. 1905, p. 382), and on June 14, 1906 (Stats. 1906, p. 43), on the budget amendment to the Constitution and on certain provisions of the budget bill.

Section 1 of the act of March 17, 1899, required an accounting to the state controller and payment into the state treasury of "all moneys belonging to the state" received by the board of trustees, board of managers, board of directors or executive officer in charge of any "state hospital, asylum, prison, school, or harbor." The amendment of March 20, 1905, assumed to make the requirement general in its application as follows:

> "All moneys belonging to the state received from any source whatever by any officer, commission or commissioners, board of trustees, board of managers or board of directors, shall be accounted for at the close of each month to the state controller, in such form as the controller may prescribe, and at the same time, on the order of the controller, be paid into the state treasury."

The amendment of June 14, 1906, did not change the wording of the section in the quoted portion nor in any other respect involving the question here under consideration.

It is contended by the petitioner that the moneys received by the respondents pursuant to said section 2460 are "moneys belonging to the state," as contemplated by the act of 1905. This contention is advanced upon the theory, as stated by counsel for petitioner, that the state board of pilot commissioners is a state agency; that the power to collect pilot fees is only by reason of governmental authority, and that, when a board or commission is created by legislative action, and is empowered by the lawmaking power of the state to charge and collect fees or commissions the moneys collected are a part of the state revenues and funds belonging to the state, and "can only be diverted by a specific appropriation by the Legislature."

[1] The members of the board of pilot commissioners are officers of the state. Section 368, Pol. Code. The board is authorized to license pilots. Section 2457, Pol. Code. When so licensed pilots are authorized to charge and collect fees from owners of vessels in accordance with rates provided by the statute. Sections 2465, 2466, Pol. Code. Money so charged and collected by pilots may not be said to be "moneys belonging to the state" when in the hands of the pilots. They are in the nature of fees or compensation for services rendered the same as is charged and collected by other officers, such as port wardens (section 2510, Pol. Code), notaries public (section 798, Pol. Code) and commissioners of deeds (section 815, Pol. Code). Pilots are required by said section 2460, Political Code, to account to the respondents for all moneys received by them, and to pay five per cent. thereof to the respondents for the purpose of paying the salaries of employees of the board, the incidental expenses of the board, and as compensation to members of the board for official services rendered. Does this payment by the pilots of five per cent. of their fees or pilotage for the purposes specified in said section 2460 convert the moneys so paid to the respondents into "moneys belonging to the state" as contemplated by section 1 of the act of 1905? We cannot conclude that it does. Such moneys may be public funds in the sense that they are acquired by the respondents under legislative authority and may be disbursed only for the uses and purposes specified in said section 2460, but they do not constitute moneys, an account of which must be made to the petitioner and which must be paid into the state treasury as required by the act of 1905. The evident purpose of section 2460 was to make the respondent board self-supporting. If the board may not disburse the funds so received under said section 2460, it is difficult to see how it could function as an agency of the state. We find no legislative authority for the payment of compensation to the members of the board or salaries for the employees of the board or incidental expenses of the board from the state treasury, unless, of course, as petitioner contends, the budget amendment or the budget bill constitutes such authority.

Petitioner has cited no authorities in support of his contention that the moneys so paid by pilots to respondents under the circumstances here shown are "moneys belonging to the state," and apparently there are none in this state. On the other hand, respondents have cited many cases in other jurisdictions which lend support to their contention that moneys received and disbursed under similar circumstances do not constitute "moneys belonging to the state." Ex parte Lucas, 160 Mo. 218, 61 S. W. 215; State v. Clausen, 51 Wash. 548, 99 Pac. 743; People v. Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344. These cases were cited and discussed in Riley v. Forbes (S. F. No. 10947) 191 Cal. ——, 227 Pac. 768, and need not be further commented upon.

[2, 3] The respondent board has continued to collect from pilots the percentage of pilotage provided for in section 2460 of the Political Code and prior enactments for nearly 53 years. The act of March 20, 1905, was in effect more than 18 years before the state controller made his demand upon the board of pilot commissioners for an accounting. We therefore have a contemporaneous construction of the statutes here under consideration by executive officers of the state extending over a long period of years which is entitled to consideration. As was said in United States v. Philbrick, 120 U. S. 52, 59, 7 Sup. Ct. 413, 417 (30 L. Ed. 559):

> "A contemporaneous construction by the officers upon whom was imposed the duty of ex-

ecuting those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned." Railroad Comm'rs v. Market Street Ry. Co., 132 Cal. 677, 64 Pac. 1065; Comstock v. Davis, 44 Cal. App. 275, 186 Pac. 380; Riley v. Forbes, supra.

We apprehend that the question now presented would not have arisen if it had not been for the enactment of the budget amendment of 1922 and the budget bill in 1923, the effect of which will next be considered.

The budget amendment to the Constitution requires the Governor to submit to the Legislature a budget containing a complete plan and itemized statement of all proposed expenditures of the state provided by existing law or recommended by him "of all its institutions, departments, boards, bureaus, commissions, officers, employees and other agencies, and of all estimated revenues," and to submit with the budget an appropriation bill covering the proposed expenditures. The budget bill enacted pursuant to the constitutional amendment contains an appropriation relating to the state board of pilot commissioners in the following language:

> "For salaries of employees of state board of pilot commissioners, two thousand four hundred dollars. For support, state board of pilot commissioners, one thousand one hundred dollars." Stats. 1923, p. 247.

The budget bill contains the following language relative to the effect of appropriations therein contained on existing statutory provisions for items of salary or support included in the act: "In all cases in which statutory provisions or appropriations have been made for items of salary or of support included in this act the amount herein appropriated shall govern, and such other appropriations shall not be deemed in addition thereto," and it is contended by petitioner that, inasmuch as the Legislature has made the appropriation hereinabove referred to, all authority for expenditure for salaries and expenses provided for by said section 2460 has been abrogated. This contention is not well taken, unless a repeal of said section, either expressly or by necessary implication, has been accomplished.

It is not urged, and, of course, could not be properly contended, that an express repeal has taken place. It is insisted, however, that there is such an irreconcilable conflict between the budget bill and section 2460 of the Political Code as to effect a repeal of the latter by implication. This contention cannot be sustained. The effect of the budget amendment and the provisions of the budget bill on certain existing statutes providing for the disposition of moneys collected and disbursed under the authority of such statutes has been construed by this court in numerous so-called "budget cases." Railroad Commission v. Riley, 218 Pac. 415; Keiser v. State Board of Control, 218 Pac. 1016; Jamme v. Riley, 218 Pac. 578; Western Shore Lumber Co. v. Riley, 218 Pac. 761; Board of Osteopathic Examiners v. Riley, 218 Pac. 1018; Riley v. Forbes, supra.

It was held in Railroad Commission v. Riley, supra, that the budget constitutional amendment did not repeal by implication any prior appropriation bill validly enacted by a previous Legislature, and that the budget bill did not operate as an implied repeal of all appropriations provided for by statutes preceding the budget bill nor do away with all special funds and convert such funds into a part of the general funds of the state. This construction of the constitutional amendment and of the budget bill was followed and approved in the other budget cases above cited.

It should be noted that section 2460 of the Political Code is not a measure appropriating funds in the state treasury not otherwise appropriated, nor does it create a special fund in the state treasury applicable to the purposes therein contemplated. It does, however, constitute statutory authority for the collection and disbursement of funds over which the Legislature has control. By its authority the board of pilot commissioners receives the money direct from the pilots and disburses the same in paying the salaries of the secretary and treasurer of the board, in defraying the necessary expenses of the board and as compensation to the members of the board for official services rendered, and is in effect a "statutory provision" for items of salary and support as contemplated by section 1 of the budget bill. It will also be noted that the appropriations in the budget bill make no provision for the item of salary or other compensation to members of the board of pilot commissioners for official services rendered, and it is impossible to segregate the moneys which the board is authorized to collect and disburse under said section 2460 so as to determine what portion is for compensation to the members and what portion is to be applied to the salaries of employees and incidental expenses, for the reason that the revenues of the board are dependent upon pilotage collected, and are not subject to definite ascertainment. The salaries of employees of the board and incidental expenses must first be met, and the members of the board receive for their compensation only the residue. An examination of the appropriations in the budget bill for the various departments of the state government discloses that a distinction is made between items for salary or compensation to members of boards and other officers and expenditures otherwise required for conducting the official business of the state departments. Whenever an appropriation is intended as compensation to the members of a board or other officers, it is so designated under the head of "salaries." Other items appear under the heading "support." The sole items mentioned in connection with the respondent board are for "salaries of employees" of the board and for "support." It cannot be assumed that the Legislature intended to deny compensation to the members of the respondent board as provided for in said section 2460 of the Political Code. The case of State v. Jorgensen, 31 N. D. 563, 154 N. W. 525, involved the effect of an appropriation for salaries of tax commissioners in the budget bill of 1915 of the state of North Dakota on a prior legislative enactment fixing the salaries of such officials at a specified amount. The budget item provided for the salary of but one member, whereas the prior statute provided for a salary for each of the three members of the board. The court decided that it could not be concluded that the Legislature in the enactment of the budget bill intended to deprive the other two members of the board of all compensation, and held the appropriation as made an inadvertence and a nullity. So here, the budget bill having made no provision for compensation of the members of the respondent board, it cannot be assumed, in the absence of language evidencing the purpose so to do, that the Legislature intended to deprive the members of the board of compensation for official services rendered. It is also apparent that the situation here disclosed is one contemplated at least in part by the saving clause included in the budget bill, wherein it is provided in section 1:

> "Appropriations for purposes not otherwise provided for herein which have been heretofore made by any provision of the Constitution or of any existing statute shall not be affected by this act but shall continue to be governed by the constitutional or statutory provision applicable thereto."

All of the purposes of section 2460, Political Code, particularly that portion relating to compensation to members of the board for official services rendered, are "not otherwise provided for" in the budget bill. We think it clear from an inspection of the budget bill not only that appropriations in the strict sense under existing statutes, but also that moneys collected under existing statutes, should be disbursed under the provisions of those statutes when not otherwise effectively provided for in the budget bill.

Inasmuch as the attempted appropriation for the respondent board is ineffectual to cover the items provided for in said section 2460, and as said section has not been repealed, it would follow that the respondent board would continue to operate under said section 2460 until otherwise provided by the Legislature.

The peremptory writ is denied.

We concur: MYERS, C. J.; LENNON, J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; LANGDON, Justice pro tem.

194 Cal. 37

BOARD OF FISH AND GAME COMMISSIONERS OF CALIFORNIA v. RILEY, State Controller. (S. F. 11042.)

(Supreme Court of California. June 12, 1924.)

1. States 🔑131—Fish and game preservation fund held not affected by budget amendment to Constitution and budget bill.

St. 1909, p. 392, St. 1911, p. 807, St. 1913, p. 986, St. 1915, p. 685, St. 1917, pp. 470, 688, and St. 1921, p. 470, creating and regulating fish and game preservation fund, constituted continuing appropriation, which was not abrogated or affected by budget amendment (Const. art. 4, § 34), or budget bill (St. 1923, pp. 242, 253, § 1), as originally enacted or as later modified by Governor, under Const. art. 4, § 16.

2. States 🔑133—Board of control may authorize expenditures from fish and game preservation fund on exhaustion of appropriation.

Under Pol. Code, § 680, appropriation in budget law (St. 1923, pp. 242, 253, § 1) for fish and game commission having been exhausted, board of control, with Governor's consent, could legalize further expenditures, from fish and game preservation fund provided for by St. 1909, p. 392, St. 1911, p. 807, St. 1913, p. 986, St. 1915, p. 685, St. 1917, pp. 470, 688, and St. 1921, p. 470.

In Bank.

Application by Board of Fish and Game Commissioners of the State of California for writ of mandate to compel Ray L. Riley, State Controller, to aprove and draw warrant on state treasury. Writ granted.

R. D. Duke, of San Francisco, for petitioner.

Ralph W. Smith, of Sacramento, for respondent.

RICHARDS, J. The petitioner herein seeks a writ of mandate to compel the respondent as state controller to approve and draw his warrant for the claim of the petitioner for the sum of $301.56, which, according to the petitioner's contention, is now payable out of the fish and game preservation fund. The facts upon which the petitioner's said claim is predicated and which are not disputed on this proceeding are as follows: In the year 1909 the state Legislature (Stats. 1909, p. 392) adopted an act providing for the creation of a special fund to be kept in the state treasury and be applicable to the payment of the expense of propagating, protecting, restoring, and introducing game fish into the public waters of this state, and also to the propagation, protection, restoration, and transferring of game birds and animals in, and to their introduction into, this state, which fund was to be designated as the "fish and game preservation fund." The administration of said special fund was by an amendment to said act, adopted in 1911

(Stats. 1911, p. 807), placed in the hands of the board of fish and game commissioners, and was made applicable to the payment of the expense of promoting the objects of its creation upon the approval of said board. From time to time thereafter this special fund was repleted from various sources, but chiefly from the issuance of licenses for the exercise of the privilege of fishing or hunting and from fines collected for the violation of the fish and game laws of the state. Stats. 1913, p. 986; 1915, p. 685; 1917, pp. 470, 688; 1921, p. 470. From the time of the original creation of the special fund in 1909 down to the date of the adoption of the so-called budget amendment to the state constitution and to the passage pursuant to its terms of the budget act of 1923 no further act of appropriation by the Legislature was made or was apparently deemed necessary to the full use of the money from time to time collected and deposited in this special fund, the foregoing acts being apparently deemed sufficient to create and provide for a continuing appropriation of the moneys in this fund to the purposes for which it was created. There is at present in this fund, according to the averment of the petition herein, a sum in excess of $280,000 applicable to the purposes of its creation.

At the general election of 1922 the so-called budget amendment to the state Constitution was adopted (Const. art. 4, § 34), and thereafter and pursuant to its terms the Governor presented to the Legislature of 1923 the budget provided for in said amendment, accompanied by an appropriation bill covering the proposed expenditures provided for in said budget and known as the budget bill. In the course of its said session the Legislature passed the act known as the budget act purporting to make the appropriations as outlined in said budget bill with such changes in and additions thereto as were deemed proper by the members of said Legislature. In so doing, and in dealing with the matter of providing funds for the functioning of the fish and game commission, the Legislature undertook to appropriate "for salaries, support and permanent improvements for the fish and game commission, such sum or sums as are provided in chapter two hundred fifty-six, statutes of nineteen hundred nine and all amendments thereto, such payments to be made from the fish and game preservation fund created thereby." Stats. 1923, pp. 242, 253. The Governor, in the exercise of his constitutional power (Const. art. 4, § 16), objected to certain of the items of appropriation embraced in said budget bill as enacted by the Legislature, and appended to the said bill at the time of signing it a statement of the items to which he thus objected. Among these was the aforesaid item embracing the appropriation for the fish and game commission. His objection thereto was in the following form:

> "I object to the item on page 14 [253] under the heading 'Developmental,' reading as follows: 'For salaries, support and permanent improvements for the fish and game commission, such sum or sums as are provided in chapter two hundred fifty-six, statutes of one thousand nine hundred nine and all amendments thereto, such payments to be made from the fish and game preservation fund created thereby,' and reduce the same to 'For salaries of officers and employees of the fish and game commission, four hundred thirty-eight thousand three hundred seventy dollars. For support of the fish and game commission, three hundred seventy-one thousand one hundred fifty dollars,' for the reason that the last-named sums are ample. The amendments proposed by the Legislature might leave the fish and game commission without any appropriation at all."

The appropriation thus objected to and thus modified became a law, and thus the general allowance made by the Legislature to the fish and game commission of the full amount of money in the special fish and game preservation fund, created by the act of 1909, above referred to, and the amendments thereto, was by the Governor's said action limited to the particular sums for salaries and support of the fish and game commission specified in his said objection. It is to be noted, however, that the Governor did not in his said objection and specification as to the specific funds to be available during the biennium to the commission change the statement of the statute as to the particular fund from which the amounts therein provided for the salaries and support of the commission were to be paid.

[1] In the several cases which have been brought before this court since the adoption of the budget amendment to the Constitution and the passage and modification of the budget bill and law we have had occasion to interpret both of these organic and statutory forms of law. In the case of Railroad Commission v. Riley, Controller, etc. (Cal. Sup.) 218 Pac. 415, it was held that the effect of the budget amendment and of the budget bill was not to work a repeal, either expressly or by implication, of the provisions of the Public Utilities Act (Stats. 1915, p. 115) creating the "Railroad Commission Fund" and appropriating the same to the uses of the commission, but that said act and said fund remained and were valid existing provisions of law. In the case of Jamme v. Riley, etc. (Cal. Sup.) 218 Pac. 578, it was held that the effect of the budget amendment and budget bill was not to repeal the act of 1921 (Stats. 1921, p. 980), providing for the better education of nurses and creating a special fund for the purpose upon which warrants by the state controller were to be drawn, but was that of placing a limitation upon the amounts available for such purposes from such existing and special fund. In the case of Western Shore Lumber Co. v.

Riley, etc. (Cal. Sup.) 218 Pac. 761, it was held that the adoption of the budget amendment and enactment of the budget bill did not repeal the act of 1917 (Stats. 1917, p. 1281) creating a special fund for the enlargement of California Redwood Park and making a continuing appropriation therefor to be placed in a special fund upon which warrants for such purposes were thereafter to be drawn. In the case of Osteopathic Examiners, etc., v. Riley, etc (Cal. Sup.) 218 Pac. 1018, it was held that the initiative law of 1922 (St. 1923, p. xciii), providing for the formation of a board of osteopathic examiners and for the creation through a system of fees and collections of moneys for the support of said self-sustaining board which were to be deposited in the state treasury in a special fund upon which warrants were to be drawn for the salaries, costs, and expenses of said board was not repealed or modified in this respect by the provisions of the budget amendment or budget bill. In this case also the appropriation provided for in said initiative law as well as the special fund into which the moneys derived from its operation were to be placed was in the nature of a continuing appropriation of such moneys to such purposes and to such special fund. In the case of Riley, etc., v. Forbes, etc. (Cal. Sup.) 227 Pac. 768, it was decided that the provisions of the act of 1901 (Stats. 1901, p. 645), creating the state board of accountancy, providing for the charge, collection, and expenditure of fees in the course of its functioning to pay the current expenses of such self-sustaining board, was not repealed by the provisions of the budget amendment nor abrogated by the provision of the budget bill (Stats. 1923, p. 247) making a specific appropriation for the support of the state board of accountancy but not specifying any particular fund upon which the warrants for such appropriations should be drawn, and that the state board of accountancy, notwithstanding the foregoing specific appropriation in the budget bill or any other provision contained therein, had a right to have its said fund retained in the form of its original creation and expended to the limit of said appropriations, but otherwise unaffected by the provisions of the budget amendment and budget bill. In the still more recent case of Riley, etc., v. Thompson, etc. (Cal. Sup.) 227 Pac. 772, it was held that the petitioner as state controller was not entitled to a writ of mandate to compel the payment into the general fund in the state treasury of the moneys charged in fees and collected by the board of pilot commissioners under earlier acts and later sections of the Political Code creating said board, providing for the collection of such fees and for the disbursement as heretofore of a certain portion thereof directly by said board; and that as to such disbursements section 2460 of the Political Code providing therefor was unaffected by the provisions of the budget amendment or budget bill. The effect of the foregoing decisions by this court upon the situation presented by the instant case is to establish as settled law the proposition that the statutes of 1909 and 1911 creating the special fund in the state treasury known and designated as the fish and game preservation fund, as well as the several later enactments providing the sources of its accretion and the purposes of its disbursement under the direction and approval of the fish and game commission, created and constituted both a continuing fund and a continuing appropriation of the moneys deposited therein pursuant to said enactments, and that said special fund so created and so to be disbursed was not abrogated or otherwise affected by the provisions of the budget amendment or budget bill either as originally enacted or as later modified by the action of the Governor above referred to, except in so far as the Governor's said action carried into the budget law might be held to impose a limitation upon the amount of money available to the commission during the biennium provided for in said budget bill. The effect of these rulings upon the instant situation would seem to compel the conclusion that the special fund created by the act of 1909 and subjected to the control of the fish and game commission under the amendment to said act made in 1911 and known and designated as the "fish and game preservation fund" still exists, and is still applicable to the uses and necessities of the fish and game commission, and that the appropriation of the moneys collected therefor and deposited therein under the various acts of the Legislature relating thereto constitutes a continuing appropriation of such moneys to such uses and necessities; that the applicability of the moneys deposited in such fund to such uses and necessities has not been affected by the provisions of the budget amendment or budget bill or by the action of the Governor in his modification of the terms of said budget bill, but that the present availability of whatever balance remains and is in said special fund has been limited by and to the specific sums set forth in the Governor's said modification to said budget bill and which became in due course a part of the present budget law.

[2] This conclusion brings us to the particular situation presented by the instant proceeding. The petitioner herein alleges in effect that on the 28th day of January, 1924, there existed in the fish and game preservation fund a sum of money in excess of $280,000, consisting of moneys received from sales of hunting and fishing and other licenses and from fines and forfeitures imposed under and by virtue of the various acts of the Legislature providing for such accretions to such fund; that on the said 28th day of January, 1924, there existed a deficiency in the funds presently available to the fish and game com-

mission due to the exhaustion of the support appropriation for the fish and game commission for the seventy-fifth fiscal year as appears from the contents of Exhibit A appended to and made a part of its petition. The support appropriation thus referred to has reference evidently to the amounts allowed to the fish and game commission in the budget bill as modified by the Governor's action thereon, and which amount had upon said date been equaled or exceeded by the expenditures of the commission since the going into operation and effect of the provisions of the budget law. The petition proceeds to allege that upon the 28th day of January, 1924, the board of control, acting under the provisions of section 680 of the Political Code and with the approval of the Governor as provided for in said section, authorized the creation of a deficiency to the extent of $5,695 in said appropriation upon the finding by said board of control that said appropriation had been exhausted and that there existed an actual and unavoidable necessity for the creation of such deficiency in order to meet the expenses of the commission for the balance of said fiscal year. The action of the board of control and of the Governor in so finding and in so doing is set forth in the resolution of that body with the Governor's approval indorsed thereon appended to said petition. The petitioner alleges that thereafter and pursuant to such action it duly issued and presented its duly audited claim for the sum of $301.56, representing a proper expenditure by said commission for supplies incident to its activities, which said claim, after being duly audited and approved by the board of control, was presented to the state controller, the respondent herein, in order to have a warrant therefor drawn upon the state treasury for the payment of said claim; that the said controller refused to draw his warrant therefor upon the ground, as set forth in his letter of refusal appended to set petition, that no appropriation has been made by the Legislature for the payment of said claim. Wherefore the petitioner herein applies for a writ of mandate to compel the respondent to draw his warrant upon the proper fund in the state treasury for the payment of said claim. The immediate question which is presented for our consideration upon the foregoing state of facts is that of the interpretation to be placed upon and the effect to be given section 680 of the Political Code and to the action of the board of control thereunder and with the approval of the Governor as provided for therein. Section 680 of the Political Code was first enacted in its present form in the year 1911, and in the course of a revision by the Legislature of article 18 of title 1, part 3, of said Code, by which revision the board of control was created and invested with the powers and duties which it has since exercised. It may be stated incidentally, but not unimportantly, that the board of control was created and proceeded to function coincidentally with the creation and functioning of a goodly number of other boards and commissions which, in that or the immediately following sessions of the Legislature, were invested as agencies of the state with a variety of powers and duties which involved the collection and expenditure of public money derivable through their varied activities and to be expended in their diversified activities. Section 680 of the Political Code reads as follows:

> "The board, with the consent of the Governor, shall have power to authorize the creation of deficiencies in any appropriations of money made by law in cases of actual necessity, and shall authorize the payment of deficiencies out of any money which may be appropriated for such purpose. No deficiency shall be authorized except upon the written authority, first obtained, of a majority of the members of the board and of the Governor. Any indebtedness attempted to be created against the state in violation of these provisions shall be null and void and shall not be allowed by the board of control or the controller."

The portion of said section which first requires interpretation is that wherein the board of control, with the consent of the Governor, is invested with power "to authorize the creation of deficiencies in any appropriations of money made by law in cases of actual necessity." The evident intent of the Legislature in the use of this language was that of empowering the board of control with the Governor's consent to validate or render legal, in so far as lay within its power to do so, the expenditure of money by boards or officers of the state in excess of the sum or sums available for their respective expenditures by virtue of appropriations made by the Legislature, and in cases of actual necessity requiring such additional expenditures in order to the proper functioning of said respective agencies of the state. This is an entirely reasonable interpretation to be given to said clause in said section, and applying it as thus interpreted to the immediate case before us it would mean that the appropriation which had been made by the Legislature of 1923 in the budget law for the functioning of the fish and game commission for the seventy-fifth fiscal year, having been exhausted, and an actual necessity for further expenditures in excess of that appropriation having arisen, as found by said board of control, that body was granted power by the terms of said section of the Political Code and with the consent of the Governor. to legalize a further expenditure of money by the fish and game commission in excess of the specific amount provided for in said appropriation. Thus far the interpretation to be given the section of the Code in question is apparently plain sailing. The effect, however, of the exercise of the foregoing power by the board of control with the Governor's consent is to be determined by the succeeding clause in said section which provides that the board of control, having exercised the power to legalize the creation of deficiencies through the means of expenditures beyond the limit of a particular appropriation, "shall authorize the payment of deficiencies out of any money which may be appropriated for such purpose." It is the contention of the respondent herein that this clause in said section, read in conjunction with the clause which preceded it, means no more than that the board of control, which has thus authorized a particular board or officer of the state to create an indebtedness in excess of the limitations of the specific appropriations applicable to its expenditures, can only be granted authority to have such expenditure liquidated by the act of some subsequent Legislature consenting to make an appropriation "for that purpose." It is undoubtedly true that such would be the effect of the action of the board of control, with the Governor's consent, in authorizing the creating of an indebtedness by any state agency in excess of its specific appropriation if there were no other available means by which such excess indebtedness could be liquidated, except by a future legislative act making an appropriation for such purposes; but it would seem that, if that were the full extent of the meaning to be given to this second clause in said section in the Code, it would have been unnecessary to include it in the section at all, since the legalizing of an expenditure by such board of an amount in excess of its specific appropriation would in itself be sufficient to create a legal obligation against the state. It is true, it would not be an enforceable obligation in the absence of an act of the Legislature providing for its payment, but it would still be sufficient to create a moral obligation upon the Legislature to make such appropriation, and would also suffice to furnish such a consideration for its action in that regard as would serve to avoid the constitutional prohibition against the gift of public money. It would thus seem that the said second clause in said section, if deemed necessary to the section at all, must be given a broader meaning than that which the respondent herein would have us assign to it. The clause reads that the board, etc., "shall authorize the payment of deficiencies out of any money which may be appropriated for such purpose." It would appear at first glance that this clause, which is phrased subjunctively as to its mood, is not phrased in the future tense, and hence that without doing any violence to its grammatical construction it may be given a meaning which would render applicable to the payment of said deficiency indebtedness any money which either may have been or which may thereafter be appropriated for that purpose. This interpretation would also supply a reason for the inclusion of this clause in said section of the Code, since as to any moneys which had theretofore been appropriated, but were not in the absence of such authorization available, some such authorization would be required, while, as we have seen, it would not be required or necessary to justify or legalize a future legislative appropriation. The respondent, however, contends that the concluding phrase in said cause reading, "for such purpose," is to be given the limited meaning which would confine the appropriation mentioned to an appropriation made for the purpose of providing for such deficiency, thus of necessity limiting the applicability of said cause to future appropriations. We think, however, the phrase "for such purpose" can be given a broader meaning and one more in harmony, not only with what we deem the spirit and purpose of the section as a whole, but also more in keeping with our interpretation of the other clauses and portions thereof already passed under review. The "purpose" apparently intended by this phrase is that contemplated by the objects for the furtherance of which the particular board or officer was engaged in functioning and for which the specific appropriation had been made, and in the course of which its limitation in the matter of expenditures had been, or, in the judgment of the board of control, should be exceeded. Such an interpretation would be entirely in harmony with our construction of this clause in said section as a whole, since whatever existing appropriation might by the action of the board of control with the Governor's consent be authorized to be applied to the payment of such legalized indebtedness would of necessity be an appropriation which had been made for the purpose of paying those expenditures which the activities of the particular state agency seeking such relief had required.

The practical wisdom of this interpretation of said section will be apparent when we consider that the policy of our law is to discourage, if not forbid, except in cases of actual necessity, or of expenditures in permanent public improvements in excess of existing revenues, the creation of interest-bearing burdens upon the state or any of its operative agencies. Again applying these conclusions to the facts of the instant case and to the state of the law relating to the special fund in the state treasury known and designated as the fish and game preservation fund and to its condition and applicability to the purpose of the payment of the proper expenditures of the fish and game commission, whenever such expenditures, though in excess of the amounts provided for the support and expenses of said commission by the specific limitations of the budget law, have been legalized and thus made available for such purpose, we are of the opinion that the action of the board of control, taken with the consent of the Governor under the aforesaid provisions of section 680 of the Political Code, has been to effectuate an authorized and thus legalized expenditure by said commission, and for the purposes of its functioning, of the sum named in the resolution of the board of control authorizing the same. The action of the board of control as thus interpreted is not legislative in character, since its effect is not to make an appropriation, but is merely to render available, to the extent of its allowance, an appropriation already made.

It is our conclusion that such expenditure, being thus authorized, is payable out of said special fund upon which a claim, properly drawn and audited, has been presented to the state controller, and that he should be and is hereby directed to draw his warrant upon the state treasury and upon said special fund for the payment therefrom of said claim.

Let the writ issue accordingly.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; SHENK, J.; WASTE, J.

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67 Cal. App. 465

CARNEY v. HEISCH. (Civ. 2301.)

(District Court of Appeal, Third District, California. May 24, 1924.)

Landlord and tenant ⚷86(2)—Notice of election to renew must state intention to renew on terms specified in lease.

If lessee has option to renew for a two-year period, notice of election to renew for one year is not binding upon lessor; such notice being an offer to make another lease and not to renew.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by John J. Carney against H. W. Heisch. Judgment for defendant, and plaintiff appeals. Reversed.

Clarence N. Riggins, of Napa, for appellant.

Frank L. Coombs and Nathan F. Coombs, both of Napa, for respondent.

FINCH, P. J. This is an action for unlawful detainer. The plaintiff leased certain lands to defendant "for a period of one year commencing on November 1, 1922, and ending on October 31, 1923." The lease contained the following provisions:

"It is understood that the said property is for sale, and this lease is executed with that knowledge. That party of the second part hereby agrees that, in the event that a sale of the said property be made during the term of this lease, he will quit and surrender the possession of said property at the end of any annual period of said lease, after written notice by him received. * * *

"It is further stipulated and agreed that, in the event that said property be not sold at the expiration of the term hereof and that the party of the second part shall have fully complied with all the terms, covenants, and agreements of this lease, that then he shall be entitled to a renewal thereof for a further period of two years."

The complaint, which was filed November 19, 1923, alleged the execution of the lease, the entry of the defendant thereunder, that the term thereof had expired, and that defendant was unlawfully continuing in possession of the premises. The answer denied the termination of the lease, and alleged, among other things, that "under the terms of said lease the privilege was granted to defendant to renew the same and to occupy the said premises under the terms thereof for a further period of one year from and after the 31st day of October, 1923, and that the defendant exercised said privilege, and by due notice thereof renewed the same for said additional period, and now lawfully occupies said premises under and by virtue of said renewal, and is entitled to said possession under the terms of said lease until the 1st day of November, 1924."

The court found all the allegations of the answer to be true, and adjudged "that the defendant was on the 1st day of November, 1923, ever since has been, and now is, in lawful possession of the premises described in plaintiff's complaint under a renewal of the lease as set forth in said answer." It is thus adjudged that the defendant exercised his option to renew the lease, not for "a further period of two years," as provided for in the lease, but for a period of one year only. Under the judgment the defendant may quit the premises, without incurring any liability therefor, on the 31st of October, 1924, while, under the terms of the lease, the exercise of his right of renewal would impose upon him the legal obligation to hold the premises and perform the covenants of the lease until October 31, 1925. In other words, the defendant's option was to renew the lease for a further period of two years, not for one year only.

"A notice of an election to renew in order to be binding upon the lessor must state an intention to renew on such terms and for such a period as are specified in the lease. If the lessee has an option to renew for a period particularly specified, or at a particular rental, a notice by him that he will renew for a different period or at a different rental is nugatory, and it may be ignored by the lessor. In fact, such a notice of an election to renew the lease on different terms is an offer, not to renew, but to make another lease, and it will be regarded by the law as an implied election not to renew the old lease." Underhill on Landlord and Tenant, p. 1381.

See, also, Mershon v. Williams, 62 N. J. Law, 779, 42 Atl. 778.

If it be conceded that the evidence is sufficient to show that the defendant, in effect, notified plaintiff of the former's election to renew the lease for a further term of two years, the court has not found in accordance with such evidence, and the judgment is inconsistent with the rights of the parties under the lease. Since the evidence on a retrial of the case may not be the same as that contained in the record, a review of the evidence herein would serve no useful purpose.

The judgment is reversed.

We concur: WEYAND, Justice pro tem.; PLUMMER, J.

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67 Cal. App. 414

LICHTIG & ROTHWELL, Inc., v. RUGGLES.
(Civ. 4239.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1924.)

1. Brokers ⚷86(1)—Evidence held to sustain finding defendant's employment as moving picture director was for production of one picture.

Evidence *held* to sustain finding defendant's employment as moving picture director was for the production of one picture.

2. Appeal and error ⚷1011(1)—Finding of trial court on conflicting evidence must prevail.

Finding of the trial court, based on conflicting evidence, must prevail.

3. Brokers ⚷86(4)—Facts held to sustain finding broker's efforts in securing defendant's employment were not producing cause of defendant's subsequent employment.

Facts *held* to sustain trial court's finding that plaintiff broker's efficient efforts in securing defendant's employment as director of a moving picture production were not the producing cause of the subsequent employment of defendant to produce other pictures.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Lichtig & Rothwell, Inc., against Wesley Ruggles. From a judgment for it, but deemed insufficient, plaintiff appeals. Affirmed.

Lloyd Wright, of Los Angeles, for appellant.

Bauer, Wright & Macdonald, Frederick W. Williamson, and Alexander Macdonald, all of Los Angeles, for respondent.

CURTIS, J. Plaintiff is a corporation engaged in acting as agent and broker for actors, directors, and others following the theatrical and moving picture business. The defendant is a moving picture director, and during the first part of October, 1920, he applied to the plaintiff and asked the latter to obtain employment for him. Mr. Lichtig, the president of plaintiff, thereafter had several conversations with Mr. Vieiller, the production manager of the Metro Pictures Corporation, regarding the employment of defendant, and on October 6, 1920, he introduced the defendant to Mr. Vieiller at the Metro Studio. As a result of this meeting the defendant, on October 6, 1920, entered the employ of the Metro Pictures Corporation at a salary of $850 per week. His first employment with this company was in the production of the picture known as "The Greater Claim." This picture was finished on November 30, 1920, and the defendant then began the production of a second picture, and, later on, of a third picture. Defendant was employed continuously on the production of these pictures from October 6, 1920, to March 30, 1921, at the same salary as mentioned above. On October 6, 1920, the defendant wrote plaintiff a letter, which, omitting the formal parts, was as follows:

> "I recognize that your office was instrumental in securing the engagement for me at the Metro Studios, as the result of your call of recent date. For your efforts in this direction, I agree to pay you the customary agent's fee of ten per cent. weekly of the money I receive for this engagement."

Defendant made several payments to plaintiff on account of the commission due from him to plaintiff, aggregating the sum of $467.50. The last of these payments being for $170, and was made on or about December 21, 1920. On December 23, 1920, the plaintiff made written acknowledgment of this last payment and inclosed to defendant a statement of account for commission of 10 per cent. on defendant's salary from October 6, 1920, to and including the week ending December 18, 1920, less such payments as had been made thereon. Defendant made no written reply to this statement, but after its receipt spoke to Mr. Lichtig regarding the same.

This action was instituted to recover from defendant commission on his salary during the entire period of his employment by the Metro Pictures Corporation; that is, from October 6, 1920, to March 30, 1921. The court found that plaintiff obtained an engagement for the defendant with the Metro Pictures Corporation, and that said engagement endured from October 6, 1920, to and including November 30, 1920, and no longer, and upon this finding awarded judgment in favor of plaintiff for 10 per cent. of the salary received by defendant during this engagement, and denied judgment for any further amount. Plaintiff appeals from that portion of said judgment which denied recovery for the full amount of its demand.

[1] It is plaintiff's contention that the evidence shows without contradiction that the understanding between the parties, at the

time of defendant's employment was that defendant was engaged to direct the production of an indefinite number of pictures, and that this engagement was to continue so long as his services were satisfactory to the Metro Pictures Corporation. Plaintiff therefore attacks the finding of the court "that the engagement endured from October 6, 1920, to and including November 30, 1920, and no longer," on the ground that there is no evidence to support said finding.

Turning to the evidence, we find that the testimony of the defendant was to the effect that he was employed to produce one picture only, and after the approval of this picture by the officers of the company, he was employed to produce a second picture, and later on he was employed on a third. Mr. Lichtig, the president of plaintiff, testified that at the time of defendant's employment Mr. Vieiller said to defendant:

> "I know, Mr. Ruggles, that you can do this picture, the first that we are going to make. I have some others afterwards, all going to be specials. We have this story, and we wish you to do it."

To which the defendant replied:

> "I will be glad to do this story."

As far as the evidence shows, nothing was said at this time towards employing the defendant to produce these other specials. Mr. Engel, the general manager of the Metro Pictures Corporation, testified:

> "Mr. Ruggles was engaged on a picture—was engaged for one picture, and then continued for two more. * * * A director is engaged with the right to dismiss him after the first picture if we want to, and with the right on his part to seek other employment after the first picture if he wants to."

[2] In our opinion this evidence was sufficient to support the finding of the court that the defendant's first employment with the company was for the production of one picture only. Counsel for appellant has called our attention to other testimony in the case which is strongly in favor of the position of the appellant, and insists that this evidence shows that the defendant's employment was one continuous engagement from October 6, 1920, to March 30, 1921. But, conceding that this testimony is all that is claimed for it by the appellant, the best that can be said in favor of appellant is that there is a conflict in the evidence, and, according to the well-established rule applicable to appellate courts, the finding of the trial court must prevail when there is a substantial conflict in the evidence in support of such finding.

Plaintiff insists that the failure of the defendant to reply to the statement sent him by plaintiff on December 23, 1920, wherein the plaintiff claimed commission beyond the period covered by the time employed on the first picture, is a strong circumstance against defendant's contention that his engagement was only for the first picture. The evidence shows that the defendant made no written reply to this statement or the letter accompanying the same. It does show, however, that he made a verbal reply to the president of the plaintiff, but just what this verbal reply was does not appear from the record. It must be conceded that this circumstance is strongly in favor of the plaintiff, yet this evidence must be taken in connection with all of the other evidence in the case, and if the evidence taken as a whole shows there is a substantial conflict therein upon any particular issue, and this issue is found against the appellant, such finding must be sustained by the appellate court.

[3] Plaintiff further claims that, even if the defendant's original engagement was for the production of one picture only, and that he was subsequently employed to produce two other pictures, these subsequent engagements were as much due to the direct results of plaintiff's efforts in bringing the parties together in the first instance as was the first engagement, and therefore plaintiff was entitled to a commission on the salary received by defendant during the two subsequent engagements. In support of this contention the plaintiff has cited the recent case of Haun v. Rosenmayer, 46 Cal. App. 353, 189 Pac. 117, which holds that a broker is entitled to a commission on sales when his efforts are the producing cause thereof, and when through his agency the purchaser is brought into communication with the seller, although the parties negotiated in person and without the presence of the broker.

In the case of Haun v. Rosenmayer the assignors of plaintiff were brokers, and on November 19 the defendant wrote them that he would be able to ship later all the cauliflower that the brokers could sell. The brokers immediately got into communication with Libby, McNeill & Libby, and as a result of the brokers' efforts the representative of Libby, McNeill & Libby called upon the defendant on November 22 and purchased 5 carloads of cauliflower. On the next day he purchased 30 carloads, and on the day following 50 carloads more. The defendant paid the brokers' commission on the first 5 carloads but refused to pay any commission whatever on the 80 carloads sold on the two following days. The lower court found that the efforts of the brokers were the producing cause of the sale of the 80 tons of cauliflower, and on appeal the appellate court held that this finding was supported by the evidence. In the case at bar the facts are entirely different from those in the case of Haun v. Rosenmayer. In addition to the evidence already referred to, it was shown that before the defendant had finished the first picture for the Metro Pictures Corporation he applied to the company for further employment and was informed by the manager that it would be necessary for certain officers of the company to see the first picture and approve it before they could consider employing defendant on a second picture. It further appears that after the first picture was finished it was reviewed by the officers of the company and approved by them and they then gave defendant further employment. This second employment was agreed to some six weeks after defendant was introduced to the officers of the company by plaintiff. From these facts the court found that the efforts of the plaintiff were not the producing cause of the subsequent employment of the defendant. We think this finding of the court is undoubtedly sustained by the evidence. While we readily assent to the rule laid down by the court in the case of Haun v. Rosenmayer—that is that the broker is entitled to his commission on sales when his efforts are the producing cause, even though the parties negotiated in person and without his presence—we find that the facts in the case before us, as found by the court, do not permit of the application of this rule.

Appellant finally contends that, if denied recovery upon the contract, yet it should have been given judgment for the full amount of its claim upon the count of quantum meruit set forth in the second cause of action of its complaint. In answer to this contention, it is sufficient to say that the complaint nowhere sounds in quantum meruit, nor was there any attempt at the trial to prove the reasonable value of the services rendered by plaintiff.

We find no error in the record, and are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

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67 Cal. App. 292

PEOPLE v. BOYD. (Cr. 1037, 2709.)

(District Court of Appeal, Second District, Division 2, California. May 15, 1924. Rehearing Denied June 12, 1924. Hearing Denied by Supreme Court July 14, 1924.)

1. False pretenses 🔑5—Intent to defraud essential element.

Intent to defraud is essential element of crime of obtaining money by false pretenses.

2. False pretenses 🔑51—Accused's fraudulent intent is question of fact for jury.

In prosecution for obtaining money by false pretenses, accused's fraudulent intent is question of fact for jury.

3. False pretenses 🔑49(1)—Evidence held to warrant conviction.

In prosecution for obtaining money by false pretenses by misrepresenting land in obtaining a loan, evidence *held* to warrant conviction.

4. Criminal law 🔑1036(1)—Objections to exhibits first made on appeal not considered.

Objections to admission of exhibits made for first time on appeal cannot be considered.

5. Criminal law 🔑393(1), 1169(1)—Admission of accused's testimony at previous trial for same offense held not harmful and not compulsory self-incrimination.

Admission of accused's testimony at previous trial for same offense was not objectionable as compelling accused to testify against himself, and, where it contained no confession nor admission and should therefore probably have been excluded, its admission was no ground for reversal, since accused was not harmed thereby.

6. Criminal law 🔑548—Witnesses 🔑393(1)—Statements of witness at previous trial admissible merely to impeach witness, and do not create conflict.

Statements of witness made at previous trial of same case are admissible merely to impeach him, and do not even create conflict of evidence.

7. Criminal law 🔑1167(1)—Variance between proof and pleading as to one charge would not require reversal.

Variance between proof and pleading as to charge of false representations of value of land would not require reversal, where other false representations were charged, especially where the evidence, though not showing representation of value alleged, showed gross overvaluation.

8. Criminal law 🔑438—Photographs of portions of land held admissible in prosecution for obtaining money by falsely representing value.

In prosecution for obtaining loan by false pretenses as to value of land, photographs of portions of land were admissible.

On Hearing in Supreme Court.

9. Criminal law 🔑406(4)—Accused's offer in open court to plead guilty held admissible.

Accused's offer in open court prior to trial to plead guilty to one charge if granted continuance was admissible; its weight and sufficiency being for jury.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Howard L. Boyd was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Harold Ide Cruzan, of Los Angeles (E. H. Richards, of Pomona, of counsel), for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and H. H. Linney, Deputy Attys. Gen., for the People.

CRAIG, J. The defendant was convicted of the crime of obtaining money under false pretenses. He was specifically charged with having falsely represented to one Julia C. Cother that he owned 320 acres of fertile land in the state of Nevada, containing numerous artesian wells, with an abundant supply of water; that the value of said property was $7,000, and that his title was good and valid. The information then charges that none of such representations was true, but that the said Julia C. Cother believed them to be true, and was thereby induced to deliver to the defendant the sum of $1,500.

The grounds of this appeal are: (1) That the evidence is insufficient to support the verdicts; (2) that certain evidence was improperly admitted; and (3) variance between the allegations of the information and the proof.

[1-3] In connection with the first proposition appellant asserts that there was no evidence to show an intent to defraud. To establish the offense charged in the information such an intent must be proved, for it is an essential element thereof. However, this is a fact which from its nature must usually be established inferentially. The question of intent is one of fact to be determined by the jury; they have reached the conclusion which the verdict indicates, that Boyd made the representations alleged in the information, that they were false, and that he knew them to be false; it was entirely competent for the jury to draw the inference that the false representations were made with intent to defraud. Although defendant's own testimony, and that of other witnesses supporting it, was to the effect that he did not know that the statements made by him were false, the jury acted within its province in rejecting such evidence, since that to the contrary was ample. This was to the effect that, when appellant solicited the loan of $1,500 from the Cothers, he stated that he had a "clear deed" to 320 acres of land in Nevada, which stood him $7,000, and that there was not a dollar against it; that he was going to plant it to canteloupes, and needed the money for seed and implements; that there were artesian wells on the land, and that by plowing furrows he could lead water for irrigation from wells located on the upper part of the land; that his property was level or rolling, productive soil, and was located about 3 miles from a railroad station.

Witnesses thoroughly familiar with the land, and some of them having resided nearby for 20 years, testified that it was not level, or rolling, but was hilly, rough, rocky, and unfit for cultivation; that it was of a broken gypsite formation in which nothing could be made to grow, and that it was absolutely worthless; that there was no water on the property, but that the nearest water was a mile and a half distant therefrom, and 150 feet below it, rendering gravity flow impossible; that there were no artesian wells nearer than 50 miles, at Las Vegas, and that the railroad ran past it at a distance of nine miles. It was admitted, and shown by documentary evidence, that appellant's only interest in the land was a half interest in a contract to purchase from the state of Nevada at $1.25 per acre, but 25 cents of which had been paid by Rush, defendant's grantor, and that they had 50 years within which to pay the balance. It further appears that, long after having made such representations, appellant wrote Williams, a Nevada surveyor, that he had represented the property to be worth $5,000, and inquiring whether or not wells could be dug on the land for irrigation, and if gravity flow could be used on any portion of the tract.

In view of this proof it cannot be said that the jury were not warranted in concluding that Boyd made the representations to the Cothers as charged in the information, and that such statements were untrue, and known to him to be untrue; or, if not known by him to be untrue, made in a reckless disregard of their truth in an effort to secure the loan which he sought.

[4] It is objected that Exhibits 12, 13, and 14 were erroneously admitted in evidence. However, it appears that no objection was interposed to their admission, and hence appellant cannot be heard to make complaint for the first time on appeal.

[5] Next, appellant asserts that it was error for the trial court to permit the district attorney to read the testimony which the defendant voluntarily gave at a former trial on the same charge. This was done as a part of the people's case in chief. This procedure is not subject to the objection made that the defendant was thereby compelled to testify against himself. People v. Barrios (Cal. App.) 199 Pac. 58. As was said in People v. Dunlop, 27 Cal. App. 460, 150 Pac. 389, where a similar situation was presented, it does not appear that the ruling complained of worked any injury to the accused. The testimony of the defendant given upon the first trial contains no confession of guilt or admission tending to establish guilt. The introduction of the testimony to which objection is so strenuously made would seem to have served no useful purpose, and should therefore probably not have been admitted; yet, since it cannot be said to have been harmful to the rights of the defendant, it will not be a ground for reversal.

[6] In appellant's opening brief he states that "at the time of the trial numerous witnesses were produced on behalf of the people, testifying that the land was not level, was worthless, and could not be farmed or used for agricultural purposes, and that there was no water upon the land." After having made this frank concession, a considerable part of appellant's briefs is devoted to argument concerning the weight of evidence upon these issues, and others, which can ordinarily receive no consideration by an appellate court. It is pointed out that the complaining witness and her husband, Robert H. Cother, testified on the trial that they would not have paid their money to Boyd except in

reliance upon his statements as to the various matters charged in the information; it is said that on the first trial these witnesses testified contrary to this evidence. It is apparent that the record thus discloses no issue which can be given consideration upon appeal. The statements made by the witness upon the first trial, introduced in evidence at the second trial upon cross-examination, are merely for impeachment, do not even create a conflict of evidence, but could only be considered by the jury as tending to impeach the testimony given by the witnesses at the subsequent trial.

[7] The argument that there was a material variance between the pleading and the proof in regard to the representation that the property was worth $7,000 is without merit. The defendant on cross-examination testified that he told the complaining witness that the land in question was "conservatively worth $5,000." This testimony, if believed, was sufficient to justify the conclusion that the defendant grossly misrepresented the value of the property, since the testimony of the people's witnesses was to the effect that the property was entirely worthless for agricultural purposes, and practically so for any purpose. Besides, there were allegations of other representations charged to have been false, and a variance between the proof and the pleading as to one would not require a reversal.

[8] Certain photographs purporting to be likenesses of a portion of the land claimed to have been owned by Boyd were admitted in evidence, and it is argued that the trial court committed error in overruling the objections made to them. At the time they were received a proper foundation had not been laid for the admission of these exhibits. However, this was probably supplied later, but the question of lack of foundation is not presented, since during the trial appellant made no objection upon that ground. The only objection offered was that the evidence would be irrelevant, incompetent, and immaterial, and that a photograph could not possibly picture more than a small portion of the entire tract of 320 acres. These objections were without merit.

The most serious question presented is that resulting from the overruling by the trial court of an objection to the admission in evidence of an offer upon the part of the defendant to plead guilty to one offense charged in the information. Prior to the trial Boyd stated in open court that he would, if granted a continuance of the case until June 1, plead guilty to obtaining money under false pretenses. It appears that the trial of the case had been set for April 27, 1923. The evidence to which objection is made consists of the record of proceedings at that time introduced upon the trial over defendant's objection. This record reads in part as follows:

"The Court: Now, People against Boyd.

"Mr. Lincoln: In that Boyd case, your honor, appearing for defendant, I will say there have been several continuances, and we are in the position now so that, if your honor and the district's attorney's office would consent to a continuance at this time until, say, the 1st of June, the plea which has been heretofore interposed will be withdrawn and another different plea will be made.

"The Court: Is that correct, Mr. Boyd?

"The Defendant: It is.

"Mr. Costello: By that other plea, you mean a plea of guilty?

"Mr. Lincoln: Yes, sir.

"Mr. Costello: Mr. Boyd, is that your intention, at that time, to plead guilty to one of these offenses charged in this information?

"The Defendant: Yes.

"Mr. Costello: To wit, obtaining money under false pretenses?

"The Defendant: Yes.

"Mr. Costello: You will at that time plead guilty to obtaining money under false pretenses?

"The Defendant: Yes, sir."

If this evidence was admissible, it must have been the theory that the statements made by the defendant's counsel within the hearing of the accused, and apparently with his authority, constituted a confession of guilt. An offer to plead guilty under similar circumstances was treated as a confession in the case of Commonwealth v. Callahan, 108 Mass. 421. The objection urged by the defendant to this testimony is that it was incompetent, irrelevant, and immaterial; prejudicial to the rights of the defendant, and he cites People v. Ryan, 82 Cal. 617, 23 Pac. 121, and Dean v. State, 72 Tex. Cr. R. 274, 161 S. W. 974. The Texas case is directly in point, the court there saying:

> "While it is true, if an agreement had been entered into it ought to have been lived up to, yet if the appellant did not desire to enter a plea of guilty, as her counsel agreed she would do, it was her right not to do so, and let the state prove her guilt if it could do so, and the court correctly held that this agreement of counsel was not admissible in evidence."

In People v. Ryan, a plea of guilty had been entered, but subsequently was withdrawn, and our Supreme Court said:

> "We cannot agree that, upon principle, where a plea is withdrawn, and another legally substituted therefor, the one withdrawn can be introduced in evidence to nullify any defense under the last plea, which would be the practical result in this case of such a doctrine."

It also appears from the testimony that during the time when the motion for said continuance was being presented to the court a recess was taken, and the defendant and his counsel left the room; the district attorney followed them into the hallway, and said to defendant's counsel, in the presence and hearing of defendant, that the case would be transferred into another court, adding:

> "You know what that means. You talk over with your client and see what he is going to do, and if he pleads guilty to the charge of taking money under false pretenses we will dismiss the charge of grand larceny, and I will recommend probation."

That the district attorney left them, and soon returned, saying:

> "Hurry up—hurry up—hurry up, Monroe's clerk is in there now, and they want to know whether you are going to take your case into his court."

The defendant testified that he knew that if the case were transferred to the other court he would not be permitted to file an application for probation in the event of being convicted. He further testified:

> "I tossed up a nickel, and I said, 'If it comes heads, I will go in and stand trial, but if it comes tails, I will go over.' Luckily it came heads, and I said, 'I will go in and plead guilty under these conditions and take my chances.' I said, 'It is just simply a case of making the best of a bad proposition.'"

The statement of the district attorney clearly implied that it would be dangerous to the defendant to permit the case to be transferred, but that, if the plea of guilty were promised and entered, such steps would receive a reward; but, waiving the question of the voluntary character of the offer to plead guilty, it must be regarded as constituting only a hypothetical admission which, as explained in Smith v. Whittier, 95 Cal. 279, 30 Pac. 529, is not admissible in evidence. Defendant was, in fact, offering to plead guilty upon condition that the matter would not be transferred out of that court. The defendant did not thereby admit any distinct fact. He said in effect that for the limited purpose of avoiding the transfer of his case to be passed upon by a certain other judge he would enter a plea of guilty to one of the charges contained in the information; it being understood further that the other charge should be dismissed, without regard to its merits. The accused did not admit his guilt. He merely agreed that under certain conditions he would make an admission of guilt. There is no reason why the same rule which excludes hypothetical admissions of this character in negotiations for settlement of a civil suit from being received in evidence should not apply equally to a criminal proceeding. We conclude that the overruling of appellant's objection to this evidence was error. However, section 4½ of article 6 of the Constitution provides:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court be of the opinion that the error complained of has resulted in a miscarriage of justice."

From a careful reading of the entire transcript, including the evidence, in the instant case, we are convinced that under the constitutional provision above quoted a reversal should not be granted. The conclusion is inevitable that appellant misrepresented the condition of his interest in the property, as well as the character of the land which he pretended to own; and that he did so knowingly and with intent to defraud. Some of these misrepresentations are charged in the information, although not all were included in it. For instance, it is charged that the defendant represented that the land in question was "fertile," whereas the testimony was overwhelming to the effect that it was stony and practically worthless. Three witnesses testified that he said the artesian wells were upon the land, while it was shown without contradiction that no wells existed thereon; it was further testified that he said he had a good and valid title to the land, whereas he had no more than a half interest in a contingent right to purchase from the state within 50 years. While it may be that the statement admitted by the defendant to have been made to the complaining witness that the land had "stood him" $5,000 is not an admission of the alleged representation that it was worth that amount, still without doubt it was intended that the Cothers should be led to believe that the value of the property was sufficient to be ample security for the loan that was sought, and in determining whether or not a miscarriage of justice may have resulted from any error appearing in the record it is worthy of consideration that the defendant knowingly made the representation, which was of course utterly false, that the land stood him $5,000. There are other matters of a similar character which are delineated in another part of this opinion. We have considered other points argued by appellant, but find no error justifying a reversal of the judgment.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition to have this cause heard in the Supreme Court, after judgment in the District Court of Appeal, is denied.

[9] We deem it proper, however, to say that we disagree with that portion of the opinion which holds that it was error for the trial court to overrule the objection of the defendant to the admission in evidence of the offer on his part to plead guilty to one offense charged in the information. The action of the defendant in that regard was an

admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury. People v. Jacobs, 165 App. Div. 721, 151 N. Y. Supp. 522. Such an admission was not, of course, conclusive evidence against the defendant. It was competent evidence merely; its weight and sufficiency being proper subjects for consideration by the jury. State v. Bringgold, 40 Wash. 12, 17, 82 Pac. 132. When the fact was established that the admission had been made by the accused, the admission was not before the jury as testimony by him establishing the truth of all or any part of the allegations of the information, but the fact that he had made it was before them, and was relevant as being inconsistent with his claim to the jury that he did not obtain any money under false pretenses from the complaining witnesses, and was not guilty. State v. Carta, 90 Conn. 79, 96 Atl. 411. The defendant's own admission, voluntarily made, was clearly competent evidence against him. That he made the admission in court can detract nothing from its relevancy or its competency. Ehrlick v. Commonwealth, 125 Ky. 742, 102 S. W. 289, 128 Am. St. Rep. 269; People v. Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493.

The opinion of this court in People v. Ryan, 82 Cal. 617, 23 Pac. 121, in which it was held to be error to introduce in evidence a plea of guilty after it had been withdrawn by permission of the court and a plea of not guilty substituted, seems to be out of harmony with what we believe to be the correct and the better rule. It should be noted, however, that the court was there dealing with a case in which there could have been no conviction without the plea of guilty being considered as a "confession," and the conviction was accordingly reversed.

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67 Cal. App. 488

HUTCHINSON v. RECLAMATION DISTRICT NO. 1619 et al. (Civ. 2668.)

(District Court of Appeal, Third District, California. May 26, 1924. Hearing Denied by Supreme Court July 21, 1924.)

1. Drains 🔑54—No formal action necessary to make agreement for dredging of ditches.

Where trustees of reclamation district formally declared intention of having ditches dredged, formal action concerning agreement by one of trustees with one who subsequently dredged the ditches was unnecessary, a contract to pay for services being implied in absence of any formal agreement, in view of Pol. Code, § 3454, subds. 3, 9.

2. Contracts 🔑168—Include what is necessarily implied from language.

A contract includes not only what is expressly stated, but also what is necessarily to be implied from language used.

3. Drains 🔑54—Dredging being left entirely to contractor, he was authorized to do work reasonably necessary under circumstances.

Where it was left entirely to dredging contractor to dredge canals in reclamation district, whatever was reasonably necessary under circumstances to be done, in order to perform services, was included, such as deepening of canal so that dredging machine could be moved through; Civ. Code, §§ 2309, 2310, and section 1624, subd. 4, being inapplicable.

4. Frauds, statute of 🔑84—Contract for dredging held not to come under statute, though value of service more than $200.

A contract for dredging services for reclamation district did not come under Civ. Code, § 1624, subd. 4, though value of services was more than $200.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by W. W. Hutchinson against Reclamation District No. 1619 and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Albert Picard and E. A. Bridgford, both of San Francisco, for appellants.

A. F. Bray, of Martinez, Matthew Ward, of Antioch, and J. E. Rodgers, of Martinez, for respondent.

PLUMMER, J. In this action plaintiff had judgment against the defendant for the sum of $2,116 for and on account of certain dredger work done and performed by the plaintiff for the defendant district, from which judgment the defendant appeals.

The action is upon two counts: One upon an express contract; the other upon quantum meruit. The trustees of the district were included as defendants, but their motion for a nonsuit was sustained by the trial court and the cause of action as against them dismissed. On the 26th day of November, 1919, at a meeting of the trustees of the defendant district, the following motion was adopted, to wit:

"Upon motion duly made and unanimously carried, it was ordered that the drainage canal running across the district should be cleaned, beginning on Sand Mound Slough and extending down to at least the bridge across said canal on the Hotchkiss land."

This motion appears to be the only record made by the board of trustees of said district in relation to the contemplated work. It appears from the transcript that prior to this date and on or about the 21st day of November, 1919, William T. Sesnon, one of the trustees of the district, had written a letter to the plaintiff which letter is substantially as follows:

"At a meeting a day or so ago with Mr. Hotchkiss, it was decided to proceed at once with the work of cleaning out the main drainage canal, and particularly the one running through my ranch, and which I endeavored to have cleaned last spring."

After receipt of this letter by the plaintiff, the plaintiff and the said Sesnon had a conversation over the phone as to the costs and expenses of performing the work. This conversation appears to have been had prior to the adoption of the motion wherein it was resolved to proceed with the work in question. The terms agreed upon for doing the work, in the conversation referred to, were the sum of $3 per hour and certain incidental expenses for taking the dredger, belonging to the plaintiff, to the canal upon which the work was to be performed. The plaintiff on or about December 19, 1919, towed the ditcher or dredger, owned by him, to the place where the work was to be performed, took it over the levee, around the lands of the district and on the 23d day of December, 1919, began the work of deepening and cleaning the canal in question. It further appears that at the time of the beginning of the work and for a considerable period thereafter there was not sufficient water in the canal to float the dredger. In order to perform the work of cleaning and moving the dredger forward, the captain of the dredger increased the depth of the canal by about five feet in the center and four feet on the sides. Work was continued from the 23d day of December, 1919, to the 8th day of January, 1920, when, on account of necessary repairs being required to the machinery of the dredger, work was suspended until about the 15th day of March, 1920, when it was again resumed. It does not appear that any of the trustees of the district were within the district during the progress of the work. It further appears from the transcript that, within a few days after the 15th of March, a son of one of the trustees of the district visited the scene of operations and notified the captain of the dredger that he was not doing the work rightly; that all they wanted was the cleaning of the ditch and not any deepening; that the deepening could be obviated by bringing water into the canal through a siphon. The captain claimed that he had no authority to turn water into the canal. Through an arrangement made by the said Mr. Hotchkiss, water was turned into the canal through a siphon which appears to have been previously installed and used by the district for such purposes when desired, and after so doing the deepening of the ditch by the dredger was discontinued and much more rapid progress was made. After the 8th day of January, when work was discontinued, and before the resumption of work on March 16th, trustee Sesnon left the state and did not return until after all the work had ceased. Prior to the leaving of trustee Sesnon, as above stated, a bill for the December work performed by the plaintiff for the district was presented for payment, the receipt of which was acknowledged by trustees Sesnon in a letter dated January 6, 1920, and is as follows:

"Mr. W. W. Hutchinson, P. O. Box 173, Antioch, California. Dear sir: I am just in receipt of your bill against the Sand Mound Reclamation District and have forwarded same to Judge Bridgford, the secretary. I will endeavor to get in touch with the judge in the next day or two so that he can call a meeting and order payment of the bill. Please accept the assurance of my appreciation of your courtesy in doing this work so promptly."

Whether any meeting was called, as contemplated, does not appear. No payment, however, was made of the bill in question at that time. All work was finally ended and the dredger moved out of the district on or about the last of April, 1920. Thereafter, the plaintiff, having filed each month during the continuance of the work separate bills or statements of the work as it progressed, filed a general claim for the total amount of work, and during the month of May, 1920, the board of trustees issued to the plaintiff on account of said work two warrants, one in the sum of $400 and the other in the sum of $1,500. No further payments having been made, this suit was instituted to recover the balance alleged to be due. It does not appear from the transcript that any conditions were attached to the two warrants issued, as above stated; that is, whether at the time of the issuing of said warrants the trustees claimed that that was the total amount due and was made in full settlement. In other words, the testimony simply shows the issuance of the two warrants on account of said work and nothing more. The transcript further shows that trustee Sesnon had a conference with W. J. Hotchkiss, a trustee of the district, relative to the doing of the work and the terms submitted by the plaintiff; that it was tacitly agreed that Sesnon should proceed to have the work done; that trustee Bridgford was ill at the time; that no conversation was had with him; and that he took no action further than the resolution passed by the board of trustees indicates. That the bills for work were forwarded to him is stated by the letter written by trustee Sesnon. Knowledge that the work was being done in pursuance of the resolution adopted by the board was thus brought home to all of the trustees shortly after it was begun (if not previously to all of them). Upon this statement of the facts it is contended by the appellant that the district is not liable for any sum whatever, although one of the trustees and counsel for the district, during the course of the trial, appears to have made the statement that the district was liable for the reasonable value of the work done. The bone of contention is really the extra cost of digging out the canal by the dredger in order to permit its progress in cleaning the canal instead of turning water into the canal through a siphon, hereinbefore referred to, and obtaining flotation of the ditcher by that method. The defendant in its answer, after denying the cause of action of any contract, etc., states its defense as follows:

> "Deny that the ditching work done upon said lands of reclamation district No. 1619, or the use of said ditcher, or said work and the use of said ditcher, was or is of the value of $4,322.00, or of the value of any greater sum than $1,900.00; and allege that said value, to wit, the sum of $1,900.00, has been fully paid before the filing of the complaint of plaintiff herein."

The court found the value of the work as alleged by the plaintiff and gave judgment for the amount thereof. The court also found that the work was done at the special instance and request of the reclamation district and for its use and benefit. Is the defendant district liable for the value of the work upon the facts stated? Subdivision 9, section 3454, Political Code, authorizes the board of trustees of the reclamation district—

> "to employ such labor and to purchase and operate or hire such tools, machinery, material and equipment and to make and enter into such contracts and agreements as they shall deem necessary in order to accomplish the proper construction, maintenance, repair or operation of the works of reclamation of the said district."

[1] Subdivision 3 of the same section specifies that the board of trustees shall elect a secretary whose duty it shall be to have charge of the office of the board of trustees, to keep its minutes, attest all documents requiring the signature of the president, keep true and accurate accounts of all expenditures made in behalf of the district and that all accounts and contracts that may be made by said board of trustees shall be open to the inspection of the board of supervisors and every person interested. There does not seem to be anything in the statute requiring any formal action by the board of trustees in entering into a contract or making an agreement with any one relative to the hiring of machinery or the performance of work for the uses and benefits of the district. The board in this instance appears to have formally declared its intention of having the work done, but no formal action concerning the agreement with the plaintiff was taken or had. The work to be done was one of maintenance. No plans were necessary and there is no prescribed form in the statute to be followed by the trustees in having the work done. Nor is there anything in the statute requiring the recording or entering upon the minutes of the district the agreement or hiring of the plaintiff to do the work in question. Thus the rule found in section 491, 14 Corpus Juris, 376, would seem to apply:

> "Charter or statutory provisions as to recording the acts of a corporation or its officers must be complied with; but in the absence of any such requirement it is not necessary that the by-laws, resolutions, contracts, or other acts of a corporation or its officers shall appear on the records of the corporation or be evidenced by any writing at all, if it would not be necessary in the case of an individual, and if no record is kept, or if the particular matters do not appear on the record, they may be proved by parol evidence."

It further appears in the transcript in this case that the practice in the district in relation to work of the kind here involved has been, after the work was authorized to be done in the district, to delegate to some one of the trustees authority to have the work done, but that this was the first time that Mr. Sesnon had undertaken to negotiate for such services. That there was no formal contract in this case the facts, of course, establish; but, in the absence of any particular provision of the law requiring formal steps or proceedings, such action does not appear necessary. If the authority exists to do the work, to enter into the agreement or to make the employment, a contract will be implied to pay for the services, or, in other words, the reasonable value thereof. In the case of Buck v. City of Eureka, 124 Cal. 61, 56 Pac. 612, a case involving the employment of an attorney, the court disposes of the contention that formal action is necessary as follows:

> "Nor is it necessary, as is contended by appellant, that the knowledge or assent of the council be evidenced by some formal corporate act, as by ordinance. Implied contracts, within the scope of the powers of the council, may be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing."

And further:

> "It was recently held by this court, in a case where the facts as to the knowledge of the board and its assent to the employment of the attorney were not unlike the facts here, that no resolution of the board authorizing the services was necessary. Power v. May, 123 Cal. 147."

The language of the court in Power v. May, supra, on this subject is as follows:

> "It is true that there was no previous formal resolution of the board authorizing plaintiff to perform the service; there was an understanding to that effect, which for some unexplained reason was not entered upon the minutes of the board. While in all matters of such importance we think the board should act formally by resolution spread upon the minutes, still, as they had the power to act and the services were performed, and the board did in fact subsequently approve the bill for the services and order it paid, we know of no reason why the subsequent ratification and order of payment should not be treated as equivalent to previous authority regularly given."

In the case at bar the board of trustees of the district ordered issued to the plaintiff two warrants in partial payment for the services rendered and to this extent ratified the agreement made by trustee Sesnon with the plaintiff.

In Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260, the distinction is clearly pointed out between contracts requiring formal procedure and cases where action may be maintained upon an implied contract for the value of the services performed. It is there stated:

> "Where the statute prescribes the only mode by which the power to contract shall be exercised the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application."

Again, in the case of Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189, it was held that:

> "Where the city * * * received and retained the benefit of a water supply, although there was no previous express contract as to the price, the city is liable in assumpsit for its reasonable value, and is estopped to deny the validity of the claim, on the ground that it had not passed a lawful ordinance therefor."

In this case a number of other cases are cited showing the circumstances under which corporations will be liable for the value of the services performed, even though no formal contract of employment has been entered into. The decisions to which we have referred and the cases in those decisions establish the principle that, where the statute requires no formal proceeding, a corporation will be held liable as upon an implied contract for services performed when the same rule would be applied to individuals, and that corporations cannot obtain and receive and retain the benefit of services without paying the reasonable value therefor, unless there is some prohibitive rule of law which renders the agreement invalid in its inception. In other words, if there is nothing requiring technical formalities, the absence of technical procedure will not, in and of itself, exempt it from liability. This does not in any wise conflict with the rule that a corporation must act by and through its board of trustees. If the circumstances are such as to lead to the conclusion that it has acted through its board of trustees, then, and in that case, we find nothing in the law which prevents a corporation such as the one under consideration from being held upon an implied contract for services performed for its use and benefit. In stating this we are not overlooking the language of the court in the case of Zottman v. San Francisco, 20 Cal. 108, 81 Am. Dec. 105, where it is said:

> "The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment."

[2] The language just quoted must be read in view of the circumstances and facts being considered and the illustration given of services performed where there have been no negotiations therefor of any kind whatsoever. It must also be borne in mind that the trustees of the district, defendants herein, had knowledge of the progress of the work, of the bills being presented, but did not take it upon themselves to go upon the premises and ascertain just how the work was being performed or whether it was being performed to the best advantage of the district or in the most expeditious manner. All these matters were left to the judgment of the contractor or the captain in charge of the dredger:

> "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used." 13 C. J. 558.

[3, 4] Under this rule, it being left entirely to the contractor to do the work and no directions being given by the trustees, it would appear that whatever was reasonably necessary under the circumstances to be done in order to perform the services would be included. There was no authority given the plaintiff or his captain to turn water into the canal. The captain, in his testimony, stated that that was a hazard to the district which he did not feel like placing upon the shoulders of his employer. This is not his language, but is the substance and meaning thereof. Upon this question, the court having found the reasonable value of the work to be as alleged, we think the defendant is bound. The appellant raises the further objection that there can be no implied contract herein by reason of the provisions of sections 2309 and 2310 of the Civil Code, in that the authorization in the first place must have been in writing and the ratification thereof could only be had by an instrument in writing. This is based upon the further contention that, under subdivision 4 of section 1624 of the Civil Code, the value of the services being more than $200, the agreement must be in writing. This contention is untenable. A contract for services or employment does not come under this section. Wilson v. Morton, 85 Cal. 598, 24 Pac. 784; Ryan v. Walker, 35 Cal. App. 116, 169 Pac. 417; and Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080. In view of what we have said, we think the language of this court in Commercial S. Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 Pac. 964, applicable.

> "It would be deemed a hard rule * * * if the courts could not * * * hold that a corporation is bound by a contract made under such circumstances as characterized the making of the contract in the present case. But the books are replete with cases holding that where it appears that a corporation is but the instrumentality through which an individual for convenience transacts a particular kind of business, 'not only equity, looking through form to substance, but the law itself, would hold such a corporation bound.'"

And further:

> "And where authority to do some particular act, which is included in the ordinary affairs of such a corporation, is not specifically given to any particuler officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation authority to perform such particular act will be inferred from the general authority so given."

In the instant case there is nothing which takes the defendant from under the general rule as to implied contracts or the general rule relating to informal contracts, where the services had been rendered and the benefits received with knowledge thereof or the means of receiving knowledge thereof, that an implied contract should be inferred and the right to maintain an action for the reasonable value of the services should be upheld.

It follows that the judgment of the trial court should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

194 Cal. 49

Ex parte WOOD. (Cr. 2658.)

(Supreme Court of California. June 20, 1924.)

1. Injunction 🔑103—Criminal acts endangering property rights will be enjoined.

Although generally acts merely criminal will not be enjoined where no property rights are endangered, the fact that acts are criminal will not prevent their being enjoined, where property rights are endangered.

2. Injunction 🔑103—Can be used to protect property rights of many citizens.

Where property rights of many citizens are involved, it is proper for the government on their behalf to enjoin injury to such rights by criminal acts.

3. Injunction 🔑103—Injunction against acts forbidden by Criminal Syndicalism Act held not to supersede the act.

An injunction to prevent acts forbidden by the Criminal Syndicalism Act is not error as superseding the act, since it rather supplements it.

4. Injunction 🔑103—Acts creating nuisance and assailing property rights may be enjoined, although they are crimes.

Acts violative of public policy, creating a nuisance or assailing rights of property, although specific crimes, and punishable as such, may be enjoined.

5. Injunction 🔑103—Enjoining teaching, advocating, etc., criminal syndicalism held proper.

Where a person procured new members for the Industrial Workers of the World, whose purpose was the overthrow of organized government by sabotage, arson, and other crimes of violence, his mere arrest and punishment under the Criminal Syndicalism Act will not afford adequate protection to property, and enjoining his violation of such act was proper.

6. Habeas corpus 🔑92(3)—Indefiniteness of complaint for injunction not open to inquiry in habeas corpus proceedings by one imprisoned for violation of injunction.

In habeas corpus proceedings by one imprisoned for contempt of court through violation of an injunction against activities denounced by the Criminal Syndicalism Act, the indefiniteness of the complaint for the injunction is not open to consideration.

7. Insurrection and sedition 🔑2—Criminal Syndicalism Act held valid.

The Criminal Syndicalism Act is constitutional and valid.

8. Injunction 🔑219—Erroneous injunction must be obeyed until reversed.

An erroneous injunction must be obeyed by the parties thereto until reversed, even though the error be in the assumption of the validity of the law going to the merits of the case.

9. Constitutional law 🔑70(1)—Injunction against acts forbidden by Criminal Syndicalism Act held not an interference with Legislature.

An injunction against acts forbidden by the Criminal Syndicalism Act did not constitute an invasion of the province of the Legislature, since it made no new law, nor did it supersede, repeal, or modify any existing law, but only aided in the better enforcement of the law already enacted.

10. Injunction 🔑103—Publication threatening irreparable injury to property rights will be enjoined.

Although a publication cannot be enjoined solely because of its libelous character, where it threatens irreparable injury to property rights and other grounds of equitable jurisdiction exist, it will be enjoined, regardless of its character as libelous or otherwise.

11. Contempt 🔑54(4) — Affidavits on which citation for constructive contempt is issued constitute complaint.

In a proceeding involving constructive contempt, affidavits upon which the citation is issued constitute the complaint, and, unless they contain a statement of facts showing a contempt, the court is without jurisdiction.

12. Injunction 🔑230(2)—Affidavits charging contempt in organization of criminal syndicalism society held sufficient.

In a proceeding for contempt for disobedience of an injunction against acts forbidden by the Criminal Syndicalism Act, § 2, subd. 4, denouncing organizing any society to promote criminal syndicalism or sabotage, affidavits charging that one had been active in obtaining persons to become members of such an organization were equivalent to charging that he assisted in organizing, extending, and increasing it.

13. Habeas corpus 🔑92(3) — Sufficiency of facts charged to constitute an offense not examined on writ of habeas corpus after conviction.

In a proceeding for habeas corpus after conviction, if the indictment or information purports and attempts to state an offense of which the court assuming to proceed has jurisdiction, whether the facts charged were sufficient to constitute an offense of that kind will not be examined into, although, if the pleading totally failed to charge an offense known to the law, the petitioner would be discharged.

14. Habeas corpus 🔑4—Cannot be made to serve purpose of writ of error or an appeal.

A writ of habeas corpus cannot be made to serve the purpose of a writ of error or an appeal.

15. Injunction 🔑230(2)—Averment of knowledge of existence of injunction held sufficient.

Affidavits charging contempt for violation of an injunction against acts forbidden by the Criminal Syndicalism Act, averring that the accused was a member of the Industrial Workers of the World, and that acts by him in organizing a criminal syndicalism society were done with knowledge of the issuance and existence of the injunction, sufficiently alleged knowledge of the injunction.

16. Injunction 🔑230(3)—Failure of accused to deny charges admits truth thereof.

Where one accused of contempt in violating an injunction against acts forbidden by the Criminal Syndicalism Act failed to deny truth of the charges on the hearing, he admitted the truth thereof.

In Bank.

In the matter of the application of R. Wood for writ of habeas corpus. On application of R. Wood for writ of habeas corpus to be directed to the sheriff of Sacramento county. Petitioner remanded.

R. W. Henderson, of San Francisco, and L. B. Schlingheyde, of Modesto, for petitioner.

J. M. Friedlander, City Prosecutor, of Los Angeles, W. V. Cowan, of Sacramento, and U. S. Webb, Atty. Gen., for respondent.

MYERS, C. J. The petitioner is in the custody of the sheriff of the county of Sacramento by virtue of an order made by the superior court of that county adjudging him in contempt of court, imposing a fine, and providing, in default of payment, for imprisonment at the rate of one day for each $2 of the fine. The conduct which was charged as a contempt was the alleged violation of an injunction pendente lite issued out of that court in an action wherein the state of California, on the relation of the Attorney General, was plaintiff and the Industrial Workers of the World et al. were defendants. The injunction commanded the defendants, and each of them, their servants, agents, solicitors, attorneys, and all others acting in their aid or assistance, to "desist and refrain from further conspiring with each other to carry out, and from carrying out, or attempting to carry out, their conspiracy to injure, destroy, and damage property in the state of California, and to take over and assume possession of the industries and properties in said state as well as the government thereof; and from knowingly circulating, selling, distributing, and displaying books, pamphlets, papers, or other written or printed matter advocating, teaching, or suggesting criminal syndicalism, sabotage, or the destruction of property for the purpose of taking over the industries and properties of all employers, or otherwise, and from advocating, by word of mouth or writing, the necessity, propriety, and expediency of criminal syndicalism or sabotage, direct action, willful damage or injury to physical property, and bodily injury to person or persons, and justifying or attempting to justify criminal syndicalism, the commission or attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with the intent to approve, advocate, or further the doctrine of criminal syndicalism, as said terms 'criminal syndicalism' and 'sabotage' are defined in chapter 188 of the Statutes and Amendments to the Code of the state of California, for 1919, and from organizing or aiding or assisting to organize or extend or increase any society, assemblage, or association of persons which teaches, advocates, aids, and abets criminal syndicalism or the duty, necessity, or propriety of committing crime, sabotage, violence, or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, and from doing any acts to carry out the doctrines, theories, and acts of criminal syndicalism, and from in any manner whatsoever conspiring or confederating together for the carrying out of said purposes, or either thereof. * * *" The petitioner was arrested, charged with being a member and delegate of the Industrial Workers of the World, was served with a citation to show cause upon affidavits charging him with having knowingly violated the injunction and order of the court, and appeared in response to the citation upon the return day thereof, when a hearing was had thereon. He was found guilty of the acts charged in the affidavits, adjudged in contempt of court, and in default of the payment of the fine imposed was committed to the custody of the sheriff. It is petitioner's contention that his imprisonment is illegal upon the grounds, first, that the injunction is invalid and that petitioner, therefore, cannot be held for disobedience thereof, and, secondly, that the affidavits upon which the citation was issued are insufficient.

[1] In support of petitioner's contention that the injunction herein is void he asserts that a court of equity has no criminal jurisdiction and cannot enjoin the commission of a crime; that the issuance of the injunction herein was an infringement of the province of the Legislature, and that a court of equity will not and cannot enjoin a publication.

It is to be noted that the acts forbidden by the terms of the injunction here in question are, substantially speaking, the precise acts which are denounced as crimes by the provisions of the Criminal Syndicalism Act (Stats. 1919, c. 188). Petitioner's contention in this behalf, speaking broadly, is that jurisdiction in equity is and has always been limited strictly to the civil side of jurisprudence; that this jurisdiction exists and may be invoked solely for the protection of private property rights; that the enforcement of criminal statutes is and has alway been beyond the scope of equity jurisdiction; that the sole purpose and effect of the injunction here in question is to take away from one charged with the commission of these particular crimes his constitutional right to a trial by jury; and that the injunction is therefore void as being wholly in excess of the jurisdiction of the court which issued it.

[2] It is doubtless true that jurisdiction in equity is primarily concerned with the protection of civil property rights in those cases wherein the law has failed to provide an adequate remedy. But it is not and never has been strictly limited to this field. As far back as the reign of Henry 1 it was recognized that the select council (predecessors of the chancellor) would act "on all applications to obtain redress for injuries and acts of oppression wherever from the heinousness of the offense or the rank and power of the offender, or any other cause, it was probable that a fair trial in the ordinary courts would be impeded, and also wherever by force and violence the regular administration of justice was hindered." 1 Pom. Eq. Jur. (4th Ed.) pp. 35, 36. The power and jurisdiction of equity to enjoin the maintenance of a public nuisance have always been recognized, even where the same was abatable by indictment or information, and where the maintenance thereof constituted a statutory crime. It is true, as a general rule, that an injunction will not be granted to restrain an act merely criminal, where no property rights are endangered thereby, but, where property rights are endangered, the fact that the acts are criminal will not prevent a court of equity from exercising its jurisdiction. Pierce v. Stablemen's Union, 156 Cal. 70–73, 103 Pac. 324. It is not in all cases essential that the property rights so endangered be private property rights of the party plaintiff.

> "As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it. Hence it follows that the government can obtain an injunction to restrain a public nuisance without showing any property right in itself. The duty of protecting the property rights of all its citizens is sufficient to warrant issuing the injunction." 5 Pom. Eq. Jur. (4th Ed.) p. 4296.

See, also, People v. Truckee Lumber Co., 116 Cal. 397, 402, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Weis v. Superior Court, 30 Cal. App. 730, 159 Pac. 464. We think that the correct rule is well stated by Professor Pomeroy in the following passage from section 1894:

> "While the right of the government to obtain an injunction to restrain criminal acts is not confined strictly to cases of nuisance, it would seem that it should be limited to cases closely analogous. Such relief, if applied to criminal acts in general, would supersede the criminal law and deprive parties of the right to a jury trial. Where the property rights of many citizens are involved, it is proper for the government, on their behalf, to invoke the powers of equity, and it would seem that only in such a case should the jurisdiction be assumed."

[3, 4] Petitioner asserts that, "if the superior court of Sacramento county can issue an injunction to supersede the criminal syndicalism law, it can enjoin the violation of any other penal statute. It might issue an injunction forbidding the commission of burglary within the county." This assertion involves both a false premise and a non sequ-

itur. The injunction herein does not supersede the Criminal Syndicalism Act. It rather supplements it. That act remains in full force and effect, in no way modified, qualified, limited, or superseded by the injunction. It does not at all follow that, if equity may properly enjoin the acts denounced by the Criminal Syndicalism Law, it may also enjoin the commission of burglary. It may be conceded that a court of equity would have no power to enjoin the commission of a burglary merely because it is a crime. But it is well settled that an injunction may issue to restrain the commission of acts which are violative of public policy, which create a nuisance or assail the rights of property, although such acts are specific crimes and punishable as such. Pierce v. Stablemen's Union, supra; People v. Truckee Lumber Co., supra; Herald v. Glendale Lodge No. 1289, 46 Cal. App. 325, 189 Pac. 329; People v. Peterson, 45 Cal. App. 457, 187 Pac. 1079; Weis v. Superior Court, 30 Cal. App. 730, 159 Pac. 464; Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901; Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652; People v. Stafford Packing Co. (Cal. Sup.) 227 Pac. 485.

"Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law." In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

"It is now clearly settled that a court of equity will enjoin the criminal intimidation of workingmen, in order to protect the property interests of their employers. Similarly, the court will enjoin strikers from committing criminal acts of violence, and, likewise, it will restrain a criminal conspiracy of any number of people to injure property. These applications of the rule, while recent, are still in accordance with well established equitable principles." 5 Pomeroy, § 1891.

[5] We will not take the space here to state in detail the objects, aims, and purposes of the organization known as the Industrial Workers of the World, or the methods followed by it. They have been set forth at some length in the opinion of this court in People v. Taylor, 187 Cal. 378, 203 Pac. 85. It will suffice to say that, in our opinion, the case presented to the superior court of Sacramento county and upon which the injunction herein was issued comes fairly within the line of cases described by Professor Pomeroy as "closely analogous" to a public nuisance. Petitioner argues that, conceding inadequacy of the legal remedy to be a proper ground for equitable relief, no such inadequacy existed in the present case, and that therefore the equitable remedy was unwarranted. He bases this argument upon the contention that the Criminal Syndicalism Act, unlike other criminal statutes, is preventive in character. As he says, "One does not have to commit criminal syndicalism or sabotage before he may be taken into custody. All he needs to do is to advocate such acts." He argues that this act is itself of an injunctive character, in that under it persons may be punished for engaging in a conspiracy to commit the crimes therein mentioned in advance of the commission of any overt act in furtherance thereof. From this he reasons that the act itself, together with the enforcement thereof by the criminal courts, affords a complete and adequate remedy. Upon reflection it will be found that this is not so. For example, it appears in the instant case that the petitioner is a member and delegate of the Industrial Workers of the World, one of the purposes of which is the overthrow of organized government by unlawful means, among which are sabotage, arson, and other crimes of violence and oppression. It also appears from the affidavits upon which the citation was issued herein that ever since the issuance of the injunction herein, and up to and including the very day of his arrest, petitioner has been busily engaged in procuring new members for this organization. It appears inferentially thereform that he had obtained at least twenty-four new members for this organization since the injunction and prior to his arrest. It is apparent, therefore, that the mere arrest and punishment of this petitioner will not afford adequate protection to the property of citizens from threatened injury and destruction so long as the remaining members of the conspiracy are left at large to carry on its criminal purposes, and together with them the twenty-four new members who have been procured by petitioner in contemptuous violation of the injunction. We are satisfied that the injunction here in question, as applied to the peculiar and particular facts of this case, involved a legitimate and proper exercise of equitable jurisdiction and is not void. Whether or no the trial court may have erred in granting it is a question with which we are not concerned upon this collateral attack.

If further authority be needed in support of our conclusion, the case of State ex rel. Hopkins v. Industrial Workers of the World, 113 Kan. 347, 214 Pac. 617, is precisely in point. That case involved the validity of an injunction issued at the suit of the state, upon the relation of the Attorney General, enjoining the defendants, the Industrial Workers of the World and others, from committing substantially the same acts here enjoined, in violation of the Criminal Syndicalism Act of Kansas. The case arose there upon appeal from the order granting the injunction, and accordingly many grounds of attack were there available which could not be urged upon the collateral attack herein. The Supreme Court of Kansas affirmed the judgment in a brief opinion, resting its decision upon the case of State v. Howat, 109 Kan. 376, 198 Pac. 686, 25 A. L. R. 1210. That case also involved upon appeal the validity of an injunction granted at the suit of the state, on the relation of the Attorney General, restraining defendants, as officers and members of a labor organization, from calling a strike of miners and mine workers in the Kansas coal fields, in violation of the provisions of the Kansas law creating a court of industrial relations. Substantially all of the points made by petitioner herein were there considered and dealt with at length in a scholarly and well-reasoned opinion, concluding with the complete affirmance of the validity of the injunction appealed from. Petitioner asserts that the Howat Case is to be distinguished from the case at bar by the circumstance that the state of Kansas was the owner of some of the lands and buildings threatened with injury by the contemplated action of the defendants. The decision of that case was not, however, predicated upon this circumstance. That court in its opinion referred to this circumstance, and then said:

> "The authorities are in substantial accord that this special interest authorized the state to apply for, and authorized the district court to grant, the injunction; but this court holds that, aside from this indisputable ground, and without aid of the statute expressly authorizing actions of injunction in the name of the state to suppress public nuisances, * * * the district court was possessed of power to grant the injunction."

[6-8] Moreover, it is alleged in the complaint for injunction here in question "that, if the purposes of said defendants are accomplished, real and personal property owned by the residents and citizens of the state of California and by the state of California itself and the municipalities therein will be injured or destroyed by said defendants for the purpose of carrying out their said plans and theories. * * *" It may be that this allegation is indefinite or uncertain or otherwise defective, but that is a question not open to consideration in this collateral proceeding. Petitioner also argues that, inasmuch as the decision in the Howat Case rested upon the validity of the Industrial Court Act, which has since been held invalid (Court of Industrial Relations v. Charles Wolff Packing Co., reported in 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103), to use petitioner's language, "the Howat Case loses its foundation and the Kansas injunction against the Industrial Workers of the World must go down in the same crash." This does not at all follow. If the reasoning and conclusion of that decision were valid, though based upon the false premise of an invalid law, then if such reasoning and conclusion be based upon the sound premise of a valid law, as is the situation in the case at bar, the result is a perfectly sound structure. The constitutionality and validity of the California Criminal Syndicalism Law are no longer open to question. People v. Steelik, 187 Cal. 361, 203 Pac. 78; People v. Taylor, 187 Cal. 378, 203 Pac. 85. Moreover, as was pointed out in Howat v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550, the validity of the injunction was not wholly dependent upon the constitutionality of the Industrial Court Act, and, even if it had been, the invalidity of that act would have served but to render the injunction erroneous, not void. Such an injunction must be obeyed by the parties thereto until reversed, however erroneous the action of the court in issuing it may have been, even though the error be in the assumption of the validity of a law going to the merits of the case.

[9] We find no merit in the contention that the issuance of the injunction here in question constituted an interference with the province of the Legislature. That injunction made no new law. Neither did it supersede, repeal, or modify any existing law. It operated solely to aid in the better enforcement of the law which had been theretofore enacted by the Legislature.

[10] It may be conceded to be a recognized rule of equity that an injunction will not issue to restrain a publication solely upon the ground of the libelous character thereof. (A valuable and instructive review and criticism of this rule is to be found in an article by Professor Pound in 29 Harv. Law Review, 640 et seq.) But it does not follow that an injunction will in no case issue to restrain a publication. This court applied that rule in Dailey v. Sup. Ct., 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160. That decision was grounded upon the conclusion that such an injunction would violate section 9, article 1, of the Constitution of this state, providing that "every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. * * *" That case is not to be regarded as authority in support of petitioner's contention herein, for the reason that it has since been determined that the right of free speech guaranteed by the Constitution does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property or the other matters proscribed by the Criminal Syndicalism Act. People v. Steelik, 187 Cal. at page 375, 203 Pac. 78. The existence and validity of the rule invoked by petitioner may be conceded, but that rule is nevertheless subject to the limitation that, where the proposed publication threatens irreparable injury to rights of property and

the other grounds of equitable jurisdiction exist, a court of equity will not hesitate to restrain such publication, regardless of its character as libelous or otherwise. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797–804; Loewe v. Cal. State Fed. of Labor (C. C.) 139 Fed. 71; Jordahl v. Hayda, 1 Cal. App. 696–699, 82 Pac. 1079; 32 Corp. Jur., 174.

[11, 12] We will next consider the claimed insufficiency of the affidavits herein to support the judgment. It is true, as asserted by petitioner, that in a proceeding involving a constructive contempt the affidavits upon which the citation is issued constitute the complaint, and, unless they contain a statement of facts which show that a contempt has been committed, the court is without jurisdiction to proceed in the matter. Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817; Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409; Hotaling v. Superior Court (Cal. Sup.) 217 Pac. 73, 29 A. L. R. 127. Petitioner asserts that the affidavits herein state conclusions of law rather than the facts which would constitute the offense. As we understand his contention it is that the facts constituting the charge against the petitioner are not stated in the affidavits with that degree of certainty, particularity, and definiteness which would be required in an information charging him with these offenses in a criminal prosecution therefor. The second section of the Criminal Syndicalism Act contains five subdivisions, each enumerating a different group or class of offenses. The first proscribes advocating, teaching, or aiding and abetting the commission of criminal syndicalism or sabotage. The second forbids justifying or attempting to justify the same. The third proscribes printing, publishing, or circulating literature advising criminal syndicalism. The fourth denounces organizing or assisting in organizing any organization, society, or group organized to advocate, teach, or aid and abet it. The fifth forbids the commission of crime advocated by the doctrine of criminal syndicalism. It was held in the Steelik and Taylor Cases, supra, that in a criminal prosecution under this act, where the charge is based on subdivisions 1, 2, 3, or 5, the acts charged must be pleaded with a degree of particularity that will impart to the accused precise information which, with the evidence adduced to sustain such charge, upon conviction thereof, will operate as a bar to another or further prosecution for the same specific acts, but that, where the charge is the violation of subdivision 4, the statement thereof in the language of said subdivision is sufficient. It would be sufficient for the purposes hereof to point out that the affidavits herein charged that petitioner "had been active in the county of Sacramento and elsewhere throughout the state of California in obtaining persons to become members of said organization." This was equivalent to charging that he assisted in organizing, extending and increasing said organization. In addition to this he was charged with the circulation and distribution of various articles of literature, verbatim copies of which were included in the affidavits.

[13, 14] Moreover, it is to be borne in mind that upon a collateral attack such as this the scope of inquiry into the sufficiency of an indictment or information is limited. It is true that the petitioner would be entitled to be discharged, if the pleading totally failed to charge an offense known to the law. But it is well settled that, if the indictment or information purports and attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into upon habeas corpus after judgment of conviction. 13 Cal. Jur. pp. 232, 233, and cases cited. Whether or not the foregoing rule should be given full application to a case involving a prosecution upon a charge of constructive contempt need not be determined here. It will suffice to say that in no event can the writ of habeas corpus be made to serve the purpose of a writ of error or an appeal. Id., pp. 236, 237.

[15] Petitioner asserts that the charging affidavits wholly failed to allege that petitioner knew of the injunction at the time he is charged with violating it. He supports this assertion by quoting the following language from one of the charging affidavits: "That said R. Wood stated to affiant that he knew that said order of injunction had been issued by said superior court." If this were the only averment upon the subject in the affidavit, petitioner's point would be well taken, because there is nothing therein to fix the time when petitioner is alleged to have acquired this knowledge. In the concluding paragraph of said affidavit, however, it is averred "that during all of said times said R. Wood was and is a member of said Industrial Workers of the World, and all of his said acts aforesaid were done by him * * * with full knowledge on the part of said R. Wood of the issuance and existence of said order of injunction." This averment was entirely sufficient upon this point. Mitchell v. Superior Court, 163 Cal. 423, 125 Pac. 1061; Hedges v. Superior Court, 67 Cal. 405, 7 Pac. 767.

[16] It is not claimed here, nor was it claimed in the court below, that the evidence was insufficient to establish the truth of the charges. In fact, petitioner admitted the truth thereof by his failure to deny the same upon the hearing. Mitchell v. Superior Court, supra. He made no effort to purge himself of the contempt, but relied solely upon the claimed unconstitutionality of the law. We

have considered all of the contentions made in his behalf upon this proceeding, and find no merit in any of them.

It is ordered that the writ be discharged and the petitioner remanded.

We concur: LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; WASTE, J.; SHENK, J.

194 Cal. 63

Ex parte MORRIS. (Cr. No. 2657.)

(Supreme Court of California. June 20, 1924.)

1. Contempt 🔑38, 40—Statute making contempt a misdemeanor held remedial; question of double jeopardy does not arise as respects punishments for contempt, under Penal Code and Code of Civil Procedure.

Pen. Code, § 166, subd. 4, making disobedience of process or order lawfully isued by court a misdemeanor, in view of sections 11, 657, 658, is remedial statute, and the remedy provided thereby is in addition to the remedies provided by Code of Civ. Proc. §§ 1209–1222, relating to contempt; and the offenses denounced in the former code provision are separate and distinct from those denounced in the latter, and the question of "once in jeopardy" does not arise thereunder.

2. Contempt 🔑40—Criminal contempt and civil contempt are to be investigated and punished under same procedure and rules.

Both civil and criminal contempts are contemplated and provided for in Code of Civ. Proc. §§ 1209–1222, and are to be investigated and punished in the same manner and in accordance with the same rules.

3. Contempt 🔑3—Statute held to make contempt criminal offense.

Penal Code, § 166, making enumerated contempts of court misdemeanors, attaches to each of them the definite quality of a criminal offense.

4. Contempt 🔑64—Attachment prior to warrant of commitment not required for commitment issued on conviction of offense pursuant to the Penal Code.

The provisions of Code of Civ. Proc. § 1212, that no warrant of commitment for contempt can be issued without previous attachment to answer or notice or order to show cause, refers to warrant of commitment issued pursuant to the procedure prescribed in that title of the Code of Civil Procedure rather than to commitment on conviction of a criminal offense pursuant to provisions of the Penal Code.

5. Constitutional law 🔑55—Contempt 🔑31—Statute making contempt misdemeanor constitutional.

Pen. Code, § 166, subd. 4, providing that willful disobedience of a process or order of a court shall be a misdemeanor is not unconstitutional as taking away the power of the court contemned to punish for contempt but provides an additional remedy.

In Bank.

In the matter of an application by Louis J. Morris for a writ of habeas corpus to the Police Court of the City of Los Angeles. Petitioner remanded.

R. W. Henderson, of San Francisco, and L. B. Schlingheyde, of Modesto, for petitioner.

J. M. Friedlander, City Prosecutor, of Los Angeles, W. V. Cowan, of Sacramento, and U. S. Webb, Atty. Gen., for respondent.

MYERS, C. J. This matter comes before us on a writ of habeas corpus. The petitioner was charged, tried, and convicted in the police court of the city of Los Angeles, was sentenced to pay a fine of $250, and, in default of payment, to suffer 90 days' imprisonment in the city jail. He was charged with a misdemeanor under section 166, subdivision 4, of the Penal Code, which is as follows:

> "Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor: * * *
>
> "4. Willful disobedience of any process or order lawfully issued by any court. * * *"

He was specifically charged with the willful disobedience of an order and injunction issued out of the superior court in and for the county of Sacramento in an action wherein the people of the state of California, on the relation of the Attorney General, was plaintiff against the Industrial Workers of the World et al., defendants. The petitioner disputes the constitutionality of the penal code section as interpreted by the prosecution, denies the jurisdiction of the police court over the proceeding here in question, and attacks the validity of the injunction which he is charged with violating. All of the questions raised by petitioner in his attack upon the validity of the injunction were raised and considered by this court and resolved against petitioner's contentions in the case of In re Wood (Cal. Sup.) 227 Pac. 908, this day filed, which involved the same injunction here in question.

[1, 2] Petitioner contends that section 166 of the Penal Code should be construed as simply declaratory of the common law which designated criminal contempts as misdemeanors, and that, if it be construed as a remedial statute, it must be held unconstitutional, because it deprives the superior and appellate courts of the power to enforce their judgments and orders and to punish infractions of their dignity and authority. In support of his first contention petitioner calls attention to the circumstance, which has long been recognized, that contempts are of two kinds, which have been designated respectively as "criminal contempts" and "civil contempts." From this he deduces the conclusion that the dual procedure for the punish-

ment of these two kinds of contempts is reflected in the provisions of the Code of Civil Procedure (sections 1209 to 1222, Code Civ. Proc.) as applicable to civil contempts, and the Penal Code section as applicable to criminal contempts. Herein petitioner fails to recognize the difference between the classification of contempts known to the common law as "criminal contempts" and "civil contempts" on the one hand, and the classification thereof which might be made with reference to the provisions of our codes whereby contempts referred to in the Code of Civil Procedure might be termed "civil contempts" and those enumerated in the Penal Code "criminal contempts." Summary proceedings for the punishment of contempt upon a rule or citation have always been recognized as sui generis, frequently arising in connection with civil actions, often partaking somewhat of the character of civil remedies, and always partaking largely of the character of criminal prosecutions. Hotaling v. Superior Court (Cal. Sup.) 217 Pac. 73, 29 A. L. R. 127, and cases there cited. These proceedings at the common law were spoken of as "criminal contempts" when they were directed primarily to the maintenance of the dignity and authority of the court, and as "civil contempts" when their primary object was the protection of the private rights of parties litigant. This distinction is clearly pointed out in Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, wherein it is said:

> "The exercise of this power [to punish for contempt] has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. * * * Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."

For an exhaustive review of the cases upon this subject see State v. Magee Pub. Co., (N. M.) 224 Pac. 1028.

[3] Both of these classes of contempts are contemplated by and provided for in the provisions of our Code of Civil Procedure, above cited, and are to be investigated and punished in the same manner and in accordance with the same rules. It is the plain intent of section 166 of the Penal Code, however, to give another and different aspect to the contempts there enumerated and to expressly attach to each of them the definite quality of a criminal offense. This intent is made certain when we refer to other sections of the same Code. Section 11 thereof provides that—

> "This code does not affect any power conferred by law upon * * * any public body, tribunal, or officer, to impose or inflict punishment for a contempt."

Section 657 provides:

> "A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt."

Section 658:

> "When it appears, at the time of passing sentence upon a person convicted upon indictment, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion."

[4] A reading of section 166 in the light of the other sections quoted leaves no room to doubt that it was intended as a remedial statute. The provision in section 1212, Code of Civil Procedure, that "no warrant of commitment can be issued without such previous attachment to answer or such notice or order to show cause," obviously refers to a warrant of commitment issued pursuant to the procedure prescribed in that title of the Code of Civil Procedure rather than to any commitment issued upon conviction of a criminal offense pursuant to the provisions of the Penal Code.

[5] Petitioner's contentions that the penal code section construed as remedial is unconstitutional and that the police court was without jurisdiction of this proceeding are so interwoven that they may well be considered together. Petitioner concedes that the Legislature might prescribe two remedies for the punishment of contempt, "provided, of course, that only the court whose order was contemned had jurisdiction." The quoted proviso contains the kernel of his argument. It is, briefly stated, that the power to punish for contempt of its authority inheres in every court of record as an essential element of the jurisdiction vested in it by the Constitution, without which it could not adequately function as a court; that by reason of the fundamental nature and purpose of this power it must be vested in each instance in that particular court whose order or authority has been contemned; that the Legislature has no authority to take from the courts this essential power; that the attempt of the Legislature to confer upon a police court the jurisdiction to punish a contempt consisting in the violation of an order of the superior

court is in effect an attempt to take from the superior court an essential portion of its constitutional authority and is therefore void. From these premises petitioner deduces the conclusion that the jurisdiction to punish as a contempt the violation of an order issued by the superior court of Sacramento county is vested solely and exclusively in that court. If we were to regard petitioner's act solely as an offense against the dignity and authority of that court, we would agree with this conclusion, and the cases so hold. Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214; Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; People v. County Judge of Placer County, 27 Cal. 152; Farmers' State Bank v. State, 13 Okl. Cr. 283, 164 Pac. 132, L. R. A. 1917E, 551; Greene v. Edgington (Idaho) 214 Pac. 751. But these cases do not hold that, when an act which is a comtempt of court is at the same time a specific criminal offense, denounced as such in the Penal Code, it will not be punishable as such. It was the plain intent of the Legislature expressed in the cited code sections to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as offenses against the peace and dignity of the people of the state of California, and remediable as such in accordance with the rules prescribed in the Penal Code. It is apparent upon reflection that the same act may at the same time take on a third aspect in which it is to be regarded as an offense against private rights, and remediable as such by an ordinary action at law. Plainly the Legislature did not intend to take away from the court contemned the power to punish a violator of its orders, but intended rather to provide an additional remedy which should be in a sense cumulative, and which should be available in the courts possessing the appropriate criminal jurisdiction. These remedies were not intended to be concurrent, but rather cumulative in character, though not strictly so, because each remedy is for a different offense, though the two offenses arise out of the same act.

Petitioner asserts that, regardless of the legislative intent, if we hold that jurisdiction herein was vested in the police court, the inevitable effect thereof will be to deprive the superior court of the power to punish its own contemners. He asserts that he, having been placed on trial in the police court, if thereafter haled before the superior court at Sacramento to answer for the same act as a contempt of that court, could then interpose a plea of once in jeopardy as a complete defense to that proceeding. He argues that the effect thereof would be to deprive the superior court of the power to punish for a violation of its own orders, because the violator, by the simple expedient of procuring himself to be charged in a police court or justice's court, and there assessed a small penalty, could render himself immune to punishment by the court which he had contemned. The reasoning is sound, but it rests upon a false premise. The defense of once in jeopardy would not lie in such case because the two offenses are distinct and different, even though the act out of which they arise be the same. We find no authority which holds contrary to this conclusion. The cases cited by petitioner (In re Breen, 30 Nev. 186, 93 Pac. 1004; McGovern v. U. S. (C. C. A.) 280 Fed. 73; State v. Clancy, 30 Mont. 193, 76 Pac. 10), do not so hold. Petitioner quotes from 8 R. C. L. 136, 137, but overlooks the following language at pages 137, 138:

> "Sometimes, however, a criminal act involves an injury to property rights, and when this is the case the act may be enjoined, if the party would not have an adequate remedy at law. Sometimes also statutes authorize injunctions against criminal acts, and when such an injunction has been issued, whether on the ground of preventing irremediable injury to property, or by statutory authority to prevent crime, the rule as to former jeopardy cannot be invoked on the ground that the same act is punishable both as a contempt of court and as a crime. The two offenses are not the same."

In Bessette v. W. B. Conkey Co., supra (194 U. S. 330 [24 Sup. Ct. 667]), the Supreme Court of the United States readopted a summary of its conclusions, arrived at in Re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, in the following language:

> "That the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; *that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation.*" (Italics added.)

The case of Ex parte Allison, 99 Tex. 455, 90 S. W. 870, 122 Am. St. Rep. 653, is direct authority for our conclusion herein. The question of "twice in jeopardy" in relation to an injunction forbidding the commission of a crime was there directly presented for decision, and the court said:

> "Nor do we think that the act in question infringes that provision of the bill of rights which declares that 'no person for the same offense, shall be twice put in jeopardy of life or liberty.' It is true that, if he commits the act which he is enjoined from committing and such act be a violation of the penal laws, * * * he may under this statute be punished for the contempt and also for the violation of the criminal law. But these are not 'the same offense.' In the former case he is punished for a violation of the orders of the court, and in the

latter for an offense 'against the peace and dignity of the state.'"

In the note to this case (2 L. R. A. [N. S.] 1111), the annotator sums up the authorities in the statement "that a statute authorizing the issuance of an injunction against an act which is also punishable as a violation of criminal law is not open to objection, as twice putting a person in jeopardy for the same offense, seems never to have been questioned." In People v. Mead, 92 N. Y. 415, the defendant was indicted in one court upon a misdemeanor charge of contempt, consisting in the willful disobedience of an order which had been issued by another court. The indictment was based on section 143 of the New York Penal Code, which is identical with our section 166. All of our penal code sections bearing on the questions here under consideration were borrowed from the corresponding sections of the New York Penal Code based on Field's draft. That case is therefore on all fours with the one at bar. The Court of Appeals held that the defendant was subject to prosecution in that manner, saying:

> "It was not necessary to the validity of the indictment that the accused should first have been adjudged in contempt by the court whose process he disobeyed. The two proceedings are wholly independent of each other. One who disobeys the lawful order of a court not only offends against the dignity of the particular tribunal, but also against the public law. The particular court may pass over the contempt and suffer its order to be spurned, but the offense against the people remains. Their authority has been contemned, the administration of public justice assailed, and its power despised. For such an offense the guilty [party] may be punished by indictment, although the court whose order has been disobeyed may take the indignity in silence. The statute has made such disobedience, when willful in its character, an offense against the people, and not left it dependent upon the action or nonaction of the specific judge or court. The statute contemplates that both remedies, or either may be pursued."

In State v. Clancy, 30 Mont. 193, 76 Pac. 10, cited by petitioner herein, the court said:

> "When prosecuted under the Code of Civil Procedure, a contempt of court is not to be regarded as a criminal offense, to be prosecuted only by complaint, information, or indictment, as laid down by section 8 of article 3 of the state Constitution, but, rather, as a special proceeding of a criminal character. * * * Furthermore, the same acts which may be punished in the summary proceeding are characterized by the lawmaking power as criminal, and the additional remedy by an ordinary criminal action is provided for in Pen. Code, § 293."

This is the same as our Penal Code, § 166. The Montana Code also contains sections identical with our 657 and 658. See, also, State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174; State ex rel. Zehner v. Vankirk, 27 Ind. 121.

The precise question here under consideration does not appear to have been directly decided by the courts of this state, but the answer thereto is forecasted in the language of some of the decisions. In Ex parte Acock, 84 Cal. 50, 23 Pac. 1029, this court said:

> "The fact that the petitioner may be prosecuted in criminal and civil actions does not prevent a prosecution for contempt. A party may be liable civilly and criminally for an assault upon an officer in open court, and at the same time may be punished for the indignity laid upon the court."

In Selowsky v. Superior Court, 180 Cal. 404, 411, 181 Pac. 652, 656, the court said:

> "Nor can the statute [the redlight abatement act] be assailed on the theory that it conflicts with section 1218 of the Code of Civil Procedure. That section cannot be said to purport to fix the penalty for all contempts. Indeed, the next succeeding section provides a different punishment for certain classes of contempts, while a still different punishment is provided in the Penal Code for the contempts enumerated in section 166 thereof."

In Ex parte Karlson, 160 Cal. 378, 383, 117 Pac. 447, 449 (Ann. Cas. 1912D, 1334) the following language was used:

> "The Penal Code declares, in effect, that the provision that no act shall be punishable as a crime except such as may be made a crime by statute, and then only in the manner prescribed or authorized by statute (section 6), shall not apply to contempts punishable under section 1209 of the Code of Civil Procedure (section 11). It necessarily follows that the Penal Code has no application to a civil contempt, and that, the question whether the particular act is punishable as a criminal contempt or not, under section 166 of the Penal Code, is immaterial to any inquiry arising in a contempt proceeding under section 1209. If, after such punishment in such civil proceeding, a person is convicted of the same act as a crime under said section 166, the former punishment may mitigate the severity of the sentence upon the subsequent conviction. Pen. Code, § 658."

We conclude that section 166 of the Penal Code is a remedial statute; that the remedy thus provided is intended to be cumulative, or, rather, in addition to the remedies provided by the title of the Code of Civil Procedure on contempts; that the offenses denounced in the former code provision are separate and distinct from those denounced in the latter, and the question of "once in jeopardy" does not arise thereunder.

The writ is discharged, and the petitioner remanded.

We concur: RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; LENNON, J.; SHENK, J.

67 Cal. App. 468

INTERNATIONAL MAGAZINE CO. v. NATIONAL RADIO CO. (Civ. 4690.)

(District Court of Appeal, First District, Division 2, California. May 27, 1924.)

1. Corporations ⟹406(2)—President of corporation held to have no power to make contract for advertising.

Where a corporation was merely experimenting with a product to be manufactured and had not yet manufactured any, the president under by-laws giving him general powers usually vested in his office did not have power to bind the corporation by contract for advertising involving a large expenditure of money and extending over a year.

2. Corporations ⟹426(12) — Ratification of contract must be made with full knowledge of facts.

Ratification of a contract of the president of a corporation by the corporation must be made with full knowledge of the facts.

3. Corporations ⟹406(2)—Reliance on ostensible authority of president is an essential element of liability of company.

In an action by a magazine company against a corporation to recover for advertising according to a contract made by defendant's president, the fact that plaintiff relied upon the general exercise of authority by the president and that it knew thereof was an essential element of the liability of defendant.

4. Corporations ⟹520—On showing in plaintiff's evidence that president of corporation had not authority to contract for it, nonsuit proper.

Where, in an action against a corporation on contract by defendant's president, plaintiff's proof contained affirmative evidence that defendant's by-laws did not give its president power to make such contract, and that there had been no special authorization by the board of directors, granting defendant's motion for a nonsuit was proper.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Action by the International Magazine Company against the National Radio Company. From judgment for defendant, plaintiff appeals. Affirmed.

Ernest K. Little, of San Francisco, for appellant.

Joseph A. Garry, Joseph M. Trusty, and Frank J. Golden, all of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it, entered after defendant's motion for a nonsuit had been granted, in an action brought to recover $1,000 alleged to be due from the defendant as the price of five one-page advertisements in a magazine known as "Motor Boating," a publication owned by plaintiff.

The record discloses that on or about July 17, 1920, Joseph B. Ruegg was the president of the defendant corporation, and on that day signed a writing in the name of the corporation, by himself as president thereof, agreeing to pay a specified sum for each insertion of a one-page advertisement in said magazine for a period of one year. The writing was not signed by either the secretary or manager, nor was it under the seal of the corporation. It also appeared in evidence, affirmatively, that there was no resolution of the board of directors of the corporation authorizing its president to sign this contract, nor was there any resolution ever passed by said board referring in any way to the said contract or the advertising to be done thereunder. The by-laws were introduced in evidence and the only portion thereof having any bearing upon our problem is the following:

> "The president * * * shall have the general powers and duties usually vested in the office of the president of a corporation."

It also appeared that the corporation had a general manager at the time the contract was signed by its president; that the advertisement which was published in the magazine in conformity with said contract referred to a manufactured product which the defendant corporation was incorporated for the purpose of producing, but that at the time the contract was signed the corporation was merely experimenting with said product and no sales had been made of the same and the article was not being produced for sale; that the contract provided for advertising for a period of a year at an expense of $200 per month.

[1] We think it is apparent that the president of this corporation had no actual authority to make the contract. The section of the by-laws above quoted giving to him "the general powers usually vested in the office of president" is ineffectual to confer authority to make a contract for the corporation such as here involved, for such power is not usually vested in the president. It was said in the case of Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494:

> "It is an elementary principle of corporation law that the president of a corporation has no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, section 716, as follows: 'The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds or management. This is a rule which prevails everywhere, ex-

> cepting possibly in the state of Illinois. * * * It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director.' See Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 632, 21 Pac. 373; Bliss v. Kaweah, etc., Co., 65 Cal. 502, 4 Pac. 507; Salfield v. Sutter, etc., Co., 94 Cal. 546, 29 Pac. 1105; Blood v. La Serena, etc., Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Barney v. Pfoor, 117 Cal. 56, 58, 48 Pac. 987; Northwestern, etc., Co. v. Whitney, 5 Cal. App. 105, 108, 89 Pac. 981."

The same rule is announced in California Jurisprudence, vol. 6, § 474, p. 1102:

> "*Powers of President.* Although the president of a corporation is the presiding officer of the board of directors, he has merely by reason of holding such office and regardless of conferred or ostensible authority, no more power of management or disposal over the property and affairs of the corporation than any other single member of the board. He has no power, merely because he is president, to bind the corporation by contract, but rather, only such power as has been given him by the by-laws and by the board of directors, and such other powers as may arise from his having assumed and exercised authority in the past with the apparent consent and acquiescence of the corporation, or which are in the ordinary course and conduct of its business."

In the instant case, the contract involved a considerable expenditure of money and extended over a period of a year. Under the special facts and circumstances of this case, where the corporation was merely experimenting with the product to be manufactured and had not yet manufactured such articles for sale, the important matter of starting out on an expensive advertising campaign, to extend over the period of a year, was, assuredly, a problem to be considered by the board of directors, the managing body of the corporation, and would not be within the general duties of the president of the corporation.

Added to this, we have in the record the testimony of the secretary of the corporation, the plaintiff's witness, as follows:

> "Q. You say you are the secretary. What power has Mr. Ruegg as president of the National Radio Company? What are his various duties by resolution? A. There are not any resolutions giving him any general powers, but each time it was necessary to sign any contract or instrument binding the corporation, there was a resolution specially passed conferring that authority and power, such as signing notes and borrowing money for the corporation."

The case of Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 514, 185 Pac. 388, is relied upon by appellant to maintain its contention that its proof in the instant case made out a prima facie case. But the Grummet Case presented a situation where an employee was suing for wages alleged to be due him. It appeared that the plaintiff had been engaged as assistant manager of the corporation by the president and manager of the same; that he performed services for the corporation and his employment continued for nearly two years; that his name appeared as assistant manager in the advertising of the defendant corporation; and that the books of the corporation showed that he was to receive a fixed compensation for his services, $710 of which had been paid to him and the balance of $2,340 had been credited to his account upon the books of the corporation. We think the facts of the two cases are not comparable.

[2] Upon the question of ratification, plaintiff showed that it had mailed copies of its magazines, containing the advertisement, to defendant from time to time. It appeared, however, that they had not been mailed to the proper address of the defendant and there was no showing made that any of them had ever been received by the defendant nor seen by any of its officers. There is also testimony that statements of account were mailed from time to time to the defendant and that some statements of similar import upon the stationery of plaintiff were afterwards seen in the files of the defendant company. There is no proof, however, that these statements were brought to the attention of any officers of the company and no showing that the corporate officers had any knowledge of the existence of the contract relied upon. A ratification must be made with full knowledge of the facts. Schmidt v. Mesmer, 116 Cal. 267, 271, 48 Pac. 54; 6 Cal. Jur. § 57, pp. 93, 94.

[3] There was no substantial evidence upon which to predicate ostensible authority of the president; for while the record contained the statement of the president that he had "O. K.'d bills and various kinds of papers * * * whatever came up in the regular routine of business of the corporation," there is no proof that the plaintiff relied upon this exercise of authority or that it even knew thereof. And this is an essential element of liability based upon the ostensible authority of an agent. 1 Cal. Jur. pp. 737 et seq., §§ 38, 39, 40.

[4] It is important to point out that the present case does not present a situation where the plaintiff simply proved the making of a contract on behalf of the defendant by its president, and thereafter the motion for nonsuit was made. Had such a situation existed the plaintiff would have made out a prima facie case under the rule of Grummet v. Fresno Glazed Cement Pipe Co., supra, and it would have devolved upon the defendant to take up the question of the absence of special authorization as a defense—that mat-

ter not entering into a prima facie showing. But in the instant case the plaintiff went further than a showing that the contract was made by the president of the corporation on its behalf. The plaintiff's proof included affirmative evidence that there was no provision in the by-laws giving the president power to make contracts and that there had been no special authorization by the board of directors. These facts were brought out by the plaintiff's witnesses. It would seem, therefore, that the plaintiff's case must fall of its own weight.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

67 Cal. App. 520

PEOPLE v. IRBY. (Cr. 1060.)

(District Court of Appeal, Second District, Division 2, California. May 27, 1924.)

1. Witnesses ⚷391—Admission of evidence of conversation for impeachment purposes erroneous.

Court erred where state was attempting to impeach accused as to certain conversation in permitting to be asked of accused, "Did you ever tell S. that?" and in permitting S. to testify that at a time other than the conversation involved certain things were said.

2. Criminal law ⚷369(1)—Admission of guilt of another crime inadmissible.

A statement of accused while under arrest, amounting to an admission of arrest for sodomy, was inadmissible in prosecution for robbery.

3. Criminal law ⚷706—Conduct of prosecuting attorney held reprehensible.

Conduct of prosecuting attorney in persistently instilling into case evidence as to another crime was reprehensible, and deprived defendant of a fair trial.

4. Criminal law ⚷1186(4)—What is technical error not resulting in miscarriage of justice.

Where, from examination of the entire cause, court is unable to determine whether appellant would or would not have been convicted but for errors of court and misconduct of prosecutor, provisions of Const. art 6, § 4½, warranting reversal only where error has "resulted in a miscarriage of justice," may not be availed of.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Macon F. Irby was convicted of robbery, and appeals. Reversed.

Chauncey Gardner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

WORKS, J. Defendant was convicted of robbery under an information in two counts. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

It is not necessary, for the purposes of the decision which we are about to render, to state even in a general way the facts involved in the second count of the information, and we shall recite but briefly, as a preface to certain portions of the record which we must state circumstantially, the facts upon which the first count is based.

The name of the prosecuting witness is Solovich. At the time of the occurrences upon which the information rests he had resided at a certain apartment house, with one Harrigan as a roommate for nine years. Solovich's story is that on a certain evening he was on his way home and stopped to look at a show window near the apartment house in which he lived; that he was there accosted by appellant, who made the assertion that they had met before, although Solovich says they had not; that appellant persuaded Solovich to spend the night with him at a hotel about a block distant from Solovich's place of residence, and that when they got into the room at the hotel appellant beat Solovich severely and robbed him.

Appellant, who took the witness stand in his own behalf, says that he met Solovich at the show window, but denies that he pretended that they had ever been acquainted before that meeting. He says that Solovich asked him to procure a room at some hotel where they might spend the night together, claiming that he (Solovich) was without funds to procure a night's lodging for himself; that appellant finally consented to do so; that they went together to the hotel mentioned by Solovich in his testimony; that they undressed and went to bed; that thereafter Solovich attempted an obscene familiarity with appellant, leading the latter to believe that Solovich intended to satisfy an unnatural sex desire upon him, and that he then jumped out of bed and administered to Solovich the beating described by the latter in his testimony. Appellant denies specifically the statements of Solovich as to the alleged robbery.

Upon the cross-examination of appellant the following transpired:

"Mr. Costello (a deputy district attorney): Have you ever been convicted of a felony? A. No, sir. Q. You say you called Mr. Solovich a degenerate? A. Yes, sir. Q. Were you ever called one? A. No, sir. Q. You are sure you have never been called one, or accused of being one? Mr. Gardner (counsel for defendant): I object to that as not cross-examination, and misconduct. The Court: Objection sustained. Mr. Gardner: We ask the court to instruct the jury to disregard the remarks of the district attorney. Mr. Costello: I have been pretty liberal to you. Mr. Gardner: I think that is highly prejudicial your honor. The

Court: Stricken out, and the jury instructed to disregard it."

Later in the cross-examination appellant said something about his desire to force Solovich "to get out of Los Angeles," in which city the events mentioned in the testimony transpired. The following then occurred:

"Q. (By Mr. Costello): Why did you want him to get out of Los Angeles? A. Because he is a degenerate, sir. Q. You are not one, are you? Mr. Gardner: Objected to as not cross-examination, prejudicial; and we ask the court again to instruct the jury to disregard the district attorney's remarks, which we assign as misconduct. The Court: The jury are instructed to disregard the remarks of the district attorney."

The persistency of the district attorney was again made evident during the cross-examination of appellant. The witness was asked by Mr. Costello:

"Just what is your understanding of a degenerate? * * * A. My opinion of a degenerate is a man that will want another man to go directly against the laws of nature, and have sexual intercourse with another man, instead of a person of the opposite sex. Mr. Costello: Did Mr. Solovich try that with you?"

It is unnecessary to set down the answer. The examination proceeded:

"Q. Did you try to do it to him? A. I hit him because he wanted to. Q. I am asking you—did you? Mr. Gardner: Just a moment. He has answered the question. The Court: No, he has not answered it. A. Did I try to do it to him? Q. Yes. A. No, sir. Q. You never tried that on any young man in your locality. A. No, sir; absolutely not. Q. Never have been accused of it? Mr. Gardner: Objected to as immaterial, and ask the court to instruct the jury to disregard it, and assign the question as misconduct. The Court: The jury will eliminate the question from your minds, and pay no attention to it."

The same subject came up yet again on appellant's cross-examination. On direct he testified that on the way to the hotel where he and Solovich took the room he noticed that Solovich had certain effeminate mannerisms. He asked how they were acquired, and Solovich said he acted in that manner because he had been a female impersonator on stage and screen. On cross-examination appellant answered a certain question thus, in part:

"I was paying more attention to Mr. Solovich's actions at that time, rather than his words, * * * and I questioned him as to why he acted that way."

Mr. Costello's cross-examination then proceeded:

"Q. How did he act? A. Why, I probably could demonstrate it but—Q. All right; let's have you demonstrate it—will you? Mr. Gardner: We object to all that, your honor; not cross-examination. The Court: Overruled. * * * A. When he was walking down Ninth street towards Main, he had one hand on his hip that way (indicating), and was walking something like this (indicating). Mr. Costello: You felt then you were right in clover, didn't you? Mr. Gardner: Objected to as misconduct, not cross-examination, and ask the court to instruct the jury to disregard it. The Court: Objection sustained, the jury instructed to disregard the question."

Appellant was arrested at the Majestic Hotel, in Los Angeles, two or three days after the happening of the events upon which the information is based. The arresting officer was one Stelzriede. On the redirect examination of appellant his counsel asked him to state a conversation which occurred between him and Stelzriede at the time of the arrest. Appellant did so, but the conversation given bore no relation whatever to any matters similar to those we have set forth in the foregoing extracts from the testimony. The recross-examination of appellant then occurred, the opening portion of it being as follows:

"Mr. Costello: Is that all the officer said to you? A. Not all. Q. Now, tell us all the officer said to you, will you? Mr. Gardner: At that place. Mr. Costello: I am cross-examining. Mr. Gardner: I am here to look out for the defendant. The Court: I assume it will be confined to that conversation."

The witness then related some matters unconnected with the subject-matter of our present statement. The recross-examination then proceeded:

"Q. Did Mr. Stelzriede ask you if you were ever arrested before? Mr. Gardner: Objected to on the ground that the witness has stated that he didn't remember any other part of the conversation. The Court: He has the right to ask the question. Overruled. A. No, sir; he didn't. Q. Did Mr. Stelzriede ask you if you were ever arrested before, and you said 'Yes,' and he asked you what for? Mr. Gardner: Hold on; we object to that—I know what is coming. Mr. Costello: I know what is coming, too. The Court: You will address the court, gentlemen. Mr. Gardner: There was another trial of this case, your honor, and I am in a little better position to know what is in counsel's mind than your honor, and it is clearly incompetent, irrelevant, and immaterial; and if he wants to ask it, I ask that the jury be excused until we can argue the matter. Mr. Costello: You are not afraid are you? Mr. Gardner: I object to counsel's remarks, and assign the same as misconduct. The Court: Yes; don't interrupt him."

Then followed a colloquy showing that the trial judge and both counsel concurred in the untenable view that the people were entitled to show the entire conversation at the time of the arrest, notwithstanding the fact that parts of it may have related to matters not cognate to those brought out on the direct examination. The colloquy ended and the recross-examination proceeded, thus:

"Mr. Costello: I have a right to test his credibility on that conversation. The Court: I think so; if the door is opened, he can go all the way in. * * * Q. Now, then, I will ask you if Mr. Stelzriede, at that time and place, didn't ask you if you were ever arrested before, and you answered 'Yes'? A. He did not. Q. And if he didn't then ask you what you were arrested for, and you told him that six weeks prior to that time you were arrested—— Mr. Gardner: We object to this, because * * * he is trying to elicit testimony that occurred at another conversation some place else. * * * I submit it is dangerous ground. Mr. Costello: I have a right on cross-examination to test his recollection. Mr. Gardner: He is trying to put something in here that is improper. Mr. Costello: I am not responsible for counsel's errors, if he opens the door. The Court: I have no means of knowing if it was this conversation, or some other conversation. Of course, I will ask Mr. Costello to be careful not to mix up two conversations. Mr. Costello (continuing): ——then on suspicion and taken to the district attorney's office for sodomy on a boy sixteen years old? A. No, sir. Q. Did you ever tell Stelzriede that? Mr. Gardner: Objected to as not proper cross-examination. The Court: Overruled. Mr. Gardner: He is asking now did he ever tell him that, your honor. I imagine he is trying to get clear away from that conversation to some other place. Mr. Costello: Will you answer that question? Mr. Gardner: Just a minute. What did your honor rule on it? The Court: I will overrule the objection. A. I never at any time told Mr. Stelzriede any such thing. Mr. Costello: Did you tell him anything in substance or effect like that? A. No. Q. Did you tell him you had been arrested for suspicion of sodomy? A. I didn't; no, sir."

Stelzriede was then called by appellant, and on direct examination testified only as to a search of appellant which he made at the time of the arrest. Mr. Costello plunged into the cross-examination of the witness thus:

"Mr. Costello: Mr. Stelzriede, at the time of the defendant's arrest, did the defendant tell you—did you ask the defendant whether or not he had been arrested before, and he said 'Yes'? A. Subsequent to the arrest he was asked that question, and answered in the affirmative; yes. Q. Did you ask him on what charge? A. I did. Q. And what was his answer? Mr. Gardner: That is at this conversation, or at some other time? A. I said subsequent to his arrest; that is, after he had been brought to the station, as I remember it."

Mr. Gardner then objected to the question addressed to the witness, and Mr. Costello insisted upon it as proper impeachment of the answer of appellant that he had never at any place told Stelzriede that he had been arrested before. Then occurred the following:

"Mr. Gardner: That is the question we objected to on the ground it was not cross-examination. That is a matter he was trying to bring out at a conversation at the Hotel Majestic; then he wanted to ramble all over the field and go somewhere else. Mr. Costello: I am not responsible for your opening the door. Mr. Gardner: You opened the door. I submit it is misconduct, and counsel knows it; and it is dangerous misconduct, too. The Court: I am inclined to think it would be impeachment on a collateral matter. * * * The jury are instructed to disregard the conversation that occurred between Mr. Stelzriede and the defendant at a time other than the time of the arrest."

The appellant having rested his defense, Stelzriede was called in rebuttal. He testified that he had a conversation with appellant at the police station shortly after his arrest; that at the time there was no promise or reward or hope of immunity offered to appellant, and that no force or violence was used toward him, and that the statements made by him were free and voluntary. The examination then proceeded:

"Q. Now, state the conversation? Mr. Gardner: Your honor, I object to that. He is trying to get in the same old matter. I can state I have heard the testimony, and so has counsel, and there is nothing as to a confession, and it is simply an effort to get testimony in that the court has already ruled is incompetent and immaterial. We * * * feel, and we do assign such conduct on the part of the district attorney as misconduct. The Court: I think certain evidence has been brought out here that would make the matter admissible. Objection overruled. You may answer. A. I then asked the defendant if he all together [sic] mentally. He said, 'Yes;' and during the conversation I asked him if he had ever been under arrest for anything previous to this; and he said, 'Yes.' I asked him what the facts were, and he said he had been arrested on suspicion of sodomy. I asked him if he had been found guilty, and he said 'No'; that the case had been dismissed against him. * * * Mr. Gardner: We move to strike out that testimony as something outside of the issues. * * * It has no business here; * * * and it is clearly introduced by the district attorney for the purpose of prejudicing the jury and putting the defendant in a bad light with the jury. He is not on trial for any such offense. The charge here is robbery. The Court: I think it is germane; motion denied. * * * Mr. Costello: Now, will you state all the conversation, please? A. * * * I asked him if he was living in town, or if he was living with anybody—if he had a woman. I asked him several questions along those lines. * * * Mr. Gardner: I move to strike out the testimony of the witness on the ground that it is not rebuttal in any way at all, and it is not within the issues of the case. The Court: Motion denied."

[1, 2] It is contended by appellant that the portions of the record which we have set forth show misconduct on the part of the district attorney, and show that the court erred in permitting the people to introduce the evidence which went in over appellant's objections and which remained in despite his motions to strike. We shall consider first the claim of error as to the rulings of the court. The condition of the part of the record showing the attempt of the district at-

torney to bring out the alleged complete conversation at the time of appellant's arrest at the Majestic Hotel is most peculiar. Appellant did not object upon the ground that the part of the conversation sought to be elicited was not proper, but only upon the ground that the matter called for was really part of a later conversation. This objection was not tenable, as the questions of the district attorney specifically called for what he was after as being a part of the conversation at the time of the arrest. The fact that the evidence so persistently sought was not a part of that conversation reflects upon the conduct of the district attorney in asking for it, as we shall later have occasion to point out, but there was no error upon the part of the court in permitting the questions in the face of the only objection which was made. The part of the record just mentioned is followed by the question addressed to appellant, "Did you ever tell Stelzriede that?" It was objected that this question was not proper cross-examination, and Mr. Gardner specifically pointed out, in support of the objection, that "He is asking now did he ever tell him that. I imagine he is trying to get clear away from that conversation to some other place"—this latter statement being more than a mere matter of imagination, as the truth of it was obvious from the question propounded. It is plain that the court erred in overruling the objection, so plain that no reason need be assigned for the statement. Another error was committed by the court in allowing Stelzriede to detail the conversation between appellant and him at the police station following the arrest. There is no theory upon which we can conceive that the evidence was admissible. The statement attributed to appellant amounted to an admission on his part that he had been charged with another crime, and the admission bore no relevancy whatever to the crime for the commission of which he was on trial. Mr. Gardner was quite justified in reminding the court, in aid of his objection to the evidence, that appellant was under a charge of robbery, and not of sodomy.

[3] As to the conduct of the deputy district attorney, his course throughout the trial was most reprehensible. Instead of proceeding with a fair and open endeavor to convict appellant upon proper evidence, as was his duty, he subjected him to treatment which was most oppressive, and which deprived him of that trial on the merits which he had a right to expect. We shall select, in support of this statement one of the instances exhibited by the portion of the record which we have quoted. The incident to which we refer was the attempt to show by Stelzriede, as a part of the conversation at the Majestic Hotel, a conversation which occurred later at the police station. Mr. Gardner pointed out forcibly that he knew, and that the deputy district attorney knew, that the conversation which the latter sought did not occur at the hotel, but at another place. He asserted that the fact was so well known for the reason that there had been a previous trial of the cause. A transcript of the earlier trial is on file upon the present appeal. It shows that the first trial commenced but 33 days before the commencement of the trial from which this appeal results, and that Mr. Costello was present at that trial as sole counsel for the people, as he was at the second trial. It does not appear possible that he could have forgotten when the conversation occurred. Stelzriede had not forgotten the true sequence of events, as the final outcome showed. If, however, Mr. Costello had forgotten, he was reminded of the truth by the plain statements of Mr. Gardner, and he should then have relinquished his persistent attempt to ingraft the second conversation upon the first, especially as the trial judge warned him not to mingle the two. Turning now to another phase of the attitude of the deputy district attorney, it might appear at first glance that his questions addressed to appellant and attempting to show an acquiescence by the latter in the alleged unmentionable conduct of Solovich at the hotel were proper. The questions alluded to were such as, for instance, "Did you try to do it to him?" Questions of this sort, we say, might appear, without mature consideration, to have been proper, and this upon the theory that, if the acquiescence of appellant were shown, it would have discredited his story as to the reason for his beating Solovich. We do not decide that the evidence would have been proper, for the reason that the point is not presented by the record. It is apparent that the deputy district attorney was not justified in asking questions along the line indicated. It was not and never has been the theory of the prosecution that the evidence was admissible upon the theory stated. There is no hint in the testimony of Solovich of any acquiescence of appellant in the acts which the latter charges against Solovich, as, indeed, there could not well be under all the circumstances of the case; the deputy district attorney did not contend for its admissibility at the trial on any such ground, and no such contention is made by the Attorney General on this appeal. The asking of the questions referred to was but part of the misconduct of which the deputy district attorney was guilty throughout the trial. We need not pause to inquire to what extent, if at all, that misconduct is palliated by the fact that, finally, the judge ruled with the prosecution and permitted the conversation which occurred at the police station. Laying that final matter aside, it is yet evident that the misconduct of the prosecuting officer is palpable and inexcusable and deserving of the stern rebuke of this court.

[4] We have as yet cited no authority upon the points we have discussed, but such

authority is at hand. That the trial court erred and that the prosecutor was guilty of misconduct is made manifest by a perusal of the opinions in such cases as People v. Tufts, 167 Cal. 266, 139 Pac. 78, and People v. Anthony, 185 Cal. 152, 196 Pac. 47. In order to determine whether the error of the court and the misconduct of the prosecutor have "resulted in a miscarriage of justice," as that expression is used in section 4½ of article 6 of the Constitution, we have made an examination of the entire cause, including the evidence. From that examination we are unable to determine whether appellant would or would not have been convicted but for the errors of the court and the misconduct of the prosecutor. He may well have been substantially injured by them. Under such circumstances the provisions of section 4½ may not be availed of in order to support the judgment of conviction. See Freeman v. Adams (Cal. App.) 218 Pac. 600, and cases cited. The misconduct of the district attorney comes well within the language of the Supreme Court in one of the cases to which we have referred above:

> "It is to be regretted that prosecuting counsel, in the heat of contest and in the desire for victory, sometimes forget that the function of a district attorney is largely judicial, and that he owes to the defendant as solemn a duty of fairness as he is bound to give to the state full measure of earnestness and fervor in the performance of his official obligations. Again and again has this court commented upon the course of prosecutors in this regard, but instances of such conduct are all too common. We have no doubt that in the present case the prosecutor's demeanor and his improper questions deprived the defendant of that fair trial which ought to have been his under the law. For this reason he should not be subjected to the result of a verdict so induced." People v. Tufts, supra.

In solving the question presented under the Constitution we do not find it necessary to state even a summary of the entire testimony in the cause. It is enough to say that if the jury had acquitted appellant the verdict would have found abundant support in the evidence. It is pertinent here to again mention the fact that there was a disagreement of the jury upon the first trial of appellant. It is asserted in the briefs that on that trial the jury stood seven to five, but as to whether the larger number was for an acquittal or for a conviction we are not informed. We are convinced that, because of the court's errors and the deputy district attorney's misconduct, appellant was denied a fair trial.

There are no other points which require consideration.

Judgment and order reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(67 Cal. App. 590)

CITY OF SAN BERNARDINO v. INDUSTRIAL ACCIDENT COMMISSION et al.

(Civ. 4754.)

(District Court of Appeal, Second District, Division 2, California. June 4, 1924.)

Certiorari 🔑66—All material evidence assumed in answer setting forth evidence omitted from application, in absence of reply.

Where application for writ does not state all material evidence on point as to which evidence is claimed to be insufficient to warrant conclusion, as required by Supreme Court rule 26, subd. 4, and petitioner files no reply to answer purporting to supply much omitted evidence, Supreme Court may assume that all material evidence on such point is contained in answer.

Application by the City of San Bernardino for writ of certiorari to review the decision of the State Industrial Accident Commission. Writ denied.

William Guthrie, of San Bernardino, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent.

PER CURIAM. In its application for the writ of certiorari petitioner has made no attempt to comply with that rule of the Supreme Court which provides that the application must fairly state "all the material evidence" relating to the point as to which the want of evidence is claimed to exist. Rule XXVI, subd. 4. Nor has petitioner seen fit to file any reply to the Commission's answer, though the time therefor has elapsed, and the answer purports to supply much of the evidence which was omitted by petitioner in its application. We therefore feel justified in assuming that all of the material evidence bearing upon the point raised by petitioner is set forth in the Commission's answer. The evidence so set forth in the answer unquestionably is sufficient to warrant the conclusion of the Commission, and the writ therefore is denied.

(67 Cal. App. 612)

PEOPLE v. PERRIN. (Cr. 1172.)

(District Court of Appeal, First District, Division 2, California. June 7, 1924.)

1. Criminal law 🔑1028—Appellate court may only review rulings by trial court.

Appellate court is court of review, power of which extends only to reviewing rulings by trial court.

2. Criminal law 🔑1141(2)—Presumption in favor of regularity of proceedings in trial court.

Every presumption is in favor of regularity of proceedings in trial court, and one asserting error must produce record showing that error was committed, not that one may have been committed.

3. Criminal law 🔑1064(1)—Point not presented, with request for ruling, in presenting motion for new trial not determined.

Point not presented, with request for ruling thereon, in presenting motion for new trial need not be determined.

4. False pretenses 🔑49(1)—Direct evidence of falsity of alleged representations unnnecessary.

In prosecution for obtaining money by false pretenses, prosecution need not rely on direct evidence to prove falsity of representations, making of which, as charged in information, is not controverted; it being competent for jury to consider defendant's acts at time of, and following commission of, offense charged, in determining truth or falsity of representations.

5. False pretenses 🔑49(1)—Direct testimony by prosecuting witness as to reliance on defendant's representations unnecessary.

In prosecution for obtaining money under false pretenses, it was unnecessary for prosecuting witness to testify in direct terms that he parted with money, in reliance on defendant's representations; it being sufficient that jury could draw such inference from evidence.

6. False pretenses 🔑49(3)—"False token" or "false writing" held sufficiently shown.

Box, in which defendant pretended to place prosecuting witness' money, and contents found therein, when opened at bank after defendant's departure, *held* sufficient showing of false token, and entries on register of hotel, to which box was brought, sufficient showing of false writing, within Pen. Code, § 1110.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Token; False Writing.]

7. Criminal law 🔑829(7)—Refusal of instructions as to evidence of alibi held not error, in view of instructions given.

Refusal of instructions as to evidence of alibi *held* not error, in view of instructions requiring findings that defendant committed act charged, on date and in city alleged, and proof of allegations of information beyond reasonable doubt.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Peter Perrin was convicted of obtaining money by false pretenses, and appeals. Affirmed.

Saunders & White, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was charged by information with the commission of a felony, he entered a plea of not guilty, and was tried before the court sitting with a jury; the jury returned a verdict finding him guilty as charged in the information; he made a motion for a new trial, and in the motion stated all of the statutory grounds; his motion was denied, and he has appealed from the judgment of the trial court and its order denying him a new trial.

For many years prior to raisin day, April 26, 1923, Clement A. Larre had resided near Fresno. While residing in that neighborhood he had accumulated sufficient funds to own the small property on which he resided, and to have $4,000 on deposit in the Bank of Italy.

Some of the facts contained in the record are as follows: Prior to the date mentioned Peter Perrin, the defendant, had been working as waiter, bartender, and café attendant in and about Tijuana. At that place he had heard at least one sure-thing man describe the so-called "can-game." Recognizing the possibilities, he determined to make an attempt to work the game on some person whom he might locate. Accordingly, he went to Fresno and was there on raisin day. While standing on the street he observed Larre, and approached and entered into a conversation with him. Finding that Larre was a Basque, he expressed his pleasure, and continued to converse with him for two hours or more. In that conversation he inquired where Larre lived and also as to whether Larre had any money. The prosecuting witness frankly stated that he had about $4,000 in the bank. The second day after raisin day Perrin called at the home of Larre, where he met both Larre and Larre's wife, and visited with them two hours. The next day after that he called again and met the same persons and also their son. On one of these visits he took with him a bottle of wine, and that he worked swiftly in ingratiating himself in the confidence of Larre is evidenced by the fact that on one occasion he made the statement "I love you like my father." On the visit last mentioned he made arrangements to meet Larre at the Free Market in town the next day. Pursuant to that appointment they met, and shortly thereafter Perrin introduced Larre to another man, who is referred to in the record as John Doe. Their new acquaintance asked them if they spoke French and expressed his delight in meeting gentlemen who spoke French. He also stated to them that he had been three days on the train and that he was stopping at the Palace Hotel. He said his father had been an architect in Fresno for a number of years and had become a very rich man, and that an automobile ran over and killed him. Before dying the father told the speaker that $50,000 of his estate should be delivered to a priest in Fresno. Thereupon Perrin interrupted John Doe by saying, "What is the use in giving $50,000 to the priest, why don't you give it to us? We are two Frenchmen and we need the money." John Doe replied that there were lots of tramps around Fresno and he did not care to give the money to tramps, but wanted to give it to some one who had money. He further stated that he had $10,000 more in a valise at the Palace Hotel that he was going to divide. Thereupon they rented a room and registered in what is known as the Arlington Hotel, which consists of some rooms upstairs over "Army Goods Store." John Doe told Perrin to go down and get a box. Later Perrin came back with the box. At that time Larre had drawn his money out of the bank and had the $4,000 in his pocket. While in the room the defendant pretended to place that $4,000 in the box. About the same time John Doe exhibited a purse which was tied beneath his coat and in which he claimed there was lots of money, and shoved around his coat, pretending that he was putting something in the box. Then the box was locked and the two strangers left the box there and told Larre that they were going to the Palace Hotel to get the $10,000. When the two strangers left for the Palace Hotel they cautioned Larre to guard carefully the box until they returned with the additional money. He did so guard it for five or ten minutes, and then he commenced to suspect that something was wrong. He took the box to the Bank of Italy, the bank called a policeman, the box was broken open, and there was inside of it a bandana handkerchief, the leather purse, and five one-dollar bills.

[1-3] The appellant calls to our attention the fact that the information purported to charge the crime of obtaining money by false pretenses. Pen. Code, sec. 532. He then reviews the foregoing evidence and contends that the evidence shows that Larre had no intention of passing title to his $4,000, and the offense, if any, was grand larceny, and was not the offense pleaded in the information. In other words, the appellant claims that there was a material variance between the offense charged and the proof introduced. Be this as it may, we do not find anything in the record that presents the point to this court for consideration. This is a court of review; its power extends to reviewing the rulings made by the trial court. We have read the record from cover to cover. In the trial court there was no objection made, and there was no motion made which, on its face, purported to present the point to the trial court. Every presumption is in favor of the regularity of the proceedings in that court. He who would assert that the trial court committed an error must produce a record showing that the error was committed, not that one may have been committed. The utmost that can be said in favor of the appellant is that his application for a new trial covered, among other grounds:

"* * * 4. That the court * * * erred in the decision of questions of law arising during the course of the trial.

"5. That the verdict is contrary to the law and contrary to the evidence."

However, the record does not show that in presenting his motion for a new trial the appellant presented the above point or asked the trial court to rule thereon. Under these circumstances we do not feel called upon to determine the merits of the question.

[4] On the trial of the case, the prosecution did not introduce any evidence directly to the point that the representations were false. However, it was not necessary that the prosecution rely on direct evidence to prove the negative. It was entitled to rely on indirect evidence as proving the negative. That the representations were made as charged in the information, is not controverted. It was competent for the jury in determining the truth or falsity of such representations to take into consideration all of the circumstances. In doing so, the acts of the defendant at the time of, and following the commission of, the offense as charged in the information certainly constituted some proof of the falsity of the representations. People v. Ward, 5 Cal. App. 36, 89 Pac. 874.

[5] It was likewise unnecessary for the prosecuting witness to testify in direct terms that he parted with his money, relying on the representations of the defendant. It was sufficient if the jury could draw that inference from the evidence introduced in the case. People v. Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096.

[6] The appellant further contends that the evidence introduced by the prosecution did not comply with the requirements of section 1110 of the Penal Code. "* * * the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by false token or writing. * * *" We think there is no merit in the point. The box and the contents found therein, when the box was opened at the bank, are a sufficient showing to constitute a false token and the entries on the hotel register were a sufficient showing to constitute a false writing, within the purview of the statute.

[7] The appellant requested the trial court to give certain instructions regarding the evidence, which the appellant had introduced in his attempt to prove an alibi. The trial court did not give any one of those instructions and the appellant assigns its refusal as error. However, the trial court did instruct the jury as follows: "The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that in the county of Fresno, at or about the time mentioned in the information, the defendant knowingly and designedly, * * *" etc. The trial court also carefully and fully instructed the jury to the effect that the prosecution must prove the allegations of the information beyond a reasonable doubt. The

nature of the defense interposed was to the effect that the defendant did not commit the alleged offense on the date charged at Fresno, because on that date he was at Tijuana, Mexico. It is patent that, if the jury found that he did commit the act on the date alleged at Fresno, he was not on that date at Tijuana, and the converse is equally true. A similar question was presented to the court in the case of People v. Buck, 151 Cal. 667, 91 Pac. 529. At page 673 [91 Pac. 531] Chief Justice Beatty said:

> "No reason occurs to us why so mere a commonplace should not have been allowed to stand, but there seems as little reason why it should have been requested. It must be presumed that a jury always understand that it is their duty to give to any evidence submitted to them the weight to which it seems entitled, and the refusal of the judge to make that comment on any particular item or line of evidence cannot be supposed to prejudice the party offering it."

We find no prejudicial error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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67 Cal. App. 570

OLIVER v. STAPLES & PFEIFFER.
(Civ. 4735.)

(District Court of Appeal, First District, Division 2, California. June 3, 1924.)

1. Appeal and error 🔑880(1)—Counsel for appellant partnership cannot object to improper joinder of individual members.

Counsel appearing for partnership appealing from judgment against it and individual members cannot object that latter were not properly sued.

2. Appeal and error 🔑1037—Partnership members, for whom general appearance was made, cannot complain of improper joinder on appeal from judgment against them and firm.

Under Code Civ. Proc. § 388, judgment against partnership, for both members of which general appearance was made, will run against both, though not named as defendants, and it does not appear whether both were served with summons, and neither can complain on appeal from judgment against partnership and members that he was not properly sued.

3. Bankruptcy 🔑303(3)—Finding as to amount of debt in action to recover preference sustained.

In action to recover preference under Bankruptcy Act, § 60, subds. a and b (U. S. Comp. St. § 9644), finding fixing antecedent debt in amount of balance of account as agreed on by undisputed settlement between bankrupt and defendants *held* proper.

4. Bankruptcy 🔑306—Alleged error in finding as to amount of antecedent debt held immaterial.

Error, if any, in finding as to amount of antecedent debt, in action to recover preference under Bankruptcy Act, § 60, subds. a and b (U. S. Comp. St. § 9644), *held* immaterial, as finding of greater amount would be of no avail to defendants.

5. Bankruptcy 🔑164—Transfer of materials to creditors held "payment," creating recoverable preference.

Transfer by bankrupt to creditors of materials worth amount of debt *held* "payment," creating recoverable preference within Bankruptcy Act, § 60, subd. a (U. S. Comp. St. § 9644); debt being payable by transfer of cash or property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment.]

6. Bankruptcy 🔑303(3)—Finding of reasonable cause to believe that transfer of materials would create preference sustained.

In action to recover preference under Bankruptcy Act, § 60, subds. a and b (U. S. Comp. St. § 9644), evidence *held* to support trial court's finding that defendants had reasonable cause to believe that transfer of materials to them by bankrupt would create preference.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by A. J. Oliver, as trustee in bankruptcy of the Commercial Brass Foundry, against Staples & Pfeiffer, a partnership. Judgment for plaintiff, and defendants appeal. Affirmed.

Leon A. Blum and David K. Watkins, both of San Francisco, for appellants.

McKannay & Hunt, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued and recovered judgment against the defendants for the sum of $538.49 in an action to recover a preference under the provisions of section 60, subds. a and b, of the National Bankruptcy Act (U. S. Comp. St. § 9644). Plaintiff alleged and the court found that he was the duly appointed and acting trustee in bankruptcy of the Commercial Brass Foundry, a partnership; that the bankrupt owed the defendants, a partnership composed of the individuals named therein, the sum of $538.49 upon a general antecedent debt, and that during the four months preceding the filing of the petition in bankruptcy this debt was paid off by the delivery to the defendants of materials of equal value. In fact, materials in excess of the debt had been delivered, but on the 7th of April, 1921, a short time before the filing of the petition, a settlement was reached between the bankrupt and the defendants by their payment of the sum of

$160 to the bankrupt. It also appeared that at the time of the transfer of these materials the bankrupt was badly involved with other creditors, a fact which was well known to the defendants, and that they had been warned of the condition of the bankrupt and that the acceptance of materials in cancellation of their debt would be treated as a void preference.

[1] On this appeal we are at a loss to know just how to treat the appealing parties. The notice of appeal was given by the attorneys who are presenting it before this court, and stated that the "defendants" in the above-entitled action appealed from the judgment rendered against them. They also signed as attorneys for these defendants. Now for the first time they, without any order, change the caption of the cause so as to make it appear that the defendant partnership separately was the only party sued. In the briefs which they have filed they have signed as attorneys for the defendant, using the singular, but whether they are appearing for the partnership or for one of the two individuals composing the partnership does not appear. If counsel are appearing for the defendant partnership, their objection that the individual defendants were not properly sued is, of course, wholly beside the question, because it is of no interest to one defendant that other parties are improperly joined in sharing the burden of the judgment. If counsel were appearing for either of the two individuals, then they might be heard upon the point that such individuals were not properly sued, but they have not elected to so appear.

[2] Treating the point, however, as being properly raised, it appears that counsel made a general and unqualified appearance for all three defendants in the court below. That is, they appeared for the defendants Staples & Pfeiffer, a partnership, and for the two individuals Staples and Pfeiffer. No special appearance was made by any of these defendants for the purpose of raising the question of proper joinder. In fact, the defendant Pfeiffer verified the answer to the complaint as "one of the defendants," and the whole proceeding before the trial court was had upon the theory that all three parties had been properly sued. Counsel for the appellants, without letting us know whom they represent, place their greatest stress upon this point, but we do not consider it of any importance. The statute, section 388 of the Code of Civil Procedure, provides as follows:

> "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

Though it does not appear in this record whether both of the individuals were served with summons, it does appear that a general appearance was made for both of them, and this, of course, is equivalent to the service of summons. Judgment, therefore, will run against both of these parties in the same manner as if they had all been named defendants in the proceeding, and none of the appellants has suffered any prejudice by reason of the form of the allegations in the complaint.

[3, 4] The appellants attack the finding that the antecedent debt was $538.49 instead of $784.60. The finding was based upon the undisputed facts that a settlement was made between the bankrupt and appellants on April 7, 1921, and the balance of the account was that included in the finding. The whole point is immaterial anyway, because the finding of a greater amount would be of no avail to the appellants.

[5] It is argued that the transfer to appellants was not a "payment" creating a recoverable preference within the bankruptcy law. The whole argument is merely a play upon words. Appellants were creditors of the bankrupt, and received a portion of the materials in settlement of their claim. A debt may be paid by the transfer of cash or property. Section 60, subd. a of the Bankruptcy Act of 1898 reads in part:

> "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property * * * to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

In support of their argument upon this point counsel for appellants insist that during the course of the trial a stipulation was entered into to the effect that the transfer of these goods was not a payment within the meaning of the Bankruptcy Act. The whole argument is based upon a misconstruction and misapplication of the record. The parties did not stipulate that the transfer was not a payment, but upon request of counsel for respondent that such a stipulation be made counsel for the appellants refused to consent to the use of the word payment. This is as far as the stipulation went.

[6] Appellants insist that there was no showing of knowledge on their part of the pending insolvency of the bankrupt. The trial court found that the appellants at the time they were taking the transfer of materials from the bankrupts had reasonable cause to believe that such transfer would create a preference within the meaning of the Bankruptcy Act. The evidence to support

this finding was that the appellants had been informed on numerous occasions that the Commercial Brass Foundry and the individual partners composing it were all insolvent and unable to meet the indebtedness which was facing them. They were also informed that, if they accepted these materials and credited them upon their own indebtedness, that act would be treated as a preference, and action would be brought to enforce the rights of the other creditors to the bankrupt assets.

The other points raised by the appellants are trivial, and do not require consideration. The whole appeal is without merit. We find no error in the record.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

67 Cal. App. 475

VORBECK v. PATTEN-DAVIES LUMBER CO. (Civ. 4206.)

(District Court of Appeal, Second District, Division 2, California. May 26, 1924. Hearing Denied by Supreme Court July 21, 1924.)

Master and servant ⟹301(2)—Employee held not authorized to employ driver of truck injuring pedestrian.

Where defendant's employee, whose duties were to load defendant's trucks with lumber, was not authorized to move trucks when loaded nor expressly authorized to employ others to drive such trucks, *held* that he had no implied authority to employ another to drive loaded truck, and therefore defendant was not responsible for driver's negligence causing injuries to pedestrian.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Marie L. Vorbeck against the Patten-Davies Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jones & Weller, of Los Angeles, for appellant.

C. A. Stice and D. A. Stuart, both of Los Angeles, for respondent.

CRAIG, J. While the plaintiff was walking along a public road in Los Angeles county in the evening of October 2, 1920, after dark, she was struck by one of appellant's trucks which was returning to the latter's place of business after delivering lumber to a customer.

It was Saturday, and none of appellant's truck drivers were at its yard when this particular load was placed on the truck. One Baldwin was employed to pile lumber and load trucks, which he testified were taken out by the company's drivers, who were sent from the office. Baldwin was not a driver, was not employed in the office, nor did he do the employing, but was generally under the supervision of a yard foreman, although at the particular time in question he was alone in the yard. A young man named Isherwood, who worked in a bakery next door, came into the yard at about 5 p. m., and assisted in loading the truck. Baldwin remarked that he wished the load could be gotten out so that the customers could work Sunday, to which Isherwood replied, "I will take it." He made the delivery, and before he returned it became dark; the truck was without lights, and Isherwood did not know of respondent's presence upon the road until she was struck.

At the conclusion of the testimony the trial court instructed the jury that the defendant was liable in this case, and that the only question for them to determine was the amount of damages. A verdict was accordingly returned for the plaintiff, and the defendant appeals from the judgment upon the ground that Baldwin had no authority to employ Isherwood, that the latter was not its employee, and that the lumber company was not liable for the consequences of his acts.

Respondent relies principally upon the rule that, if two distinct causes are operating at the same time to produce a given result, and the original negligence is operative until the accident, and is a contributing cause thereto, and its effect is not broken or disturbed by the intervention of the other cause, but is only accelerated or augmented thereby, then either or both parties who created the cause are liable for the damage occasioned thereby. And it is argued that, had the truck been equipped with headlights, the accident would not have occurred; that this truck was kept by appellant for the purpose of delivering lumber to customers, and that Baldwin was in charge of the yard for the purpose of loading trucks and sending them out to deliver lumber; that he sent Isherwood with the load, and gave him instructions, from which it is inferred that Isherwood was appellant's employee, and that it was liable for his acts. The authorities cited by respondent all discuss the rule mentioned, but there seems to be only one question presented, which is the status of Isherwood, because, if he had no authority to move appellant's truck at Baldwin's direction, there is no evidence of intention that it should be operated at that time, and the absence of equipment from an automobile standing in the lumber yard would create no liability.

Baldwin testified that the superintendent of the yard was off for the afternoon, and that there were no drivers there at that time, and that he was alone. He testified in response to questions by the court that he was not in charge of the yard, but was loading trucks. He was then asked, "But you were in charge of getting that out?" to which he replied in the affirmative but in response to a question then asked by counsel, "You mean you were in charge of—," he said, "Getting the trucks loaded" He stated that he had nothing to do with employing men for any work, but that Isherwood volunteered to make the delivery in question, though he had not driven the truck before that time—that he was a baker. Dissieux, a witness for the defendant, who at the time of the accident was manager of appellant's yard, testified that he and the yard foreman did the hiring of drivers, and that Baldwin had at no time had anything to do with employing labor; that no conversation had ever occurred in which the matter of Baldwin employing men was mentioned. He stated that when regular drivers were not present to take out a load it was always held until a driver came in, but that they did not pick up someone else to make delivery. Isherwood testified that he had helped around the yard before, but had never driven one of the trucks out; that he was "just bumming around there." This testimony leaves no substantial conflict in the evidence, which establishes the fact that Baldwin had no actual authority to employ truck drivers under any circumstances, or to do anything further than load the trucks. He had never before secured the services of Isherwood to drive a truck, and in doing so upon this occasion acted entirely outside of the scope of his authority as an employee of the defendant company.

In Gates v. Daley, 54 Cal. App. 654, 202 Pac. 467, wherein the employee was himself the regular driver, and entrusted to another the performance of his own duties, this court said:

> "The cases in which masters have been held liable for the negligence of assistants to their regularly employed servants, laying aside those instances in which the servants have engaged the assistants under an express authority conferred by the masters, seem to be divided into two classes: First, those cases in which the assistants committed the acts of negligence in the presence, and, therefore, impliedly, under the direction, of the servants; second, those in which the assistants, although being negligent while working out of the presence of the servants, were engaged in the rendition of services which they had been accustomed to perform at the servants' request for considerable periods of time, thus giving rise to the view that the servants enjoyed an implied authority to engage them."

We do not think the facts of the instant case bring it within the purview of either of these classes. Baldwin's duty was to load the trucks; drivers constituting another set of employees were hired to make deliveries when loaded. In so far as Isherwood may have helped in the loading, he assisted Baldwin, but when he volunteered to do the driving he assumed the duties of employees of a distinctly different capacity. The latter are so segregated as to be required by law to procure licenses from state authorities before they shall operate automobiles upon the public thoroughfares.

The general principle is announced in many cases from other states that one employed by a servant to assist in the performance of his master's business is not an employee of the latter, for whose negligence the master will be liable, unless the servant had authority, either express or implied, to employ the help. As was said in Thyssen v. Davenport I. & C. S. Co., 134 Iowa, 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572, 576:

> "But, generally speaking, we think the rule of these authorities is not grounded upon the thought that one who assists a servant becomes thereby a servant of such servant's master, except it be in cases where we may find express or implied authority in the servant to employ or permit the assistance so rendered. In the absence of such authority, the one safe and logical ground upon which to rest the liability of a master for the negligence of a volunteer assistant of his servant is the negligence of the servant in inviting or permitting a stranger to perform or assist in the performance of the work which was intrusted to his own hand."

Board of Trade Bldg. Corp. v. Cralle, 109 Va. 246, 63 S. E. 995, 22 L. R. A. (N. S.) 297, 132 Am. St. Rep. 917, is much in point. The building corporation employed two operators to run the elevators in its seven-story building, but when the plaintiff entered, desiring to go to an upper floor, the operators were in other parts of the building. One Zachary, who was in the company's employ to oil and care for the elevators and do general work as "hall boy," called upon another man who was present, but not employed by the company, instructing him how to manage the elevator, and asked him to take the plaintiff up. No one was authorized to employ elevator operators except the machinist and engineer in charge of the building, and no one except the regular operators was authorized to run the elevators. Plaintiff was injured and brought suit for damages. The Supreme Court of Virginia, in reversing a judgment against the company, said:

> "The uncontradicted evidence shows that Zachary, the 'hall boy,' had no express authority to employ any one to operate the elevators. It being no part of his duty to operate them or to see that they were operated, it would seem clear that he had no implied power to employ another to do work he was not employed to do, and for the doing of which he was in no way responsible.
>
> "In the case of Taylor v. Baltimore & Ohio R. Co., 108 Va. 817, 62 S. E. 798, 2 Va. App. 650, * * * which involved the question of whether or not the railroad company was liable

for injuries suffered by the plaintiff, who had been requested by the conductor in charge of a freight train of the railroad company to assist him in unloading freight as he was late and his men were out of place, it was held that the plaintiff was not entitled to recover, because the conductor had no authority to create the relation of master and servant between the railroad company and the plaintiff, as well as because he had no intention of creating such relation in requesting the plaintiff to assist him in his work."

The positive evidence in the case at bar is all to the effect that Baldwin was not authorized to move the trucks when loaded, nor to employ the services of others for that purpose; and it therefore necessarily follows that he had no implied authority to employ another to do work which he was not employed to do, and for the doing of which he was in no way responsible.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

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67 Cal. App. 601

WHEELOCK v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al. (Civ. 4687.)

(District Court of Appeal, Second District, Division 2, California. June 5, 1924.)

1. Divorce 🔑165(5) — Filing motion to set aside decree with clerk insufficient.

Mere filing of motion with clerk of court to set aside final divorce decree within six months thereafter, without calling court's attention to it or giving adverse party notice thereof until service of supporting affidavit and notice of motion subsequently filed, is not application contemplated by Code Civ. Proc. § 473.

2. Divorce 🔑165(4)—Motion to set aside decree for fraud in procuring movant's application for its entry held too late.

Motion, filed more than six months after entry of final divorce decree in favor of movant, to set it aside on ground that she was defrauded in moving for its entry, *held* too late, though regarded as invoking court's inherent power to set aside judgments procured through fraud, irrespective of Code Civ. Proc. § 473.

Application by George M. Wheelock for writ of prohibition directed to the Superior Court in and for San Diego County, S. M. Marsh, Judge. Writ granted.

Harold C. Morton, of Los Angeles, for petitioner.

Stickney & Stickney, of San Diego, for respondents.

WORKS, J. Petitioner was defendant in a divorce action pending before respondent court, in which an interlocutory decree of divorce was entered in favor of the plaintiff, Mary Katherine Wheelock, on April 8, 1922, and in which, on Mrs. Wheelock's motion, a final decree was entered on June 14, 1923. On December 14, 1923, which it will be observed was exactly six months after the date of entry of the final decree, Mrs. Wheelock filed in the office of the clerk of respondent court, under the title of the divorce action, a certain paper which was headed "Motion." This paper began thus:

> "Comes now the plaintiff * * * and moves the above entitled court for an order setting aside and vacating the final decree of divorce heretofore entered in the above entitled cause on the 14th day of June, 1923, separating the parties hereto, on the following grounds and for the following reasons and particulars, to wit"—the grounds of the motion then being set forth.

In brief, they were that the parties to the action had resumed their marital relations on or about June 9, 1922, and had continued those relations up to the date of entry of the final decree of divorce; that on June 9, 1922, they entered into an agreement to remarry after the granting of a final decree in the action; that they both believed that the entry of a final decree was a necessary prerequisite to a valid remarriage; that Mrs. Wheelock made her application for a final decree solely because of that belief; and that on the entry of the final decree Wheelock abandoned her and refused to comply with his agreement to remarry her. The motion was neither called to the attention of respondent court, nor was petitioner in this proceeding ever given notice of it, nor did he have notice of it, except at the time and in the manner below to be stated. The motion was accompanied by no affidavits, and referred to none, but on December 19, 1923, an affidavit of Mrs. Wheelock in apparent support of it was filed in the office of the clerk of respondent court, and on January 10, 1924, several affidavits of other persons were also filed by her. None of these affidavits was ever served on petitioner, except that the affidavit of Mrs. Wheelock was served as hereinafter stated.

On January 23, 1924, a notice of motion, dated January 14, 1924, was served on petitioner, notifying him that on January 28, 1924, Mrs. Wheelock would call up for hearing the motion theretofore filed by her, and stating the purport of the motion. It was also said in the notice that the motion would be made upon the affidavit of Mrs. Wheelock and that a copy of the motion and a copy of that affidavit were attached to the notice. On January 28, 1924, in open court, Mrs. Wheelock made a motion to vacate and set aside the final decree, and petitioner then objected to respondent court hearing or considering the motion on the ground that the court had no jurisdiction to hear or consider it, more than six months then having elapsed after the entry of the final decree. Notwithstanding the objection, the court proceeded with a hearing of the motion, and thereupon petitioner presented to this court his petition in this proceeding, alleging that respondent court, unless restrained from doing so, would enter its order vacating the final decree. The alternative writ issued and the proceeding is now before us upon the question whether the writ shall be made peremptory.

[1] Section 473 of the Code of Civil Procedure provides that a party may be relieved "from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken." If Mrs. Wheelock's motion to set aside the final decree of divorce be deemed to have been made under this section, it came too late. The mere filing of a motion with the clerk of the court was not the "application" contemplated by the section. No application was actually made until when, on January 28, 1924, one month and two weeks after the six months' period following the entry of the final decree, Mrs. Wheelock made her motion in open court. "As a motion for relief, predicated upon the provisions of section 473 of the Code of Civil Procedure, the motion having been made more than six months after the date of the judgment, the court should have refused to entertain it. People v. Ah Sam, 41 Cal. 645; Spencer v. Branham, 109 Cal. 337, 41 Pac. 1095; Estate of Eikerenkotter, 126 Cal. 54, 58 Pac. 370. It is not sufficient that notice shall be given within the six months that a motion will be made after the six months. The motion itself must be made, and the action of the court requested on it within the six months." In re Morehouse, 176 Cal. 634, 169 Pac. 365.

[2] If the motion which was finally made to respondent court be regarded as one invoking the inherent power of a court to set aside orders and judgments procured through fraud, irrespective of the provisions of section 473, although we do not decide that it may be so regarded, the law is equally plain that it was unseasonably late. This point is mentioned because of certain language in the opinion of the Supreme Court in Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 631, 32 Pac. 600. Waiving the question whether Mrs. Wheelock's motion was of the kind mentioned in that case, and conceding for the sake of argument that it was, the fact that it was not made in time is established by many decisions of the Supreme Court, although the expression in Ex-Mission L. & W. Co. v. Flash impels toward the contrary view. In a comparatively early case such a motion as the one now under consideration was regarded as coming strictly within the terms of section 473, but as the decision had to do with a case of fraud, we deem it not unworthy of note here. The court said:

> "The application must be made within six months, even though the 'mistake, inadvertence, surprise, or excusable neglect' has been caused or brought about by fraud practiced by the party in whose favor the judgment or proceeding was taken. After that period, the question of 'mistake,' etc. (whatever the remedy in equity), cannot be tried by affidavit." Wharton v. Harlan, 68 Cal. 422, 9 Pac. 727.

The language just quoted draws attention to a peculiar condition evident in the present case. The fraud claimed here was not committed by the "party in whose favor the judgment or proceeding was taken," but by the other party against that party. The final decree of divorce was in favor of Mrs. Wheelock. It is she who claims to have been defrauded into moving for the entry of the decree. This circumstance does not affect the principle now involved, except to show that there is not here present any question whatever of a fraud upon the court granting the decree, and it is for that purpose that it is mentioned. It has frequently been, in instances in which a fraud was practiced upon the court itself, that the power has been invoked to set aside judgments or orders, without reference to the provisions of section 473. We return to the decisions. In a case in which a judgment had been set aside on motion made several years after its rendition, and not made pursuant to the terms of section 473, it was said that "what is a reasonable time within which a motion may be made to set aside a judgment, not void upon its face, must depend somewhat upon the circumstances of each particular case, and it is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure" People v. Temple, 103 Cal. 447, 37 Pac. 414. The Supreme Court said in an opinion dealing with a motion not made under section 473:

> "After the expiration of six months from its rendition, a judgment can only be set aside upon motion in cases where it is upon its face absolutely void for want of jurisdiction of the subject-matter or of the person of the defendant." People v. Dodge, 104 Cal. 487, 38 Pac. 203.

"In the case before us," a case of fraud by one of the parties against the other, "the application was undoubtedly made under section 473, but that fact alone should not deprive respondent of his relief outside this section, if the showing entitles him to it. We think, however, the rule is, and should be, that where the judgment does not show on its face that it is void, and the motion is not made under and within the time prescribed by that section, the party should be remitted to his equitable action." Young v. Fink, 119 Cal. 107, 50 Pac. 1060. We refrain from further quotation, but cite several other cases bearing more or less directly upon the point under discussion. Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 Pac. 928; May v. Hatcher, 130 Cal. 627, 63 Pac. 33; Canadian & A. M. & T. Co. v. Clarita L. & I. Co., 140 Cal. 672, 74 Pac. 301.

We do not follow respondents in the several specific arguments which are advanced in their brief. The general views which we have expressed afford an answer to every point made.

A peremptory writ of prohibition will issue as prayed for.

We concur: FINLAYSON P. J.; CRAIG, J.

(67 Cal. App. 480)

McRAE v. McRAE et al. (Civ. 4388, 4389.)

(District Court of Appeal, Second District, Division 2, California. May 26, 1924. Hearing Denied by Supreme Court July 21, 1924. As Modified on Rehearing June 25, 1924.)

1. Trusts ⚿44(1)—Finding that husband held property conveyed before marriage in trust for wife supported by evidence.

Evidence *held* to support finding that husband held in trust for his wife property conveyed by her before marriage.

2. Appeal and error ⚿1011(1)—Decision by trial court on conflicting evidence not disturbed.

Decision by trial court on conflicting evidence will not be disturbed upon appeal.

3. Trusts ⚿42—Declarations of alleged trustee held admissible.

In action to have trust declared in land, statements of defendant, made subsequent to transfers to him, were admissible, though not having direct reference to language or acts of parties at time transaction was consummated; there being other evidence of existence of a trust.

4. Husband and wife ⚿258—No lien created on account of money expended by husband upon separate property of wife held in trust.

Where husband before marriage obtained possession of wife's property and became trustee of her separate estate, no lien was created on account of money expended by husband on such property of wife; his expenditures at most but creating a demand enforceable against owner.

Appeal from Superior Court of Los Angeles County; Edwin F. Hahn, Judge.

Action by Pearl Ellen McRae against Robert H. McRae and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

James E. Fenton, of Los Angeles, and S. T. Jeffreys, for respondent.

CRAIG, J. Two suits in equity were filed by the respondent against appellant on the 19th day of July, 1921, one involving certain furniture and other personal property, and the other an interest in a contract for the purchase from defendant Los Angeles Investment Company of lot 208 of St. Vincent College tract, in the city of Los Angeles, which respondent assigned and transferred to appellant on February 25, 1918, each praying that a decree be entered declaring that appellant held said property in trust for the use and benefit of respondent, and that he be required to reconvey the same, with the rents, issues, and profits thereof, to respondent; also for an order restraining any transfer pending final judgment. Said suits were consolidated and tried together, and the court below entered a decree in favor of the plaintiff, from which defendant Robert H. McRae appeals.

The complaints recite that prior to the transfers plaintiff and defendant became engaged to marry, and that their relations were confidential; that the plaintiff was not versed in business matters, whereas the defendant was a shrewd, intelligent, and experienced business man, and that plaintiff at all of said times reposed absolute confidence in the defendant and trusted him implicitly, relying upon the truth and wisdom of all representations made by him in business transactions between them. She alleged that when they became engaged she possessed certain personal property which she had procured from one concern upon a so-called "lease contract," which in fact was a conditional sale, and a piece of real property which she had agreed in writing to purchase from the defendant investment company, and that she had paid installments upon each of these contracts. She further averred that after their engagement defendant persuaded plaintiff to assign and transfer to him all her interests in said contracts and properties, and that she did so assign and transfer them to defendant, but with the express understanding and agreement that defendant would retransfer the same to her at any time thereafter if she should so desire and request. It is alleged that defendant, by his dominating influence over plaintiff, and because of their confidential relations, caused her to make such transfers, though he did so fraudulently and with intent to deprive her of her property, and that on October 13, 1920, he repudiated his agreement to return the same, and denied the existence of the trust, but that at all the times previously to this latter date he had admitted that he held the legal title and possession of said property for her use and benefit, and promised to reassign the same whenever she might desire and so request. The parties were married on April 18, 1918, and plaintiff alleges that on many occasions prior to and after their marriage she demanded of defendant that he return the property to her, but that defendant continuously put her off, and finally refused to do so.

The defendant admitted the transfers to him, but denied that he ever promised to reassign or retransfer the property to plaintiff, and alleges that prior to February 25, 1918, he had advanced various sums of money to plaintiff, aggregating more than the value of plaintiff's interest in said property, and that in consideration thereof the plaintiff caused the officers of the investment company to prepare an assignment of her interest in the real property to defendant, and an acceptance and agreement on his part to pay the balance due said company, which were signed by the respective parties, and that plaintiff personally wrote and signed the transfer of said personal property to defendant "for value received."

Plaintiff alleged that at the time of said marriage she had money which she thereafter expended for the upkeep of the household, and that the defendant collected rents from said property amounting to $1,338.60, out of which he had paid $940 on account of installments due under the terms of the contract of purchase; that she made all the payments due on the personal property, except $110, which the defendant advanced to her and thereafter collected from another party to whom he rented the furniture.

The defendant denied that the plaintiff had money at the time of their marriage, as alleged, or that she paid household expenses. He alleged that he paid all of the installments of purchase price, and that he was the owner of said property, for a full and adequate consideration, but denied that he paid more than a small amount, if anything, out of the rentals. The defendant alleged and testified that he purchased the property from plaintiff at the plaintiff's cash valuation, and that he satisfied the indebtedness against all of the real and personal property in question.

The trial court found from the evidence adduced that at the time of the transfers of said properties the parties were engaged to marry each other, and that their relations were confidential; that at defendant's request, and without consideration, the plaintiff transferred the properties to defendant, as alleged in the complaint, through fraud and selfish design of the defendant, that all payments made on account of purchase price after said marriage and before September 1, 1920, were made from funds of the community, but that such payments did not exceed the amount of rents collected. It was further found that defendant received as rentals for the use of said properties $1,490, and that he advanced to the plaintiff $781.40; that the plaintiff is the owner of said properties, and of the rents collected by defendant, and that the latter holds possession thereof in trust for the use and benefit of the plaintiff. Judgment was rendered accordingly, canceling the assignments and awarding the properties to plaintiff.

This appeal is from the judgments and orders denying motions for new trial in both cases, and as grounds thereof it is maintained that the evidence is insufficient to support the findings and judgment that appellant agreed to hold the property in trust for respondent, that the trial court erred in admitting the testimony of witnesses relative to declarations made by appellant subsequently to the transfers, and, lastly, that the evidence shows that subsequent to the marriage of the parties the realty and furniture became community property.

[1, 2] There is abundance of testimony by the plaintiff, both on direct and cross examination, to the effect that when she became engaged to marry the appellant they conversed about his wide experience in business affairs; that she had been a school teacher and was practically without such experience; that the appellant on many occasions urged that he be permitted to care for her affairs, and that she put the properties in his name for that purpose. She testified that she replied that she preferred to manage her own affairs, but that appellant assured her that it was to her interest to make the transfers, and that so long as they were to be married he could relieve her of the burden and would always have her best interests in view; that he would hold the properties in trust for her, and that at any time she should desire that he return them he would do so; that "he wouldn't think of doing anything against me at all, and he would, any time I wanted the house, return it to me, he certainly would do it, but he felt he could transact the business and take care of my affairs better than he thought I would be able to." She further testified that she trusted him implicitly, and that she finally made the assignments, but that, because of their confidential relations and her belief in his integrity and honest intentions, she did not have any agreement in writing as to the purposes of the transfers. Other witnesses testified that in the autumn of 1919 the appellant stated that he intended to retransfer the properties to respondent, but that he had delayed so doing because he feared that she would leave him as soon as she obtained her property, and that he was "getting old and he was not going to be turned out in the cold and have to start life anew and build up a new home." One witness testified that appellant was told by the witness' husband that the only fair thing to do would be to return the home to Mrs. McRae, to which appellant replied, "I have always intended to give the property back to her, but that is the only way I have of holding her." Appellant testified that he did not make such

statements, and denied any conversation or arrangement as described by respondent, which created a conflict of evidence necessitating a decision by the trial court as to the credibility of witnesses, and when this question is so determined it will not be disturbed upon appeal. Rolland v. Porterfield, 183 Cal. 466, 191 Pac. 913; Wall v. Wall, 183 Cal. 431, 191 Pac. 687.

[3] It is next contended that the trial court erred in admitting in evidence the testimony of respondent's witnesses which purported to quote statements made by appellant in 1919. It is insisted that his statements made subsequent to the assignments could not be related unless having direct reference to language or acts of the parties at the time the transaction was consummated. Appellant cites as authority for his position Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543, and Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506. Sheehan v. Sullivan is authority for the rule that such statements may be introduced in corroboration of plaintiff's evidence, but it was there held that, since there was no evidence of the existence of a trust, they could not be used for the purpose of establishing one. In Cooney v. Glynn, supra, it was said that the offered statements in that case related to what was said and done at the time of executing the deed, but it is not held that such statements as here presented would be inadmissible. Sherman v. Sandell, supra, and Tillaux v. Tillaux, supra, each decided that the conveyance in question was absolute, without any agreement of trust being made at the time of the execution thereof, and that subsequent oral declarations of the parties could not create a trust where none formerly existed.

Taylor v. Morris, 163 Cal. 717, 722, 127 Pac. 66, 68, is pertinent, and is decisive of the case before us. We quote from the opinion in that case:

> "It is conceded, as it must be, that there is evidence to establish that plaintiff was trustee for her mother of the Villa property, but it is asserted that the deeds by which her mother conveyed title to her were absolute in form, that the stipulation of the parties in this action acknowledges her absolute title and that, therefore, the evidence to establish the trust in contradiction of the deed and of the stipulation was inadmissible. To this proposition the familiar sections of the Code and the familiar decisions under them, forbidding the attempt to vary the language of written contracts by parol are cited. But appellant mistakes the scope of the rule. The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When [a trust] rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary, and it should be sufficient to refer to such cases as Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; Hayne v. Hermann, 97 Cal. 261, 32 Pac. 171; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Becker v. Schwerdle, 141 Cal. 391, 74 Pac. 1029; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Cooney v. Glynn, 157 Cal. 589, 108 Pac. 506; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430. * * * The statements of Mrs. Taylor were not promises. They were admissions and acknowledgments of a trust relationship resting in parol, which trust relationship was created and existed contemporaneously with the acquisition by her of the Villa property and the purchase by her of the Flower street flats. So, while it is true, that a constructive trust cannot be created by a naked promise of the grantee after conveyance made to him, it is equally true that his declarations showing the existence of a trust at the time he accepted the conveyance, afford strong evidence against him in the establishment of the trust. * * * The difficulty with appellant's contention is that the claim against her does not arise under an implied trust but under a positive, voluntary trust resting in parol, and it is of course well settled that the statute of limitations does not run against such a trust until repudiation of it by the trustee, with knowledge of this repudiation brought home to the beneficiaries. Only after this repudiation and knowledge does the four years' statute of limitation apply. Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Norton v. Bassett, 154 Cal. 415, 129 Am. St. Rep. 162, 97 Pac. 894."

Brison v. Brison, 90 Cal. 323, 27 Pac. 186, is also applicable in that facts quite similar to those related by the plaintiff's witnesses in this case were held to establish a constructive trust.

[4] Having obtained title and possession of respondent's properties acquired by her before marriage, appellant became the trustee of her separate estate. As was said in Carlson v. Carlson, 10 Cal. App. 300, 303, 101 Pac. 923, 925:

> "Labor or expenditures incurred in the improvement of the property have no operation upon the direction of the title. They, at most, but create a demand which, under certain circumstances, may be enforced as a claim against the owner. Noe v. Card, 14 Cal. 606. In the absence of any specific agreement, no lien would be created on account of money expended by a husband upon the separate property of the wife. Peck v. Brummagin, 31 Cal. 450, 89 Am. Dec. 195. The law will not infer from such expenditures alone an agreement either to change the character of the property or an intent to charge the same with a lien. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate, and that it was intended to accrue to her interest. Flournoy v. Flournoy, 86 Cal. 294, 21 Am. St. Rep. 39, 24 Pac. 1012. There is no finding of any fact, nor is there anything in the record tending to rebut the presumption, that the payment by the husband was to accrue to plaintiff's interest."

As was said in Lewis v. Johns, 24 Cal. 98, 85 Am. Dec. 49,

> "The husband cannot, by any independent act of his, acquire an interest in the separate estate of the wife. * * * That the husband cannot, by his management, supervision, or labor, acquire any interest in the estate itself, is conceded, and by parity of reason he cannot acquire any interest in the increase, for that is hers also, and upon the same terms—the latter being a corollary of the former proposition. There is no magic in the touch or manipulation of the husband by force of which separate is transformed into common property."

These authorities preclude appellant's claim that subsequent to the marriage the realty and furniture became community property.

Appellant also pleaded the statute of limitations, but this question was covered by the opinion of the Supreme Court in Taylor v. Morris, supra, and requires no further discussion.

The judgments are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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67 Cal. App. 399

PEOPLE v. GIROTTI. (Cr. 777.)

(District Court of Appeal, Third District, California. May 22, 1924.)

1. Criminal law ⚷396(2), 1169(1)—Introduction of affidavit made in other prosecution held not to render complaint attached thereto admissible in liquor prosecution, and admission was prejudicial.

In a liquor prosecution, where defendant introduced an affidavit made by state's witness for purpose of impeaching his testimony, which affidavit was attached to complaint in another action, admission in evidence of complaint was error, in view of Code Civ. Proc. § 1854, where affidavit and complaint were not parts of same instrument, and respective statements contained therein were made by different persons, and were not "on the same subject," and the error was prejudicial.

2. Criminal law ⚷763, 764(6)—Instruction that evidence given in support of alibi should be scrutinized differently than that given in support of any other issue error.

In a liquor prosecution, where defendant made out substantial case of alibi, court erred in instructing jury that they were to scrutinize testimony offered in support of alibi with care, since it was for the jury to pass upon weight of testimony given in support thereof under same rules of evidence applicable to other questions of fact.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

J. P. Girotti was convicted of selling intoxicating liquor, and he appeals. Reversed.

Edward Bickmore and Frank C. Hale, both of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. By separate counts in the information the defendant was charged with two unlawful sales of intoxicating liquor—one alleged to have been made on the 18th and the other on the 22d of October, 1923. He was convicted of both offenses, and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

[1] L. R. King, a private detective employed by the district attorney, testified that he purchased whisky from defendant as charged in both counts; that on the 22d he arrived at defendant's store at Merced Falls about 5 or 5:30 o'clock in the evening, not later than 5:30; that it was "just before sundown." The court takes judicial notice of the fact that the sun set at 5:18 on that day. King testified that on his arrival at defendant's store that evening he saw defendant there and purchased liquor from him as stated. C. A. Carter, a detective employed by the district attorney of Mariposa county, testified that he accompanied King to defendant's place of business on the 22d of October and witnessed the sale of liquor by the defendant to King; that they arrived at defendant's store about 5 o'clock in the evening, possibly as late as 5:30. For the purpose of impeaching the witness King, the defendant introduced an affidavit made by King on the 25th of October, 1923, in which he stated that the aforesaid purchases of intoxicating liquor on the 18th and the 22d of October were made by him from one Joe Artiense. This affidavit was attached to the complaint in an action entitled "United States v. Joe Artiense, Joe Girotti, W. A. Gibbons, John Doe, and Richard Roe," filed in the superior court of Merced county on the 26th of October, 1923. The complaint alleged that the use of the buildings occupied by defendant constituted a nuisance by reason of the storage and sale of intoxicating liquors therein, and prayed for a judgment abating such nuisance. The complaint was signed and verified by the district attorney on the day it was filed. The affidavit is not referred to in the complaint or made a part thereof. On the theory that the complaint and the affidavit attached thereto constituted a single document, and that, because the defendant had introduced a part thereof, the prosecution had the right to introduce the remainder, the court permitted the district attorney, over defendant's objection, to introduce in evidence and read to the jury the whole of the complaint. The complaint alleges, among other things, that "on or about the 26th day of September, 1923, * * * a written notice, signed by the district attorney of Merced county, Cal., of the existence of the nuisance was served upon J.

W. Gibbons; that on or about the 24th day of October, 1923, Joe Girotti was charged in the justice court No. 2 township, Merced county, with the unlawful possession of intoxicating liquor in the building and on the property described in this complaint, and, upon being duly arraigned on said charge, said Joe Girotti * * * entered a plea of guilty"; that "said defendants, Joe Artiense, Joe Girotti, W. A. Gibbons, and J. W. Gibbons used, occupied, and conducted said building as and for a place of keeping, storing, selling, bartering, and dispensing intoxicating liquor, in violation of the * * * 'National Prohibition Act.'"

Section 1854 of the Code of Civil Procedure provides:

> "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other."

The very terms of this section show that the complaint was not admissible in evidence. The affidavit and the complaint were not parts of the same instrument. The respective statements contained therein were made by different persons. They were not "on the same subject"; those of the affidavit relate to sales alleged to have been made on the 18th and the 22d of October, those of the complaint relate to the unlawful possession of liquor and the maintenance of a place where liquors are unlawfully kept and sold. The statements in the complaint are purely hearsay as evidence, however sufficient they may be as a pleading. The admission of the complaint was in violation of the rule that one crime cannot be established by proof of the commission of an independent crime. Its admission was so wide a departure from the rules of evidence and so prejudicial to the rights of the defendant that it cannot be covered by the constitutional mantle of harmless error.

[2] The evidence shows that Merced is 26 miles distant from Merced Falls. Carl Andre testified: That he was a clerk in the employ of the Merced Produce Company, at Merced. That on the 22d of October, 1923, in the afternoon, he sold groceries to defendant of the value of more than $200. That he last saw him on that day between 5 and 5:30 o'clock in the evening. That "I had been putting up his order at all times and this afternoon it was late, as usual, when he gave it to me and our last delivery goes out at 5 o'clock and we were waiting for our truck to pull out of there, so he could back in and load up. I know I walked from the back of the store just as our truck started to pull out, and he was standing out in front, and I told him to come back and get loaded up and he could go on home. * * * He was loading it on a Dort truck." The sales tag made by the witness at the time of the sale, dated October 22, 1923, was admitted in evidence. S. H. Reuter, bookkeeper for Merced Produce Company, testified: "My hours in the afternoons there at the Merced Produce is from 4:30 to 6, and it was after that time he [defendant] was in to see me," October 22, 1923. The defendant testified that he left Merced about 5:30 in the evening, and that it took him an hour and three-quarters to reach Merced Falls. He denied that he made either sale charged in the information. If the testimony of Andre and Reuter is to be believed, then the defendant made out a substantial case of alibi. The court instructed the jury as follows:

> "The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing, as it does, that the party asserting it could not have been present at the time of the commission of the crime alleged in the indictment, and therefore did not participate in it, when credited, a defense of the most conclusive and satisfactory character.
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> "The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court.
>
> "These are that, while you are not to hesitate at giving this as a defense full weight—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitles the defendant to an acquittal—still, you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

A similar instruction was considered in People v. Lee Gam, 69 Cal. 552, 554, 11 Pac. 183, 184, where the court said:

> "Taking the charge as a whole, and giving it an unstrained interpretation, it does not appear that the jury were instructed upon the weight of evidence."

In People v. Levine, 85 Cal. 39, 42, 24 Pac. 632, it is said:

> "The defense of alibi is, in our judgment, not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause."

In People v. Lattimore, 86 Cal. 403, 405, 24 Pac. 1091, 1092, it is said:

> "If trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed."

In People v. Roberts, 122 Cal. 377, 378, 55 Pac. 137, 138, the trial court had instructed the jury that, "when satisfactorily proven," an alibi is a good defense. The Supreme Court said:

> "When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; yet there is no such burden cast upon a defendant charged with a crime, except in certain particular instances which are in no sense presented here. * * * It is thus apparent that the alibi, to be efficacious to a defendant, need not be 'satisfactorily proven,' and need not be established to the satisfaction of the jury."

In People v. Smith, 189 Cal. 31, 37, 207 Pac. 518, 521, an instruction substantially identical with that in the instant case was under consideration. The court said:

> "In People v. Roberts, 122 Cal. 377, 65 Pac. 137, a similar instruction was held to be reversible error, upon the grounds that they constitute a charge upon the weight of the evidence, and that they cast the burden of proof upon the defendant."

If the jurors are to "be satisfied that a fabricated defense is not being imposed upon" them, the burden is cast upon the defendant to satisfy them that such defense is not fabricated; that is, that it is true. The instruction not only casts an unwarranted burden upon the defendant, but casts suspicion upon his defense and the evidence produced in support thereof. It is essentially an argument against the defendant, legitimate if made by the district attorney, but an invasion of the province of the jury when made by the court. The giving of the instruction has been condoned in a number of cases where the rights of the defendants did not appear to have been prejudiced thereby. Where a defendant presents substantial proof of an alibi, the jury should be left free to pass upon the weight thereof, under the rules of evidence applicable to other questions of fact; and, if unsubstantial proof is produced, the jury may be trusted to reject it. The instruction should never be given.

The judgment and the order are reversed.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

(67 Cal. App. 420)

GULF MAIL S. S. CO. v. W. A. HAMMOND S. S. CO. (Civ. 4891.)

(District Court of Appeal, First District, Division 1, California. May 23, 1924. Hearing Denied by Supreme Court July 17, 1924.)

1. Appeal and error 🔑649—Insertion in transcript after filing of notice of appeal, without notice to respondent, held not to invalidate proceedings.

Where appeal was duly taken under Code Civ. Proc. § 953a, and transcript filed, after notice, with approval of trial court, etc., insertion therein of notice of appeal inadvertently omitted and its recertification, without notice to respondent, did not invalidate proceedings.

2. Appeal and error 🔑640—Motion to affirm judgment on technical ground, after transcript certified and filed in appellate court, denied.

Motion to affirm judgment, after appeal was taken and transcript had been certified and filed in appellate court, on ground of irregularities in inserting notice of appeal in transcript must be denied.

3. New trial 🔑163(1)—Document held order granting motion for new trial.

Document, properly entitled and signed by trial judge and filed in open court, stating that motion for new trial was granted for insufficiency of evidence, and that "for these reasons I am constrained to grant defendant's motion for a new trial herein, and it is so ordered," *held* order for new trial, under Code Civ. Proc. § 657, though it was referred to as "opinion" in clerk's minute entry.

4. Courts 🔑116(1)—Have inherent power to correct own records.

Courts have inherent power over their records and may at all times correct clerical errors on their own motion, or on motion of either party.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Gulf Mail Steamship Company against the W. A. Hammond Steamship Company. From an order amending nunc pro tunc previous order granting new trial, plaintiff appeals. Affirmed.

See, also, 227 Pac. 940.

H. W. Glensor and Aitken, Glensor, Clewe & Van Dine, all of San Francisco, for appellant.

Nathan H. Frank and Irving H. Frank, both of San Francisco (Keith Ferguson, of San Francisco, of counsel), for respondent.

ST. SURE, J. This is an appeal from an order of the superior court amending nunc pro tunc a previous order granting a new trial.

[1, 2] After the transcript certified by the clerk and by the trial judge, had been filed in this court, respondent made herein a motion for affirmance of the judgment upon technical grounds. It appears that appeal was taken in due time (section 953a, Code Civ. Proc.), transcript prepared and filed, and notice given of presentation of transcript to the trial judge, for approval. The trial judge approved the transcript on January 3. Thereafter appellant discovered that through inadvertence notice of appeal had been omitted from the transcript, and without further notice to respondent, appellant inserted in the transcript the notice of appeal, and pro-

cured from the trial judge and clerk new certifications, dated January 9. Respondent complains that failure to give due notice of such recertification invalidated the whole procedure. We fail to see wherein any substantial right of respondent was affected. The transcript, recertified, was, with the exception of the inclusion of the notice of appeal, the same. Admittedly, appeal had been properly taken. The omission of the notice of appeal, even though the transcript had been filed, might have been thereafter, in the interests of justice, supplied upon suggestion in this court of diminution of record. Furthermore, the motion to affirm, coming as it does after the transcript had been certified by the trial judge, and filed in this court, must be denied and the appeal considered upon its merits. Revert v. Hesse, 184 Cal. 295, 193 Pac. 943; White v. Hendley, 35 Cal. App. 267, 270, 169 Pac. 710.

As to the merits, the record shows that Judge John Hunt, presiding in department 5 of the superior court, granted a motion for a new trial. The clerk of the court entered a minute order thereof as follows:

> "The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that the said motion be, and the same is, hereby granted. 'Opinion filed.'"

While an appeal was pending, respondent herein applied to the superior court for an order amending nunc pro tunc the original order above quoted. The motion was regularly heard and granted by the lower court, and an amendatory order entered as follows:

> "The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that the said motion be, and the same is hereby granted upon the grounds of the insufficiency of the evidence to sustain the verdict, and that the verdict is against law."

This entry was based upon an order made by Honorable Franklin A. Griffin, the then presiding judge of department 5, which reads, in part, as follows:

> "It appearing from the records of this court that on the fourth day of November, 1919, Honorable John Hunt, then and there a judge of this court, granted the defendant's motion for a new trial upon the grounds that the verdict is against law, and of the insufficiency of the evidence to justify the verdict; and it appearing that the clerk of the court omitted to recite in said minute order that the defendant's motion for a new trial was granted upon said grounds, including that of insufficiency of the evidence to justify the verdict, it is ordered," etc.

[3] In the original minute order mention is made of an "opinion filed." This "opinion," correctly entitled, is signed by the trial judge. It bears the same date as the entry of the original minute order made by the clerk. It was "filed in open court." Its context shows conclusively that the motion for a new trial was granted upon the grounds of the insufficiency of the evidence to sustain the verdict, and that the verdict was against law.

An examination of this so-called "opinion" convinces us that it rises to the dignity of a written order signed and filed by the trial judge; while it contains language giving the reasons of the trial judge for making the order, with which reasons we are not concerned (Unger v. San Francisco-Oakland Terminal Rys. et al., 61 Cal. App. 125, 214 Pac. 510, 515), it shows indubitably that the motion for a new trial was granted upon the grounds above stated, and concludes with the words "for these reasons I am constrained to grant defendant's motion for a new trial herein, and it is so ordered." Section 657, Code of Civil Procedure, provides when a new trial may be granted, and further provides that "when a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify. It is clear that Judge Hunt so specified in the order made by him, and it follows that the contemporaneous minute entry made by the clerk was erroneous.

[4] Courts have inherent power over their records, and may at all times correct mere clerical errors made by the clerk in entering the order in the minutes, so that it may truly state what was the order of the court, by setting forth all its terms. As was said in Crim v. Kessing, 89 Cal. 478, 486, 26 Pac. 1074 (23 Am. St. Rep. 491), the right of a court of general jurisdiction to amend or correct its records so that they shall speak the truth, is too well recognized to need any argument. Such errors or defects may be corrected at any time by the court on its own motion, or on motion of either party. Brush v. Pacific Electric Railway Co., 58 Cal. App. 501, 208 Pac. 997. The order amending nunc pro tunc the previous order granting the motion for a new trial was properly made, and is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

67 Cal. App. 424

GULF MAIL S. S. CO. v. W. A. HAMMOND S. S. CO. (Civ. 4648.)

(District Court of Appeal, First District, Division 1, California. May 23, 1924. Hearing Denied by Supreme Court July 17, 1924.)

1. Appeal and error ⚷659(3) — Method of correcting omission in record of statement of reason for granting new trial held proper.

Pending appeal by plaintiff, it was proper for defendant to apply to appellate court on suggestion of diminution of record to have incorporated in transcript an order of superior court amending nunc pro tunc previous order granting new trial, which failed to specify new trial was granted for insufficiency of evidence, as required by Code Civ. Proc. § 657.

2. Appeal and error ⚷979(2)—Order granting new trial for insufficiency of evidence not disturbed, except for abuse of discretion.

Order granting new trial for insufficiency of evidence to sustain verdict will not be disturbed on appeal except for abuse of discretion, and such abuse is not shown by fact that there was no conflict of evidence, as probative force thereof was for trial court on hearing on the motion.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Gulf Mail Steamship Company against the W. A. Hammond Steamship Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

See, also, 227 Pac. 938.

H. W. Glensor and Aitken, Glensor, Clewe & Van Dine, all of San Francisco, for appellant.

Nathan H. Frank and Irving H. Frank, both of San Francisco (Keith Ferguson, of San Francisco, of counsel), for respondent.

ST. SURE, J. This is an action wherein plaintiff sought to recover damages for an alleged breach of a purported contract for the purchase of a $^{62}/_{64}$ interest in the steamship Centralia. The cause was tried before a jury, which gave plaintiff a verdict for $25,000. The superior court thereafter made its order granting defendant's motion for a new trial.

[1] Pending appeal, defendant made application to this court, upon suggestion of diminution of record, to have incorporated in the transcript an order of the superior court amending nunc pro tunc a previous order granting a new trial. Such procedure is proper. Biaggi v. Ramont et al., 189 Cal. 675, 677, 209 Pac. 892. The original order stated merely that a new trial was granted, without specifying the grounds, as required by section 657, Code of Civil Procedure. Upon motion, the trial court amended the original order to conform to the truth, incorporating therein the statement that the new trial was granted "upon the grounds of the insufficiency of the evidence to sustain the verdict, and that the verdict is against law." We have this day, in Gulf Mail Steamship Co. v. W. A. Hammond Steamship Company, numbered 4891, 227 Pac. 938, affirmed such action of the trial court, and the motion for diminution of the record is therefore granted. We are then to determine this appeal upon the corrected record.

The cause was submitted to the jury upon evidence offered by plaintiff, defendant contenting itself with cross-examination. The record relates that on April 24, 1917, the defendant, by its president, W. A. Hammond, addressed and delivered a letter to one Paul Hartman, which reads:

"Mr. Paul Hartman, 112 Market Street, San Francisco—Dear Sir: Confirming our verbal understanding, we offer to sell you the steamer Centralia on the following terms:

"Price: We will deliver to you $^{62}/_{64}$ interest of the steamer on the basis of $85,000 net to us for the entire ship. Payment to be made of $5,000 within one week from date, to bind this contract, and $25,000 additional within 30 days' time. Further payments to be made of $3,000 per month until balance is paid up. The deferred payments to bear interest of 6 per cent. per annum.

"You to pay for all stores on inventory at time of delivery based on market prices.

"You also to keep the vessel insured in our favor to cover balance due at all times. You are also to assume the wireless contract and take up unexpired insurance at time of delivery. We will allow inspection of vessel during the next 30 days, dry-docking to be at your expense.

"In the event this sale is consummated we will make delivery on June 1, 1917, or as soon thereafter as practicable, depending upon her position. We would not, of course, take her off the coast before the date above named, and delay would be due to her absence on lumber business between California and northern ports.

"This offer is good for reply not later than the first day of May, 1917.

"Yours truly,
"W. A. Hammond Company, Inc.,
"W. A. Hammond."

Thereafter, on May 1, 1917, Paul Hartman, together with H. W. Glensor, plaintiff's attorney and secretary, called at the office of Stanley Pedder, attorney and secretary for defendant company. Glensor said to Pedder: "We have come to buy the ship * * * to close up for the Centralia, under this document" (referring to above quoted letter). Pedder looked at the letter and said: "This was signed W. A. Hammond, Inc., by mistake. * * * The W. A. Hammond Steamship Company is the real owner of the vessel; they are buying her under a contract from the Pollards, under contract of sale, that is, they own an equitable interest in the vessel." Glensor replied: "Yes, I understand," and Pedder then said that the Hammond Steamship Company was buying the vessel under a contract of sale, the same as the Hammond Steamship Company were going to give Glensor's principal. Whereupon Glensor asked Pedder his interpretation of the clause in the letter of April 24, relating to the inspection of the vessel, which was not made clear, but Pedder remarked that he thought that the vessel should be put in a seaworthy condition when delivered, and that he would so advise his principal. Other subjects were discussed relative to the proposed sale, among which was the equipment, and Glensor said: "Well, suppose we do this, suppose we put a clause in the contract when it is drawn up, that the first time the vessel comes into San Francisco * * * Give us permission to go aboard and take an inventory of the deck and engine room supplies and equipment, and, whatever that inventory discloses, so will the ship be turned over to us when you finally deliver under your agreement." To which Pedder replied: "That is all right."

Further conversation followed about the effect of deferred payments, and how they were to be made, which ended by the proposal of Pedder that as it was obvious they could not draw up the contract that day, that they should let the whole matter go over until a time agreed upon, and in the meantime Glensor and he would get together and draw up a contract, and when Hammond came back they would close negotiations and work out all the details, to which Glensor said: "That is all right, except this; this is our last day under the option to pay you the $5,000, and what will we do about it?" Whereupon it was agreed that the money be placed in escrow, to be delivered to the defendant when the written contract was completed, to which proposal Glensor assented. Thereupon the check of Paul Hartman, uncertified and unindorsed, was placed in the bank in accordance with the following agreement indorsed on the reverse side of the letter:

> "It is hereby understood and agreed that the payment of $5,000 mentioned in the within option, to be paid on or before the 1st day of May, 1917, may be deposited in escrow with the Anglo London Paris National Bank, to be paid over to the W. A. Hammond Steamship Company upon completion of a contract between the said Steamship Company and the Gulf Mail Steamship Company, if the contract is not completed by the 4th instant.
>
> "W. A. Hammond Steamship Company,
> "By Stanley Pedder, Secretary."

The check was deposited with the instruction to the bank that, if a contract to sell and buy the steamship Centralia, executed by defendant as seller, and plaintiff as buyer, should be deposited with it by May 4, 1917, then the check was to be delivered to defendant, but to be returned to plaintiff if not delivered before May 4, 1917. It further appears from the testimony of Hartman that he and Glensor were requesting that the oil contract in the name of Pollard Steamship Company and certain tankage be included in the agreement of sale which was to be drawn up, and that was one of the reasons why the contract could not be signed at the first meeting of May 1, 1917. The meeting of May 1 was adjourned to the next day for the purpose of preparing a draft of the contract, and Pedder said: "We will draw up a form of contract, leaving the points which I do not understand, that is, regarding the oil contract and the equipment and supplies, open for negotiations between the parties when Mr. Hartman returns." To which Glensor replied: "That is reasonable." Pedder then remarked that there were to be no more "comebacks" about the equipment and oil contracts after the parties finally ascertained what equipment would be on the vessel on arrival in port, and the oil contract question was settled, and received the reply from either Glensor or Hartman, "That is understood." On May 2 the parties took up the draft of a contract, Pedder having dictated one, which was discussed with Glensor, and on which Glensor made pencil changes after taking it to his office; the oil contract, equipment, tankage, and insurance premiums were again discussed, and the meeting was finally concluded by the remark of Pedder: "Suppose we leave those clauses and let them settle it between themselves at the time the contract is finally executed, because it is more a matter for the parties to decide on those things than it is for you and I." Glensor replied: "All right, I agree with you Mr. Pedder, there is no use you and I wrangling here over the price and value of the ship's stores and those things, because when Mr. Hammond comes back he can take up with Mr. Hartman direct * * * then we can put the clauses in the contract accordingly." On May 3, Glensor talked with Pedder on the telephone and arranged that the meeting set for May 4 be continued to May 7, and that the option be extended. There is some discrepancy as to the date, but it was May 7 that the meeting was to take place, and May 8 to which the option was extended. On May 7 Glensor called Pedder on the telephone, and was advised that the parties would not negotiate further. Glensor, however, came to Pedder's office in the afternoon, with Hartman and Smith of the Gulf Mail Steamship Company. Glensor opened the conversation with a suggestion regarding the oil contract, and was informed by Mr. Pedder that inasmuch as the proposition for the sale of the vessel had been left open for negotiation to agree on a contract if possible, and as his people were not disposed to agree on the matters under discussion, they would not enter into a contract. Proof as to plaintiff's damages was admitted in evidence.

Upon these facts the case was submitted to the jury, with the result above mentioned. Appellant contends that "nowhere in the case does any question of the sufficiency or insufficiency of the evidence arise"; and that the questions presented for decision are wholly questions of law. Adverting to the declarations made by the trial court in its order granting the motion for a new trial, appellant argues that the trial judge "made the original order because of his views of the law, and not because of his views on the evidence." The high lights of the trial judge's order, indicating his views, are as follows:

> "In this case the jury were, in substance, instructed that, in order to constitute a contract, there must be a 'meeting of the minds,' and that, where a proposal is made, and only a qualified acceptance thereof results, such qualified acceptance is, in law, deemed a new proposal, and could be revoked at any time before its acceptance. These conditions were not, in my opinion, sustained by the evidence introduced on behalf of plaintiff. * * *
>
> "* * * It appears that it was the undoubted intention of the parties herein to reduce their agreement to writing, and have it mutually signed by both parties thereto, and the jury were charged accordingly. * * *
>
> "* * * The alleged contract herein violated the provisions of the statute of frauds. * * *
>
> "* * * The amount of damages awarded in this case, even assuming the plaintiff is entitled to recover, was, in my opinion, grossly excessive. While I do not think that the jury, in arriving at their verdict, were influenced by passion or prejudice, it is clear that their verdict was not sustained by the evidence.
>
> "For these reasons I am constrained to grant the defendant's motion for a new trial herein, and it is so ordered.
>
> "It is my practice whenever a new trial is granted by the court in a jury case, upon the ground of the insufficiency of the evidence, to justify a verdict, to apply to the presiding judge." etc.

In a decision this day rendered in a companion case we have held that a document containing such language, properly entitled and signed, and filed in open court by the trial judge, constituted an order granting a motion for a new trial, upon the ground of the insufficiency of the evidence to sustain the verdict. A further consideration of the matter convinces us that this view is correct. Just what questions of fact or of law this record presents we do not propose to discuss, as we are satisfied that there must be a retrial of the case in the superior court.

[2] Nor do we wish to be understood as adopting any of the views expressed by the trial judge in the order granting a new trial, nor as hinting or squinting at an expression of opinion upon any branch of this case, excepting the single point herein decided; and, coming directly to that, it should only be necessary to mention the well-settled and familiar rule which says that insufficiency of the evidence to justify the verdict is a ground for new trial, appealing peculiarly to the discretion of the trial court, and its order granting same shall not be disturbed upon appeal in the absence of a showing of abuse of discretion. Section 535, 2 Cal. Jur.

Appellant stresses the point that the evidence at the trial was undisputed; that "none of this testimony was contradicted or rebutted; * * * that the defendant introduced no evidence whatever." In answer, we will say that a reading of the record convinces us that the trial court was justified in its action granting a new trial. Paraphrasing language used by Mr. Justice Lennon in a case wherein the facts were somewhat similar (Meinberg v. Jordan, 29 Cal. App. 760, 762, 157 Pac. 1005, 1007), we say further, in reply, conceding, as appellant contends, that there is no conflict in the evidence, nevertheless the probative force and effect of the evidence was ultimately for the determination of the trial court upon the hearing of a motion for a new trial. This rule is also stated in Otten v. Spreckels, 24 Cal. App. 251, 257, 141 Pac. 224, 226, wherein it was said that "the rule (elementary and commonly familiar in our system of jurisprudence) is that the plaintiff in a civil action must establish his cause by a preponderance of proof; but, although many witnesses may testify directly in favor of his position, and no adversary testimony directly adduced, it is still with the jury in the first instance and finally with the court, where a new trial is asked on the ground stated, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of the law as to the degree of proof essential to the support of an issue of fact."

No abuse of discretion is disclosed by the record and the order granting a new trial is, therefore, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

(67 Cal. App. 507)

NORMART v. SAFER et al. (Civ. 2704.)

(District Court of Appeal, Third District, California. May 27, 1924.)

1. Partnership 🔑258(2)—Administrator of deceased partner held entitled to defend action in claim and delivery on surviving partner's failure to act.

In claim and delivery by third person for property constituting partnership assets, administrator of deceased partner had right to appear and defend in behalf of decedent's estate, despite Code Civ. Proc. § 1585, where surving partner had taken position that there were no partnership assets, and allowed a default to be taken against him as he thereby waived his right to possession.

2. Principal and agent 🔑103(9)—Contract held not to authorize one to sell crop until owners agreed to sale.

A contract authorizing one joint owner's father-in-law to sell crop for specified sum, with a penalty if owners failed to live up to agreement, *held* not to authorize him to consummate a sale, unless, after finding person able to purchase for stipulated price, owners ratified or consented to such sale.

3. Joint adventures 🔑4(1)—Party given management held authorized to sell crops.

Where agreement between adjoining owners to pool their lands and crops gave one of them the management and supervision of the enterprise, and required him to account for all moneys expended and "all moneys received," he had an implied right to sell the crops.

4. Replevin 🔑69(1)—Court authorized to take into account all circumstances in determining bona fides of sale, though fraud not pleaded.

In claim and delivery against one joint owner, based on a sale of property by person acting under alleged authority, notwithstanding no issue of fraud was tendered by answer, court was authorized, in determining credibility of witnesses, and weight to be given testimony, and whether sale was bona fide or mere pretext to secure advantage of defendant, to take into account all circumstances characterizing carrying out thereof.

5. Principal and agent 🔑190(3)—Implied finding that sale of property was made to defraud one owner sustained.

Evidence *held* to sustain trial court's implied finding that a sale of property by father-in-law of one joint owner under alleged authority was fraudulent and carried out by alleged agent, his son-in-law, and the buyer, with intent of wrongfully depriving remaining owner of his just rights in the property.

6. Replevin 🔑70—Plaintiff's action fails, if he does not establish his ownership upon which claim of possession based.

Where plaintiff's claim of right to possession of property was founded solely upon his alleged ownership thereof, upon his failure to establish such ownership his action failed.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by P. M. Normart against John Safer and J. D. McNary, administrator of the estate of Norton K. Crosby, deceased, substituted as defendant in place of Norton K. Crosby, deceased. From an adverse judgment, plaintiff appeals. Affirmed.

N. Lindsay South, of Fresno, and Atran & Sheets, of Colusa, for appellant.

Alva A. King and Thomas Rutledge, both of Colusa, for respondents.

HART, J. This action is in claim and delivery. The complaint, which was filed on the 22d day of September, 1922, alleges that the plaintiff was at all times mentioned therein the owner and entitled to the possession of four tons of Thompson Seedless and Sultana raisins, and three tons of grapes of the same varieties, and also a crop of almonds, all of which were and are of the value of $3,000; that within "one year last past," in the county of Colusa, without the consent of plaintiff, the defendants Crosby and Safer took and detained said personal property from the possession of plaintiff; that plaintiff, prior to the commencement of this action, demanded of defendants possession of said personal property; that the latter have failed and refused and still fail and refuse to do so; and that they "still wrongfully withhold and detain such personal property, to the plaintiff's damage in the sum of $3,000."

The prayer is for the delivery of the possession of said property to plaintiff, or, in case said delivery cannot be had, that he have and recover judgment for the sum of $3,000, the value thereof, etc. The defendant Safer failed to answer the complaint or otherwise make an appearance in the action within the time prescribed by law, and his default in that behalf was duly entered.

By leave of the court first had and obtained the defendant McNary, as administrator of the estate of the defendant Crosby, deceased, the latter having died subsequently to the commencement of this action, to wit, on September 30, 1921, filed an answer to the complaint. After stating that said Crosby died after the commencement of this action, and that later said J. D. McNary was duly appointed administrator of the estate of said deceased, and under an order of the court substituted as party defendant in the place and stead of said deceased, the answer denies positively or on information and belief all the allegations of the complaint, with the exception of that contained in paragraph 2 thereof. Paragraph 2 alleges that the personal property mentioned therein is of the aggregate value of $3,000. The answer states that, on the 23d day of September, 1921, the plaintiff wrongfully and fraudulently took the property described in the complaint from the possession of said Norton K. Crosby under a claim of ownership; that the sheriff of

Colusa county, under a provisional process issuing in this action and founded upon an affidavit and undertaking filed herein by the plaintiff and pursuant thereto, did, on the 22d day of September, 1921, take said personal property from the possession of the said defendant, and thereafter delivered all of said property to the plaintiff; that, as administrator of the estate of said Crosby, deceased, the defendant, McNary, is entitled to the return and delivery to him of the possession of the whole of said property. The prayer of the answer is for a judgment that said property be delivered to said McNary, as administrator, etc., or that he as such administrator be awarded judgment for the sum of $3,000, the value thereof, in case such delivery cannot be had.

The findings are in accord with the denials and averments of the answer, it being specifically found, as the complaint alleges and the answer admits, that the property described in the complaint was, at the time of the commencement of this action, of the value of $3,000. The court further found that said Crosby at the time of his death was a resident of Colusa county and died in said county subsequent to the date of the filing of the complaint herein; that said J. D. McNary, at a date subsequent to the death of said Crosby, was, by proceedings duly had in the superior court in and for said county, regularly appointed administrator of the estate of said Crosby, deceased; that he thereafter duly qualified as such administrator; that letters of administration of said estate were by said court duly issued to him; and that said McNary has ever since been such administrator.

The judgment is for the delivery of said property to the defendant McNary, or, if the same cannot be so delivered, for the sum of $3,000, the value thereof.

This appeal is by the plaintiff from said judgment, and is supported by a record made up according to the alternative method.

It appears that on and prior to the 31st day of January, 1921, H. Panosian, Norton K. Crosby (the deceased above referred to), and John Safer were the owners of a 160-acre tract of land which is situated near the town of Arbuckle in Colusa county, in the following proportions in severalty: Panosian 40 acres, Crosby 80 acres and Safer 40 acres; that these several parcels of land, to the extent of 70 acres in the aggregate, were improved and devoted to the growing of raisin grapes and almonds; that, on the 31st day of January, 1921, the three parties named entered into an agreement in writing, which, in substance, provided: That said parties, for the purpose of farming and developing said property and growing thereon grapes and almonds, and "in consideration of the mutual advantage to be derived from the association of said parties for said purpose," agreed to pool their several interests in said land and the crops thereon growing, and manage and work the same jointly and as one enterprise; that, to this end, the said Crosby, who then resided on his parcel of said 160 acres, was to be given and have personal supervision and management of all said property, and devote all the time necessary to the proper management "of said farming enterprise," with full power to purchase whatever equipment, machinery, supplies, etc., he might find essential to the carrying on of the same "in a first-class manner"; that said Crosby was to improve the unimproved 90 acres of the 160-acre tract, "under the same terms and as may hereafter be agreed upon between the parties"; that the expense required to operate or carry on "said enterprise" was to be borne by Crosby in the proportion of one-half thereof and Safer and Panosian each one-fourth thereof, and the profits derived from the enterprise were to go to said parties in the same proportions respectively; that Crosby was to receive, in addition to his one-half of the profits, the sum of $600 as compensation for "his personal management and supervision of said enterprise." It was further provided in said agreement that "this lease," as it is termed in said written agreement, was, by the terms of said agreement, to terminate on January 31, 1922, unless continued in force, and this was to be done, if it was the desire to continue it on the same terms, by an indorsement to that effect on the writing itself and subscribed by the said parties.

Crosby, in pursuance of the terms of said agreement, assumed and took active management of the properties, and continued so to manage them until there arose between the parties the misunderstanding regarding the sale of the raisins and almonds which led to the institution of this action by the plaintiff, and as to which misunderstanding the facts will now be stated.

Panosian was the father-in-law of Safer, and these two resided and remained in Fresno, while Crosby was engaged in managing "the enterprise." Shortly after the said agreement was made Panosian sold or transferred his one-fourth interest in the fruit crops growing upon the land to his son-in-law, Safer.

On the 11th day of August, 1921, the following document was signed by Crosby and Safer, which was received in evidence and marked Exhibit A:

> "We have given authority to A. Panosian to sell the crop of 160-acre ranch known as Stanton's Place, and consisting of 20 acres of vineyard and 40 acres in almonds, for the sum of $500, with privileges of using all trays and boxes on said place in curing the crop, with understanding that all trays and boxes are to be collected and stacked at their places, after curing said crop.
>
> "If we fail to live up to our agreement, we agree to pay A. Panosian $400."

On the same day (August 11, 1921) Panosian, so the plaintiff and Safer testified, sold the entire crop grown on said lands to the plaintiff for the sum of $500, and Panosian and the plaintiff signed a writing in the city of Fresno, of date August 11, 1921, the same having been prepared by Attorney South of said city and one of the attorneys for the plaintiff herein, purporting to evidence such sale. This writing was received in evidence and designated plaintiff's Exhibit B. Panosian and the plaintiff testified that the latter paid for said crops in two several amounts on two different occasions. A short time thereafter—how long a period thereafter is not made definitely to appear—the plaintiff, accompanied by Safer and a "hired man" went to the land, and the plaintiff exhibited his agreement of sale to Crosby, and informed him that he (plaintiff) had purchased the entire crops of grapes and almonds and the raisins which had already been cured for $500 from Panosian; that he had paid the latter said sum, and demanded possession of said crops and raisins. Crosby declined to deliver possession, declaring that he had already sold the crops and the raisins to a firm known as Guggenheim & Co. After some controversy over the matter, the plaintiff, leaving Safer and his "hired man" in charge of the crops, with instructions to maintain possession thereof for him, returned to Fresno. The facts will be further considered as we proceed with the discussion of the points urged by the plaintiff.

The grounds of the attack upon the judgment are these: (1) That the legal effect of the written agreement by the terms of which Crosby, Panosian, and Safer associated themselves together in the prosecution of the business of growing and selling the fruit products of the land described in said writing was to create the relation of partnership between said parties; that therefore Safer, being the sole surviving partner of Crosby, deceased, is, by virtue of the terms of section 1585 of the Code of Civil Procedure, entitled to the sole and exclusive possession of the personal property in controversy for the purpose of settling the business of the partnership; that, per consequence, defendant McNary, as administrator of the estate of Crosby, deceased, is not entitled to such possession until the business affairs of the partnership have been fully adjusted and settled; (2) that Exhibit B, executed by Crosby and Safer, vested in Panosian the unqualified authority to sell the corps for a definitely stipulated sum, and that the sale of the crops to plaintiff by Panosian under the authority so conferred for the sum specified in the writing was and is binding on Crosby and Safer; (3) that the findings vital to the judgment do not derive sufficient support from the evidence. In other words, the contention as to the last stated point is that the evidence, without conflict, shows that Panosian was authorized to sell the crops, did sell them, and that the interests of Crosby and Safer therein were thereby divested.

1. The point that the effect of the written agreement between Crosby, Panosian, and Safer, whereby they associated themselves together to carry on, as a joint enterprise their several or independently owned interests in the business of growing grapes and almonds on the land described in the complaint, was to establish a partnership relation between them, constitutes the subject of an extended discussion pro and con in the briefs of the respective counsel. While it is doubtful whether the said parties by said agreement intended to establish the partnership relation, still it must be conceded that the agreement bears some of the characteristics of a partnership, and yet, viewed by the light of the evidence in the case, it might well be said to amount to a joint adventure. But, in view of the situation as to the transactions eventuating in this litigation as disclosed by the record, the question whether the agreement involved the creation of a partnership or a joint adventure or a mere association by the parties for the purpose of rendering to each other mutual assistance in the growing, harvesting, and marketing of their respective crops, is of no particular consequence in the decision of this case. We will, however, for the purpose only of considering the point that Safer and not the defendant McNary, as administrator, etc., was entitled to take possession of the property in dispute, assume that the effect of the agreement was to create a partnership between the parties. Section 1585 of the Code of Civil Procedure reads as follows:

> "When a partnership exists between the decedent, at the time of his death, and any other person, surviving partner has the right to continue in possession of the partnershp, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained."

[1] It will be observed that by the above section the surviving partner has the right to continue in possession of the partnership for the purpose of settling the business thereof, which he is required to do within a reasonable time, and likewise report the same and pay any balances due the decedent to the executor or administrator. If he fails to do

this, the executor or administrator may proceed to compel him to do so by the proceeding outlined in said section. In the present case Safer, the alleged surviving partner, not only failed to exercise his right to continue in possession of the partnership, but, in effect, took the position from the time this controversy arose that there were no partnership assets. He failed to perform the duty which the above section required of him, and by his conduct prior to the commencement of this action, and by his testimony in this case clearly indicated that he had no intention of taking charge of the alleged partnership business for the purpose of settling it. While we have found no express provision of law specifically providing that, in case the surviving partner fails to exercise his right to continue in possession of the partnership for the purpose of settling its business, the executor or administrator of the estate of the deceased partner may, as such, take possession of the latter's interest in the partnership, we think it is clear upon principle that it would be his duty to do so under such circumstances. Indeed, if this were not true, the interests of the deceased partner in the partnership might be wasted, or otherwise (perhaps through the fraud of the surviving partner) be lost to the estate. The right of the administrator of the estate of the deceased in this case to appear and defend in behalf of the estate of the deceased in this action seems to be so clear that further discussion of the proposition is unnecessary. The fact is, Safer waived his right to continue in possession of the property as the surviving partner, if in truth he ever had any such possession, and, indeed, allowed a default to be taken against him in this action in favor of the plaintiff herein, which indubitably shows that he did not intend to continue in possession of the partnership, if such it was, but, on the contrary, intended in every way to aid in securing a determination that the personal property involved herein was not at any time after the alleged sale thereof to plaintiff any part of the so-called partnership assets.

[2] 2. The contention that by Exhibit A above quoted herein Safer and Crosby conferred upon Panosian the unqualified authority and right to negotiate the sale of the crops from the lands referred to for the sum of $500 is not sustained by a reasonable construction of the language of the writing itself. It will be observed that the last clause of said writing reads: "If we fail to live up to our agreement, we agree to pay A. Panosian $400." It is clear from this language that Panosian's authority was intended to be limited by the writing to the finding of a purchaser of the property and not to the negotiation of the sale thereof to said purchaser, except upon the consent of Crosby and Safer. In other words, the last paragraph seems to be absolutely clear upon the proposition that Panosian was not authorized to consummate a sale of the property, unless after finding a person willing, ready, and able to purchase the same at the stipulated price, Crosby and Safer prior to the consummation of the sale ratified or consented thereto. The writing might well be said to confer upon Panosian the authority to offer any person desiring to purchase the fruit an option to make such purchase, which option was subject to the right of Crosby and Safer or either of them to accept or reject the proposition to sell. It is also clear that the trial court was justified in finding, as impliedly it did, from said paragraph in Exhibit A and the actions and conduct of the parties as disclosed by the evidence that the sale was not to be consummated by Panosian, unless both Crosby and Safer previously consented thereto.

[3] The above construction, we may assume from the findings, accords with that given it by the trial court. As seen, it was shown that Crosby, upon being told by plaintiff and Safer that Panosian had sold the fruit to the former, declared that he would not confirm or ratify the sale; that Panosian had no authority to make an outright sale of the fruit; that he (Crosby) had sold the fruit to Guggenheim & Co. Testimony to this effect was given by a number of witnesses, including a representative of Guggenheim & Co., all of whom stated that the conversation occurred in their presence between the deceased and Safer and the plaintiff. That Crosby had the right to sell the property is implied from the language of the agreement to the effect that he was, at the end of the term of the agreement, to render a full and correct account "of all moneys expended and of all moneys received as a result of said enterprise."

[4, 5] But, even if it were necessary to concede that the construction thus given the writing is erroneous, still we are satisfied that this court cannot disturb the implied finding that the purported sale of the property to the plaintiff did not involve a bona fide transaction. In other words, we think the implied finding that no actual sale was made by Panosian to the plaintiff is supported by all the circumstances of the case, or, at any rate, the evidence tending to support such finding is such as to preclude this court from declaring that the decision of the court upon that question is erroneous.

The defendant McNary does not specifically allege in his answer that the alleged sale involved a fraudulent transaction or was one which was falsely represented by Panosian, Safer, and the plaintiff to have been consummated for the purpose of defrauding Crosby out of his just rights in the property. In other words, fraud was not set up by the defendant McNary for the purpose of vitiating the effect of said writing, assuming that such effect was to vest in Panosian the right to consummate a sale of the crops for the sum stated therein. This probably was due to the fact that said defendant's counsel construed said writing as we have herein construed it, and so regarded it as not having given authority to Panosian to sell the property except upon the express consent of both Crosby and Safer. However this all may be, the court below, notwithstanding that the issue of fraud as to the alleged sale was not tendered by the answer, was authorized, for the purpose of determining the credibility of the witnesses or the weight to be attached to the testimony of the plaintiff, Safer, and Panosian as to said transaction, and whether the same was bona fide or involved a mere pretext in order to secure advantage of Crosby, to take into account all the circumstances characterizing the carrying out thereof. And it is to be presumed, in support of the judgment, that the court below rejected as untrue or as unworthy of belief the testimony of Panosian, Safer, and the plaintiff appearing to show that the purported sale was in fact a bona fide transaction, or, to state the proposition in a more direct and positive form, that the implication from the decision is that said court concluded and found, from the circumstances disclosed at the trial of the case, that the transaction involving the purported sale was fraudulent and carried out by said parties with the purpose and intent wrongfully of depriving Crosby of his just rights in the property in dispute. The circumstances may briefly be recited: That the plaintiff made the alleged purchase without having any personal knowledge of the condition of the crops; that he paid $500 for property which admittedly was of the value of $3,000; that Panosian and Safer, the former the father-in-law of the latter, and who once owned a one-fourth interest in the crops, but which he transferred to his son-in-law, immediately upon the execution of Exhibit A together proceeded to look for and shortly found in the person of the plaintiff an alleged purchaser of the crops; that immediately upon said alleged purchase being effected the plaintiff appointed and constituted Safer as his agent, with authority to sell the crops for him (plaintiff); that within a few days thereafter Safer sold the crops to Rosenberg & Co., for a sum slightly in excess of $3,000; that, on arriving on the land with plaintiff after the purported sale to the latter, Safer apprised Crosby of the alleged sale, saying to him (as a number of disinterested witnesses who heard the conversation testified) that he (Safer) had sold the grapes, raisins, and nuts to plaintiff for the sum of $500; that, so the plaintiff testified, neither he nor Safer then tendered or offered to pay Crosby any money for his interest in the property, but that Safer, although admitting he had previously received the full amount of the alleged purchase price, offered to give Crosby his (Safer's) note for the former's share of said amount, which Crosby refused to accept. Other circumstances tending to stigmatize the transaction culminating in the alleged sale of the property to plaintiff as spurious or wholly without foundation in fact might be referred to herein but the circumstances already adverted to as characterizing the transaction are such as to compel the conclusion that it would amount to an unauthorized invasion of the province of the trial court, as the arbiter of the questions of fact, for a court of review to declare that the implied finding that no sale of the grapes, etc., to plaintiff was actually made by Panosian or any other person was not warranted. Indeed, upon the presumption, which this court must indulge, that the trial court disbelieved and rejected as unworthy of belief the testimony of Panosian, plaintiff, and Safer to the effect that there was a bona fide sale of the property, no other witnesses having given testimony as to the alleged sale, the record must be viewed by this court as practically containing or disclosing no testimony showing or tending to show a sale of the crops by Panosian to plaintiff. But we may even proceed a step further and say that, upon their face, the circumstances above recited herein strongly tend to show that the whole scheme of Panosian and Safer, with the aid of the plaintiff, was to perpetrate a fraud upon Crosby, and so deprive him of his just proportion of the actual value of the crops.

There is, it is true, evidence tending to the conclusion that Crosby was willing to sell the crops for the sum of $500. The fact that he joined in the execution of the writing authorizing Panosian to find a buyer at the figure named may well be so construed. Again, it was made to appear that about three months prior to the execution of said writing Crosby addressed to Panosian a letter in which he stated that the grapes and nuts were not in a healthy condition or had been damaged by the frost, and, in effect, suggested that they should be sold for whatever they could get for them. It is significant, though, that, when Safer told Crosby that the crops had been sold to the plaintiff, Crosby declared that he would not deliver possession thereof to the plaintiff, unless he was paid the sum of $500 in cash. From this statement it may be inferred that Crosby might have understood the proposition involved in the purported authorization to Panosian to sell the crops to be that he was to receive for his share, if the crops were sold under said authorization, the sum of $500. But, be that as it may, even with all the testimony referred to as indicating Crosby's willingness to sell the crops for the sum of $500, it was still for the court to determine from all the evidence the truth or the real character of the transactions culminating in this controversy, or, as above stated, to determine whether the testimony of Panosian, Safer, and the plaintiff was to be given any credence, and to disbelieve their testimony, as presumptively it did. See Richey v. Butler, 40 Cal. App. 314, 318, 180 Pac. 652.

[6] The purpose of the action of claim and delivery, like the common-law writ of replevin, is to try the right to the possession of personal property or chattels, and therefore, where a party claims the possession of movables, and resorts to the action in claim and delivery to establish his claim, it is incumbent on him to prove that he is entitled to the immediate possession of the chattels or personal property, whatever may be the source of such claimed right. If in this he fails, so must his action fail. In the present case, the plaintiff's claimed right to the possession of the property in controversy is founded solely upon his alleged ownership thereof. He failed, according to the trial court's decision, to establish his ownership of said property, and with such failure necessarily his claim of right to the possession of the property also failed. With the decision of the trial court, for the reasons above explained, we are without just authority to interfere.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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67 Cal. App. 597

PEOPLE v. MOCK DON YUEN. (Cr. 768.)

(District Court of Appeal, Third District, California. June 4, 1924.)

1. Criminal law 🔑730(13)—Reference on cross-examination to defendant's prior conviction held not prejudicial.

In prosecution for unlawful possession of a preparation of cocaine, prosecuting attorney's inadvertent reference to defendant's prior conviction for same offense was not prejudicial under Pen. Code, § 1025, where court admonished jury to disregard it, and charge of previous conviction had been read to jury and frequently alluded to before defendant admitted same.

2. Poisons 🔑9—Evidence of unlawful possession of cocaine held sufficient.

In prosecution for unlawful possession of preparation of cocaine, evidence *held* to sustain conviction.

3. Constitutional law 🔑62—Criminal law 🔑1201—Statute providing that second conviction for unlawful possession of narcotics should constitute a felony held not unconstitutional.

St. 1921, p. 978, providing by section 7 that a second conviction for unlawful possession of narcotics shall constitute a felony, is not unconstitutional as a delegation of legislative power to prosecutor to make any given subsequent offense a felony or a misdemeanor by charging or failing to charge the previous conviction.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Mock Don Yuen was convicted of unlawful possession of a preparation of cocaine, and he appeals. Affirmed.

Hugh H. Sydenham and Ralph W. Smith, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. By information filed in the trial court on the 15th day of June, 1923, the defendant was accused of the unlawful possession of a preparation of cocaine on the 7th day of June, 1923. The information further charged that on the 27th day of June, 1923, the defendant was convicted of the crime of the unlawful possession of a preparation of cocaine. The defendant entered a plea of not guilty and denied the prior conviction. During the impanelment of the jury that part of the information which charged the prior conviction was read in the presence of the prospective jurors and frequent reference thereto was made by the district attorney and the court, to all of which counsel for defendant objected. When reference was first made to the prior conviction, during the impanelment of the jury, counsel for defendant said: "We will withdraw our former plea, and we will plead guilty to the former conviction." The court replied: "Then he will have to be rearraigned. He has already been arraigned and entered a plea of not guilty to the former conviction." Throughout the impanelment of the jury counsel for defendant continued to object to any reference to the prior conviction, but made no move to withdraw the denial thereof or to have the defendant admit the same. After the jury was impaneled the clerk proceeded to read the information. It seems then to have been discovered for the first time that the prior conviction was charged in the information to have been had at a time subsequent to the filing thereof. The district attorney thereupon asked leave to amend the information by changing the date of the prior conviction from June 27, 1923, to June 27, 1922. Counsel for defendant said: "I understand that conforms to the files." The information was amended accordingly. Counsel for defendant said: "Now, we will plead guilty, since it has been corrected," evidently meaning that the defendant would admit the prior conviction. The court answered: "The defendant is the only one that can enter the plea of guilty." A little later the court asked counsel if the defendant desired to withdraw his denial of the prior conviction and admit the same. Counsel replied: "We want to stand as not saying one word. We haven't a word to say;

we are in the hands of the court." The district attorney then made his opening statement to the jury, in which he stated that the prosecution expected to prove the alleged prior conviction. Council for defendant objected to the statement and assigned it as "prejudicial error." Finally defendant withdrew his denial of the prior conviction and admitted it. Thereafter the district attorney referred to the prior conviction in a question asked the defendant on cross-examination. The court sustained defendant's objection to the question and instructed the jury "to disregard any statement about any prior or previous conviction." The defendant was convicted and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

[1] It is first contended that the foregoing references by the district attorney and the court to the prior conviction constitute prejudicial error. The foregoing statement is a sufficient answer to the contention. Section 1025 of the Penal Code provides that when a defendant is charged "with having suffered a previous conviction," and pleads not guilty, but "answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." Up to the time that defendant admitted the prior conviction it was proper to allude to the charge thereof and to read it to the jury. In view of the fact that the charge of the previous conviction had been read to the jury and frequently alluded to before the defendant admitted the same, the district attorney's later reference thereto in his cross-examination of defendant, which was probably inadvertent, could not have prejudiced the defendant's rights, especially after the court's admonition to the jury to disregard it.

[2] It is urged that "there is no evidence to sustain the charge of possession" of cocaine. The testimony not only shows positively that defendant had cocaine in his possession at the time charged, but that at that time he stated to the arresting officers "that he only had a little bit, but he had it for his own use."

[3] Section 7 of the act under which defendant was prosecuted provides that upon his first conviction of the unlawful possession of forbidden narcotic drugs a defendant shall be deemed guilty of a misdemeanor and that "for the second and each subsequent offense of which said person so convicted shall be found guilty, said person shall be deemed guilty of a felony." Stats. 1921, p. 978. Appellant contends that, since a second or subsequent offense cannot be punished as a felony unless the indictment or information charges a previous conviction, the statute is unconstitutional as a delegation of legislative power to prosecutors to make any given subsequent offense a felony or a misdemeanor by charging or failing to charge the previous conviction. It would be equally as logical to contend that section 666 and 667 of the Penal Code and all other statutes imposing greater penalties for second offenses are unconstitutional attempts to delegate legislative power. The contention is so patently untenable as to merit no further discussion.

The defendant was given a fair trial and no error appears in the record. If his case was prejudiced by reading the charge of his previous conviction to the jury and by references thereto made by the district attorney and the court, the defendant has only himself to blame therefor, as stated.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; BURROUGHS, Justice pro tem.

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67 Cal. App. 564

FORREST v. BURT. (Civ. 4873.)

(District Court of Appeal, First District, Division 2, California. June 3, 1924. Hearing Denied by Supreme Court July 31, 1924.)

1. Master and servant 🔑43—Directed verdict on issue of breach of contract warranted.

In action for breach of oral contract of employment, evidence *held* to warrant directed verdict for defendant.

2. Chattel mortgages 🔑34—Bill of sale held taken as security for repayment of moneys advanced.

Bill of sale *held* taken by buyer to secure repayment of moneys advanced to seller, though word "security" was not used, so that buyer was entitled to hold property until settlement of account and repayment of amounts advanced.

3. Chattel mortgages 🔑300—Seller held not entitled to sue at law for breach of contract to reconvey property.

One executing bill of sale to secure repayment of moneys advanced, *held* entitled to sue in equity for accounting, but not at law for damages for breach of contract to reconvey.

Appeal from Superior Court, Alameda County; Mortimer Smith, Judge.

Action by George M. Forrest against J. S. Burt. Judgment for defendant, and plaintiff appeals. Affirmed.

Franklin P. Bull, of San Francisco, for appellant.

Olin L. Berry, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a judgment for money. The defendant answered, and a trial was had before the trial court sitting with a jury. The plaintiff pleaded his claim in three counts. In the first count he pleaded that he sold and delivered to the defendant the goods, wares, and merchandise known as "Quality Electric Motor Co.," for the agreed sum of $8,500. In the second count he pleaded the sale of the same property for the reasonable value of $8,500. In the third count he pleaded the facts, and in doing so he charged that on the 6th day of October, 1921, he executed to the defendant a bill of sale of the property, "and defendant was to carry on said business and build up the trade for plaintiff, and allow plaintiff to work in said business, receiving for his wages the sum of twenty dollars ($20) per week until the business warranted plaintiff drawing or receiving more for his services, and to then reconvey to plaintiff said business"; that plaintiff has duly performed, etc.; that defendant has, since the 22d day of June, 1922, refused to allow plaintiff to work in said business, and has refused to reconvey to plaintiff the property; that the reasonable value of the property is $8,500; that the reasonable value of the good will of the business is $2,500; that after being deprived of a place to work, the plaintiff accepted other employment at a lower wage, and has been damaged in the sum of $1,000; that plaintiff has been damaged in the further sum of $12,000, and that plaintiff prays judgment for $12,000.

On the trial of the case the plaintiff abandoned the first count and second count, and after both parties had introduced their evidence, the trial court instructed the jury to return a verdict for the defendant. In ruling, the trial court used this language:

> "I will speak plainly to you; as far as the complaint is concerned, and as far as the testimony of this plaintiff himself is concerned, he testified this property was assigned; he transferred it to the defendant, Burt, as security for what was given him and money advanced to the business, and to be retained by him until such time as that business would be sufficient to pay Burt back, at which time the business was to revert to Forrest. Under that consideration and stipulation he made the bill of sale. As to damage by way of employment, you have failed to prove damage. You have not brought a single witness to show he has been damaged. In fact, he has been benefited to the extent of $25 a week. In my opinion you have sought the wrong remedy. You should have brought an action in accounting. This is an action for breach of contract."

An examination of the record discloses that the trial court did not err in directing the verdict, and that the reasons assigned by the trial court for so directing the verdict were in all respects sound.

On the 6th day of October, 1921, the plaintiff was the undisputed owner of the Quality Electric Motor Company, a business then being conducted at 198 Twelfth street, Oakland. The plaintiff had theretofore received numerous loans from the defendant. The exact amount had never been ascertained and the balance remaining unpaid was, and is, in dispute. However, as we understand the record, the plaintiff concedes that there was $1,500 remaining unpaid, and some more moneys besides. The defendant claims that at said time there was a much larger sum owing and unpaid. Besides these moneys, on October 6, 1921, the plaintiff owed for merchandise, purchased but not paid for, the further sum of $700, which was falling due in installments nearly every day. In addition to these financial obligations there was an outstanding unsettled liability of the plaintiff for the support of a child by a former marriage. The plaintiff testified that he had on said date a balance of 75 cents in the bank and did not possess any other means. On or about the date that the bill of sale was executed the plaintiff and defendant had a talk regarding the execution of the paper. A part of that talk was had in the presence of Mr. Coffman, who afterwards wrote out the paper. As to the exact language used by the parties, the witnesses do not relate the incident in the same language, but the variance is slight. In reply to questions propounded by his own counsel, the plaintiff stated that the conversation between him and the defendant, which led to the making of the bill of sale, commenced with a talk regarding the possibilities of litigation arising against the plaintiff on his liability to support his child. The defendant knew of the circumstances, and after he had put a considerable amount of money in the business, he stated to the plaintiff that Mrs. Chase, the plaintiff's former wife, was liable to come up here and take the business away from the plaintiff. The defendant thereupon suggested that the plaintiff had better make out the bill of sale, and he did so. But in this behalf the plaintiff testified:

> "I did not sell this property to him. It was not transferred to him as security; there was nothing said about security.
>
> "The Court: Q. It was transferred to keep the authorities away from you on account of your not supporting the child? A. It was done by J. S. Burt's advice.
>
> "Mr. Bull: Mr. Burt was afraid this property would be attached? A. Yes, and the money he had in there would be lost."

On cross-examination the witness testified:

> "I discussed the question of attachment and possible process against this business in the presence of Mr. Burt and Mr. Coffman. * * * I did not have any fear at all of Mrs. Chase causing any trouble, but Mr. Burt did. At that time Mr. Burt had advanced me $1,500 or more. He was uneasy. To allay his uneasiness, I consented that the bill of sale be made. He told me if I gave him the bill of sale he would build up the business for me and put in any amount that was required to run it. It was not security on my part because I did not fear. When I made this arrangement I knew that Mr. Burt was going to continue to put money

into the business. * * * I had known him since 1912, and he had that much faith in my ability to make good. It was done for pure friendship from him to me. It was no partnership of any kind or nature. There was nothing said about loss in the business. As the business grew up he was to take out of the profits the money he had advanced. He was not to draw anything out of the business until he was paid. I was to repay him. * * * In other words, I put in the property I had, my time, and experience as a mechanic against the money he put up. I drew out enough to live on and that is all."

On the other hand, Mr. Burt testified that, fearing attachments, he declined to make further advances unless he obtained security. That the kind of security was discussed and it was debated whether the defendant should take a bill of sale or a chattel mortgage. It was deemed advisable to take a chattel mortgage because a chattel mortgage could be used as security to protect future advances. After the 6th day of October, 1921, the plaintiff commenced to act under the terms of the bill of sale and drew out $20 per week, and continued so to act until the 22d day of June, 1922. During that period of time Mr. Burt made further advances. The exact amount of those advances had not, prior to the trial, been ascertained, and during the trial the respective parties did not purport to settle the account. As we understand the record, it shows that additional advances to the amount of $15,000 or $16,000 were made. In the latter part of June, 1922, the plaintiff and defendant commenced to discuss the advisability of taking a different location for the business. The location selected was a building on the opposite side of the street. The moving of the plant had commenced. Before the moving was completed, the plaintiff left. The circumstances of his leaving and for the period of time, etc., were testified to by him as follows:

"I left when the majority of stuff was moved. I left when there was nothing there but the office and the heavy machinery to be moved. About a month and a half before that I told Mr. Burt I was going to take my wife out to the Yosemite and her mother was going along, and some of our friends were going along, and we would be right back. I did not tell Mr. Burt and Mr. Hutchinson that I was going away for two weeks. I went away Friday night and was back Monday. Mr. Burt came to my house. After I came back I went to the shop about three days afterwards. I don't remember who I saw. After I came back Mr. Burt came down to my house. He asked me—he thought I made a big mistake—first he told me he had a good man in my place and he needed my services no longer. He didn't tell me who the man was. I went either that night or the next night. I went there to see him about the things I had there in that office. That is the time he demanded of me $22,000. I was not away two weeks. The reason I went away was that I had had the flu, and previous to that I had been working so hard and late at night that my health was not any too good, and my wife's health was not any too good either. So I decided to take her up to the Yosemite for a little rest. I thought the trip away from the shop would do me good."

Aside from the foregoing there is no other testimony by the plaintiff concerning discharge or prevention. An employee in the shop, Mr. Hutchinson, testified that, on the date that the plaintiff left, the plaintiff stated to him "that conditions were not such that he was looking for, and he said he was going to leave. I asked him how he thought Mr. Burt would take it and he said he did not care."

[1] We do not find any testimony in the record that the appellant was, by the terms of the oral agreement, to be kept in employment during any particular length of time. The testimony which we have quoted above shows that the appellant quit the employment of his own volition, and that he was not discharged; that after he quit, another man was put in his place, and when the appellant learned of that fact he made no objection whatsoever, but went to the office to get his things. Furthermore, the entire record shows that the quitting or discharging did not create a damage. As the trial court remarked in granting the directed verdict, the appellant gave up $20 a week to accept employment at a wage varying from $48 to $50 a week. He was benefited rather than injured. However, in passing, it should be observed that, as we view the record, $20 was not by the parties to be considered as a wage. It was by them deemed to be an advance by the trustee to the trustor. True, the appellant was to devote his time to managing the shop. All his time and energy was to be devoted to the building up of the business. In that manner the time would be shortened within which the business would be turned back to him, discharged of its debts. To make that time as short as possible, the parties agreed upon the sum of $20 per week as an advance, well knowing at the time that the value of the appellant's services to the business might readily exceed $50 a week. But in connection with the employment theory, the appellant introduced no evidence showing the reasonable value of his wages in the shop, and, therefore, neither the trial court nor this court can ascertain whether he was damaged or not damaged.

[2, 3] As to the main branch of the case, it is patent that the agreement between the plaintiff and the defendant was that the bill of sale was, in legal effect, taken as security to secure the repayment of moneys advanced. The fact that the word security was not used by the parties, as the appellant claims, is not determinative of that fact. Having received the plaintiff's prop-

erty, to secure the repayment to him of advances made to the plaintiff, the defendant was entitled to hold the said property until his account had been settled, and the amount of the advances ascertained and repaid to him. As stated above, an accounting has never been had. While the plaintiff is entitled to maintain an action in equity for an accounting, he is not entitled to maintain an action at law. 2 Perry on Trusts, § 843; 39 Cyc. 469.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

67 Cal. App. 609

Ex parte COX. (Cr. 1176.)

(District Court of Appeal, First District, Division 1, California. June 7, 1924.)

Habeas corpus ⚷102—Writ discharged and petitioner remanded, where evidence was sufficient to justify commitment.

Where evidence as to whether one accused of selling securities without procuring license, in violation of Codes & Gen. Laws 1917–21, Act 1700, § 5, prior to St. 1923, p. 90, § 2, requiring agents of brokers to procure licenses (Codes & Gen. Laws 1917–21, p. 1448, § 2, subd. 8), acted as broker's agent, was sufficient, though unsatisfactory and confusing, to justify commitment, writ of habeas corpus will be discharged and accused remanded.

Application by Harry P. Cox for writ of habeas corpus directed to the Sheriff of Alameda County. Writ discharged, and petitioner remanded.

Arnold C. Lackenbach, of San Francisco, for petitioner.

Ezra W. Decoto, Dist. Atty., Earle Warren, Asst. Dist. Atty., and Carlisle C. Crosby, Deputy Dist. Atty., all of Oakland, and Clifford J. MacMillan, for respondent.

TYLER, P. J. Petition for writ of habeas corpus.

The application recites that petitioner is imprisoned and restrained of his liberty by the sheriff of Alameda county, and that such restraint and imprisonment are illegal, the alleged illegality consisting in this, to wit, that on the 6th day of March petitioner was charged by a complaint filed in the police court of Alameda county with having unlawfully and feloniously engaged in the business of selling, offering for sale, and negotiating for the sale of stocks issued by others without first having obtained from the commissioner of corporations of the state of California a broker's license, in violation of the Corporate Securities Act; that said petitioner was preliminarily examined in the police court upon said charge and was held to answer to the superior court in Alameda county.

It is claimed that the evidence adduced at the preliminary hearing fails to show that petitioner was guilty of the charge or any other public offense.

Under certain provisions of the Corporate Securities Act which were designed to prevent fraud in the sale of securities, a broker is required to procure a license in order to conduct his business, and his failure so to do is made a felony. Codes and General Laws 1917–21, p. 1450. The information filed by the district attorney is based upon a violation of this provision, and it charges that the petitioner on the 16th day of November, 1922, willfully and feloniously acted as a broker and agent in the negotiation and sale of an irrigation district bond and also certain shares of the common capital stock in the California Ink Company without first having obtained a permit from the commissioner of corporations. Petitioner had prior to the commission of the alleged offense been a duly licensed broker, but his license had been revoked for having transacted business in the name of a company with which he had severed his connection. Cox v. Daugherty (Cal. App.) 222 Pac. 178. No claim is made that persons dealing with petitioner were in any manner defrauded by his acts, the charge being merely that he sold the securities mentioned without having first procured a license. Petitioner admits having made the sales, but claims he did so as the agent of a broker, and that this being so, he in no manner violated the provisions of the act in question.

The Corporate Securities Act, with reference to agents, reads as follows:

> "The word 'agent' as used in this act means and includes every person or company employed or appointed by * * * a broker who shall, within this state, either as an employee or otherwise, for a compensation, sell, offer for sale, negotiate for the sale of, or take subscriptions for any security of any company of its own issue offered for sale by it."

Section 2, subd. 8, Gen. Laws, p. 1448.

It seems to be conceded that at the time the alleged offense was committed and at all times prior to April, 1923 (St. 1923, p. 90, § 2), when this act was changed so as to require agents to procure a license, an employee or agent of a broker was not required to procure one in order to sell securities.

The sole question here presented is whether or not there is any evidence tending to show that Cox did act as an agent for one T. R. Jump, a broker, when he sold the bond and stock in question. The evidence at the preliminary examination in the police court shows that petitioner had conducted several distinct transactions in the sale of securities. We have read the evidence, and while it is not of a satisfactory character, we cannot say that it is insufficient to convict, or that the petitioner has been committed upon a criminal charge without reasonable or probable cause. There was some evidence as to whether petitioner acted as an agent of Jump in his transactions, and while this evidence is somewhat confusing we are of the opinion that on the whole it is sufficient to justify the action of the committing magistrate in holding the petitioner to answer the charge against him. In re James, 47 Cal. App. 207, 190 Pac. 466.

This being so, the writ is discharged and the petitioner remanded.

We concur: KNIGHT, J.; ST. SURE, J.

(67 Cal. App. 533)

ALAMEDA COUNTY WATER DIST. et al. v. SPRING VALLEY WATER CO. et al. (Civ. 4670.)

(District Court of Appeal, First District, Division 1, California. May 29, 1924. Hearing Denied by Supreme Court July 28, 1924.)

1. Arbitration and award 🔑21—Dismissal of suit according to arbitration agreement held proper.

In suit for an injunction, where an agreement between the parties in nature of a common-law submission to arbitration provided for dismissal in case a settlement was reached by the arbitrators, the court lost control over the case and had no authority to enter judgment on the arbitrators' reaching an agreement, and dismissal of the suit was proper.

2. Appeal and error 🔑866(1)—On dismissal of suit following award of arbitrators, appellate court has no power to modify award on appeal.

Where a common-law submission to arbitration provided for dismissal of suit on making of an award, the court lost jurisdiction, except to order a dismissal of suit when award was made, and the appellate court had no power on appeal from judgment of dismissal to modify the award, since it formed no part of the judgment rendered.

3. Arbitration and award 🔑76—Award may be corrected in equity.

If arbitrators, whose award was to be final, in violation of an arbitration agreement, encroached upon the rights of parties to a suit, the aggrieved parties have a remedy in equity to correct the award.

4. Arbitration and award 🔑18—Agreement by parties to arbitrate not to be treated as a stipulation to dismiss.

Where parties to a suit entered an agreement for a common-law submission to arbitration, and withdrew the suit from the jurisdiction of the court, which had only authority to order a dismissal on the arbitrators' reaching an award, the agreement could not be treated as a stipulation to dismiss, which, under Code Civ. Proc. § 581, subd. 2, would require the signature of the parties' attorneys.

5. Arbitration and award 🔑82(5) — Award held to determine rights of individual owners who had sued by representative.

In a suit by a water district against a corporation to enjoin interference with a stream of water, brought by the district on behalf of all individual landowners as their representative, and acquiesced in by them for several years, an award of arbitrators, pursuant to agreement of the water district and defendant, determined the rights of the individual landowners.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Suit by the Alameda County Water District and others against the Spring Valley Water Company and others. From an order and judgment dismissing the suit, plaintiffs appeal. Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellants.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondents.

KNIGHT, J. By this action plaintiffs sought to enjoin the defendant, Spring Valley Water Company, from obstructing, extracting, arresting, or diverting any of the waters of Alameda creek, which flow on the surface of the bed of said creek or which flow or percolate underneath the surface thereof. Subsequent to the filing of the complaint, and before issue was joined, an arbitration agreement was entered into between the plaintiff Alameda county water district and the defendant Spring Valley Water Company, which provided for a settlement of the controversy between the parties by the members of the state water commission and upon settlement thereof that the action be dismissed. An award of settlement was made by the arbitrators, and thereafter, on motion of said defendant Spring Valley Water Company, said action was by the trial court dismissed. Its judgment of dismissal was entered accordingly, from which order and judgment of dismissal all of the plaintiffs have appealed.

Plaintiff Alameda county water district is a public water district organized under the act of the Legislature approved June 10, 1913 (Stats. 1913, p. 1049), said district comprising approximately 44,000 acres in Alameda county, situate in the region surrounding Niles, where Alameda creek has its origin, and westerly and southerly thereof to San Francisco bay, a portion of which is usually designated as the "Niles Cone." The remaining plaintiffs are landowners within the district.

It appears from the allegations of the complaint that beneath the surface of the lands in question there are various strata of gravel through which the waters flowing in Alameda creek percolate and supply the territory with water through this underground drainage, and that in years of drought practically all of the waters of Alameda creek seep into this underlying gravel strata. It is further alleged in the complaint that the defendant water company, at the time the action was brought, was constructing a storage reservoir on Calaveras creek, a tributary of Alameda creek, by means of which it planned to increase the diversion from Alameda creek which it had previously been making. The action sought to enjoin the construction of said Calaveras dam and any increase of the diversion from Alameda creek or its tributaries, for the reason, as said complaint alleges, that said dam and an increased diversion would tend to decrease the supply of water to the various lands underlaid by the gravel strata to which reference has heretofore been made, and that the flood waters of the creek which do not percolate into the gravel deposit upon the lowlands situated within the district large quantities of silt, and that said silt reclaims the lowlands, rendering them capable of cultivation and useful for agricultural purposes; and that the diversion of the flood waters will irreparably damage the lands affected by the overflow.

Before the cause was brought to an issue the Alameda county water district and the Spring Valley Water Company entered into said agreement wherein, after reciting the objects to be attained, it was stated that said parties were unable to decide upon the terms of settlement of the controversy by reason of the lack of physical data necessary for a fair consideration of the question and had therefore agreed that for a period of three years, the state water commission should gather the necessary data and upon the completion of that time, or sooner in case it should obtain sufficient data, said water commission should proceed, in conference with the parties, to fix and determine the terms and conditions in accordance with the character of the particular season upon which such storage and additional diversion might be made, the object being to reach a settlement whereby in the most economical and practical manner it should be made possible without further litigation to conserve and put to beneficial use the waters of Alameda creek and its tributaries which were not being used, and at the same time prevent any damage being done to the lands underlaid by the water-bearing strata, supplied in whole or in part from Alameda creek, or if was not possible to prevent such damage entirely to compensate the owners of said land to the extent to which such damage was not prevented; the making of such compensation by the water company, if it be provided for by such settlement, to be a condition of the exercise by said water company of any rights or privileges accorded to it by such settlement. Said agreement further provided:

> "The settlement so fixed and determined by the state water commission shall be final and conclusive upon the parties hereto, but the water company shall not be deemed to waive any existing rights which it may have acquired against particular landowners or particular lands within the water district (the water district, however, not conceding that any such rights or claims are binding upon it), and the settlement awarded by the state water commission shall be subject to such particular rights so far as such rights may exist."

The agreement then provided the manner of releasing the water to flow down Alameda creek for the purpose of ascertaining the water levels of the lands in question. It was also agreed that no further proceedings be taken until the said water commission should make findings and award or until before expiration of the three-year period the commission should report that it was unable to make such settlement, and in case such settlement be had such action should thereupon be dismissed; also that if there be a failure to obtain such settlement the right to proceed with such action should revive to the plaintiff therein and the intervening lapse of time "shall not affect any right, cause of action or defense which any party thereto may have, or which any party on whose behalf such action is brought may have."

Pursuant to the terms of said agreement the members of said state water commission undertook the work of assembling the physical data necessary to a determination of the matter in controversy and placed their engineer in charge of said work. This work was commenced in 1916 and the three-year period included the years, 1916–1917, 1917–1918, and 1918–1919, a report being made after each season to the interested parties, the final report being made under date of June 3, 1920. After the submission of the final report the parties were asked to comment upon said report and to submit their suggestions as to a proper solution of the problem. Several conferences followed between the parties and their attorneys at which discussion was had of said report and also of the written suggestions and comments submitted by the respective parties. The last conference was held on October 21, 1920, and the last written comments and suggestions were submitted on November 19, 1920.

On December 28, 1920, the said arbitrators rendered an elaborate report of its investigations in which it adopted the findings of its engineer under whose direction the data necessary for such final determination was assembled. Said arbitrators, among other things, found that there were 36,800 acres of land within said water district affected by said percolating waters and that said water company had acquired by conveyances certain water rights in and to 6,080 acres of land in said district riparian to said Alameda creek. After determining the amount of water which was held to be the quantity of flow of said creek which percolated into the gravel strata underlying the lands in said district, said arbitrators deducted from said quantity 16½ per cent. determining that the amount so reduced was the amount which should be allowed to go down the creek and flow into the gravel strata underlying all of the lands in said district, including the lands owned by persons, the predecessors in interest of whom had made said grants of said riparian rights in favor of the Spring Valley Water Company. Thereafter, to wit, on October 20, 1921, said water company gave notice of motion to dismiss said action on the ground that the arbitrators had made their findings and award in accordance with said agreement. Said motion came on for hearing on November 4, 1921. Said plaintiffs objected to the entire proceeding upon several grounds and in support of said objections filed and submitted two affidavits, the substance of which was to the effect that said water district had not waived its right to attack, object to or defend against said award; that said arbitrators had not complied with the terms of and had in fact exceeded their powers under said arbitration agreement by attempting to deduct said 16½ per cent. of water from the total quantity of water they otherwise would have permitted to flow down said Alameda creek through said district; that the determination of what was in fact done under said alleged settlement by arbitration would require the introduction of much evidence and that said matter could not be fairly determined until an answer was filed and a trial of the action had. Said motion was submitted, and on the 14th day of December, 1921, was by the court granted and judgment of dismissal accordingly entered on December 16, 1921, from which said order and judgment of dismissal this appeal has been taken.

[1] Appellants make five points on appeal, the first being that the trial court did not lose jurisdiction by reason of the mere submission of said cause to arbitration, particularly where it expressly stated in said arbitration contract that the arbitration called for shall be made before a dismissal occurs. In this respect appellants contend that if the award was made by said arbitrators jurisdiction was still retained by the court to require defendant to plead to the complaint, and that therefore the right was reserved in appellants to attack said award and to offer evidence for that purpose.

In answer to this contention the respondent states that it makes no claim that the action was discontinued or made subject to dismissal by the mere fact of the submission to arbitration, but that it does claim that when the award was made the action was then subject to dismissal both because the controversy had been concluded by the award and there was nothing left to be determined by the action and because the parties had agreed in such case that it should be dismissed. In support of this position the respondent has cited the case of Draghicevich v. Vulicevich, 76 Cal. 378, 18 Pac. 406, the ruling in which they claim is decisive of the question here involved.

In view of the context of the arbitration agreement we are satisfied that the respondent's position is sound and that the procedure adopted by the trial court in the dismissal of the action was correct. In Draghicevich v. Vulicevich, supra, the matters in dispute were before trial submitted to arbitration by the parties and an award made. Later, but still before trial, a stipulation was filed setting forth the fact of the arbitration and award. Nevertheless, the court proceeded to try the case and gave judgment. On appeal the judgment was reversed and the court below was directed to dismiss the action, the Supreme Court saying that—

> "The submission of the cause to arbitrators operated as a discontinuance of the action, and that after such discontinuance the proceedings of the court were without jurisdiction."

In the instant case the parties agreed by their arbitration agreement that no further proceedings should be taken in the action, except that defendant should file its answer, until a settlement was made by the arbitrators and that upon such settlement being made it should become "final and conclusive upon the parties," and that, "in case such settlement be had, such action shall thereupon be dismissed." The alternative was also provided for in said arbitration agreement in that it stated that—

> "In case there be a failure to obtain such settlement then the right to proceed with such action shall revive to plaintiffs therein."

A settlement by said arbitrators was made, and such settlement concluded the action and rendered unnecessary any trial or the determination of any issues of fact. The right of the defendant to have the action dismissed therefore became absolute under the law as well as under the terms of said arbitration agreement.

It is evident from the terms of said agreement that there was no intention of the parties to bring themselves within an arbitration provided for by the Code. Sections 1283 et seq. Code Civ. Proc. In fact no such contention is made by appellants. Their agreement was in the nature of a common-law submission to arbitration, a voluntary withdrawal of the case from the jurisdiction, by which the court lost all control over the case and had no authority to enter judgment, providing the settlement was reached by said arbitrators, which, as we have already seen, was accomplished. Heslep v. City of San Francisco, 4 Cal. 1; Gunter v. Sanchez, 1 Cal. 45; McNulty v. Solley, 95 N. Y. 242; Bowen v. Lazalere, 44 Mo. 383; Buel v. Dewey, 22 How. Prac. [N. Y.] 342.

The cases cited by appellants do not in our opinion lay down any different rule. In the case of Laflin v. Chicago, etc., R. Co. (C. C.) 34 Fed. 859, the court distinguished between an actual submission and an executory arbitration agreement and held that there was no discontinuance where no arbitrators are chosen and nothing is done by the parties under the agreement. That is not the case here. The submission was had and an award made, and the agreement to dismiss was an additional reason for granting the motion. 18 Corp. Jur. 1179; Toupin v. Gargnier, 12 Ill. 79. The case of Callanan v. Port Huron, etc., R. Co., 61 Mich. 15, 27 N. W. 718, contemplates a stay not followed by proceedings or an award, the court saying that "it may easily happen that the time for bringing a new suit has passed, and action by the referees may be prevented by failure or refusal of either party to proceed before them," and that "there are strong reasons of justice against regarding a reference, not followed by an award, as in any case going further than becoming the basis of an application to stay proceedings, rather than operating as an absolute stay." This again is not the case here. There was an award and a conformity with the agreement and following the rule laid down in Draghicevich v. Vulicevich, supra, the case was dismissed. We therefore see no error in the court's ruling.

[2] The second and third points made by appellants relate to that part of the award which provides that said Spring Valley Water Company, on account of its ownership of said riparian rights in the lands within the district, may reduce the quantity of the flow of water down said Alameda creek to the extent of 16½ per cent. In this respect it is contended that the award was not what the parties contracted for; that it shows upon its face that said arbitrators exceeded their authority to the prejudice of the landowners of the district and of the district itself, for the reason that the terms of said arbitration agreement expressly negatived the power of the arbitrators to determine any issues between the Spring Valley Water Company and the owners of the land along the creek resulting from prior deeds and agreements and that therefore it was error for the court to dispose of the case by motion, particularly in view of the objections of plaintiffs, who denied that the award conformed to the contract of arbitration and who reserved the right, as they claim, to attack the award on every legal ground. While the respondent does not concede that the award of the arbitrators which provides for a reduction of the flow of the quantity of said water down said creek was in excess of the authority of the said arbitrators, it does contend that in the event this court should conclude that such action of the arbitrators in making such reduction complained of was erroneous and open to review by the courts, the award as a whole is not involved and should be allowed to stand, amended only by the elimination of the objectionable provisions, and in this regard respondent in its brief says:

> "This deduction, as we have said, is not of importance either to the landowners of the district or to the water company. This appears plainly from the fact that in order to bring the matter to an end we have repeatedly offered in vain, and have offered in this brief, to consent to an amendment of the award by the elimination of the deduction, provided only that the water district would then acquiesce in the award."

And in respondent's reply brief it also states:

> "We would also call attention to the fact that respondent has repeatedly offered to waive the 16½ per cent. deduction but without avail."

In view of the fact, as above pointed out, that this was a common-law submission to arbitration and that upon the making of the award the court lost jurisdiction to hear and determine the merits of the controversy or of the award, except to order a dismissal of the action, and the trial court having followed that course, the only judgment rendered by it was one of dismissal. The merits of the award were not considered, and the award itself was neither adopted nor rejected. That being so, it follows that this court would not have power on appeal to order a modification of the award, for the simple reason that the award forms no part of the judgment rendered in the action. We are therefore of the opinion that respondent's suggestion of the modified award cannot be adopted.

[3] If, however, as appellants contend, said arbitrators in violation of the terms of said arbitration agreement "stepped outside of any authorization conferred upon them and undertook to defeat the rights of the landowners within the district by cutting down the natural supply of water to said lands when they were supposed to substitute a quantity equivalent to such natural supply," they are given ample remedy in equity to correct said award so as to eliminate the objectionable portions thereof concerning the reduction by said arbitrators of the flow of said water and which, as before stated, respondent is willing should be done. Utah Const. Co. v. Western Pacific R. R. Co., 174

Cal. 156, 160, 162 Pac. 631. In the case of Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313, it is stated that a court of equity may interfere to correct accident or mistake appearing on the face of the record and that it makes no difference whether the mistake is one of fact or law. The court pursued the subject further upon a rehearing in which the court said that—

> "It is proper for courts to distinguish between those portions [of the award] which are good and those which are not, where the award is not attacked on the ground of fraud, and the subject-matter is in its nature divisible."

It is plain, we think, that, if appellants desired to correct the alleged error of law on the face of the award, resort might be had to a court of equity. Respondent, as above stated, is willing to stipulate that the objectionable parts of the award be eliminated providing the remaining portions of the award, which is the product of three years' labor, may not be disturbed.

[4] There is no merit in the fourth point made by appellants to the effect that if the agreement be treated as a stipulation to dismiss it is ineffective for the reason that it was signed by the parties and not by the attorneys for the parties. Subdivision 2, § 581, Code Civ. Proc. It is obvious that said document was not a stipulation to dismiss made under the Code sections cited, but was an agreement to arbitrate, and the dismissal consequently followed as a natural result of the court's loss of jurisdiction upon the settlement being made by the arbitrators.

[5] Appellants' final contention is that the individual plaintiffs are not shown to have used the district as the trustee of an express trust and the award could not, as to them, determine their rights, they not having signed the agreement. It is apparent, we think, that the individual plaintiffs were not only parties to the arbitration agreement in a moral sense, but likewise in a legal one. The action was one avowedly brought, according to the allegations of the complaint, on behalf of all landowners, by the district as the representative of said landowners. While the water district was the party to the arbitration agreement in settlement of the action, the individual plaintiffs, represented by the same counsel, acquiesced in this for several years. The motion to dismiss was made on the ground that plaintiff Alameda county water district, for and on behalf of itself and its coplaintiffs, agreed in writing with the defendant that the controversy should be submitted for investigation and settlement and that upon the terms of such settlement being prescribed said action should be dismissed; that the terms of the settlement were prescribed and laid down, but that the plaintiffs nevertheless neglected and refused to dismiss said action. No denial was made as to the allegation that by the agreement the individual plaintiffs were not represented by the water district and the court after submission of the cause granted said motion. We think that the facts justified the court's action. Other details appear which might operate as an estoppel to the individual owners, but a discussion of them would, we think, serve no useful purpose.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

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67 Cal. App. 553

PEOPLE v. REVLEY et al.

(District Court of Appeal, Second District, Division 1, California. June 2, 1924. Hearing Denied by Supreme Court July 31, 1924.)

1. False pretenses ⊂⊃23—Unnecessary to show accused was present when money was obtained by false pretenses.

Under Pen. Code, § 971, abrogating the distinction between accessory before the fact and principal, in a prosecution for obtaining money by false pretenses, the fact that defendant was not present at the time the money was procured did not exonerate him from liability, it being unnecessary to show that he participated at the exact moment of the offense.

2. False pretenses ⊂⊃49(1) — Evidence held sufficient to sustain conviction of accomplice in obtaining money by false pretenses.

In prosecution for obtaining money by false pretenses, evidence *held* sufficient to sustain conviction of an accomplice.

3. False pretenses ⊂⊃49(1)—Proof of all false representations alleged not necessary.

Conviction for obtaining money by false pretenses does not depend upon every fact alleged in information, but it is sufficient if one material false representation by defendant is shown which was relied upon by his victim and induced him to part with his money.

4. False pretenses ⊂⊃38—Variance as to kind of stock immaterial.

In prosecution for obtaining money by false pretenses, where the information alleged defendants agreed to give the defrauded person stock for money and shares in H. No. 3 oil well, and that the person gave them money, a variance between the information and proof that the certificate of stock in question was H. No. 4, in view of the fact that the information contained no allegation of accomplishment of fraud as to the certificate of stock, was immaterial.

5. False pretenses ⊂⊃52—Instruction on issue of conspiracy not error.

In a prosecution for obtaining money by false pretenses, an instruction that conspiracy of codefendants may be proved by direct or circumstantial evidence or by both, *held* not erroneous.

6. Criminal law 🔑369(12)—Evidence tending to prove offense charged admissible, though proving conspiracy.

Although, under Pen. Code, § 182, conspiracy to commit a crime is a criminal offense, in prosecution for obtaining money under false pretenses, evidence tending to prove the offense was not inadmissible because it also tended to prove a conspiracy.

7. Criminal law 🔑369(2)—Evidence pertinent to proof of offense charged admissible, although showing another offense not related thereto.

Although, under Pen. Code, § 182, conspiracy to commit a crime is a criminal offense, if evidence be pertinent to the proof of an offense charged, it is admissible, although showing an offense not related to that charged.

8. Criminal law 🔑1166½(12)—Statement as to coming together of defendants held not reversible error.

In prosecution for obtaining money by false pretenses, a statement of the judge that witnesses testified that both defendants came together subsequently, covered by an immediate statement by a deputy district attorney in charge of the prosecution that there was no testimony that defendants came together subsequently in the house of the defrauded person, followed by a statement of the judge that it did not have to be in her house, if error, was immaterial, and not sufficient to warrant a reversal.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

D. Gordon Revley and another were convicted of obtaining money by false pretenses, and they appeal. Affirmed.

Hearing denied by Supreme Court. All concur, except Houser, Justice pro tem., not participating.

Buel R. Wood, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

HOUSER, J. Defendants appeal from a judgment of conviction of the crime of obtaining money by false pretenses, and from an order denying their motion for a new trial.

The information, in effect, charged that the defendants, with intent then and there to cheat and defraud one Olive A. Stowell, did willfully, unlawfully, and feloniously pretend and represent to the said Olive A. Stowell that the defendants were the authorized agents of and for the J. E. Barrett Company of San Francisco, and that the defendants were purchasing oil stock for and on account, and as agents, of the said J. E. Barrett Company, which said company was represented as being an established and responsible brokerage house, and that the said company, through the defendants, was acquiring a corner and controlling interest in certain oil stocks owned by the said Olive A. Stowell, to wit, certain shares in the Hamilton No. 3 oil well of the Hamilton Oil Syndicate; that the defendants did then and there pretend and represent to the said Olive A. Stowell that if she would give to defendants 12 shares of such capital stock owned by her, and the further sum of $350, the defendants would, through and on account of the said J. E. Barrett Company, give to the said Olive A. Stowell certain shares of stock of the Southern California Edison Company of the par value of $3,000; that the said Olive A. Stowell then and there believed the said false and fraudulent pretensions and representations, and relied thereon and was deceived thereby, and was then and there and thereby induced, by reason of the said false and fraudulent pretenses and representations, to pay over and deliver to the said defendants the sum of $350; and that each of the said representations was, and all of them were, false and untrue.

The record herein discloses that, for the purpose of defrauding complaining witness and others, defendant Mitchell assumed the fictitious name of A. L. Atkins, and that defendant Revley assumed the fictitious name of L. D. Bradley; that they obtained certain business cards and buy orders from an imaginary brokerage house in San Francisco, designated as J. E. Barrett Company, together with a letter purporting to have been written by said company and which letter authorized Atkins to act as agent and representative of said Barrett Company; that defendant Revley stated to defendant Mitchell that a Mr. Barrett was in the market for Hamilton No. 4 stock, and requested Mitchell to call upon complaining witness and others who held stock in the company referred to, and ascertain if they desired to dispose of their stock; that defendant Mitchell, using the name of Atkins, and at the request of defendant Revley, called on complaining witness and stated to her that he represented J. E. Barrett Company of San Francisco; that he was buying stock for that company, and asked complaining witness if she owned any stock in Hamilton No. 3, and what she had paid for it; to which complaining witness replied that she had paid $200 per share for her stock; that defendant Mitchell then stated to complaining witness that his company would pay her $200 a share for the stock, to which she answered that she would not sell until she had conferred with the company. Defendant Mitchell later informed defendant Revley that complaining witness would sell her Hamilton oil stock. Later, defendant Revley called at the house of complaining witness and stated to her that Mr. Atkins (Mit-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

chell) was unable to keep his appointment with her on account of illness, and that he (Revley) had come to see if she would sell her stock. At this time a daughter of complaining witness was informed by defendant Revley that complaining witness had "$2,400 worth of worthless stock," and that he was empowered, as agent of the Barrett Company, to offer her par for it; that the reason they could pay par for the stock was that two wealthy Germans in San Francisco, who owned stock in the Hamilton Company, had decided that they wanted to get their money out and were willing to pay par value for the stock, even though they could buy it cheaper; that the Barrett Company did not pay money for stock like this, but turned over bonds or other stock in exchange; that he had offered complaining witness three Edison Company bonds, worth $1,000 each, for her stock in the Hamilton Company, and she was to pay the difference in cash; that the bonds would be delivered about a week later. Defendant Revley then took complaining witness to the bank and she gave him $350, for which Revley gave her a receipt. When they returned from the bank a Mrs. Arfuedson was at the home of complaining witness. Mrs. Arfuedson told complaining witness that defendants wished to buy her stock and had come to see if she was going to sell it; that defendants were expected to come to her home for the purpose of making the trade. Subsequently, both defendants called at Mrs. Arfuedson's home and were shortly thereafter placed under arrest. Complaining witness testified that she relied upon the representations of defendants as to the Southern California Edison Company stock, and that the fact that defendants had stated to her that they represented the Barrett Company of San Francisco induced her to enter into the transaction. After defendants were arrested, they voluntarily admitted that they were not from San Francisco; that no such concern as the J. E. Barrett Company existed; that the Mr. Barrett whom they represented was a man whose acquaintance they had made at the Alexandria Hotel, and that he had sent them out to buy this stock. They also admitted that they had used fictitious names because they knew it was a "phoney" deal and for that reason did not want their true names to be used. Defendants also stated that the $350 obtained from complaining witness had been used for their own personal benefit. After the arrest of defendants, a letter was taken from the person of defendant Mitchell, which purported to be on the letter head of "J. E. Barrett Company, San Francisco," addressed "To Whom It may Concern," and introducing A. L. Atkins (Mitchell) as a special representative of the J. E. Barrett Company and authorizing Atkins to deal generally for said company in the purchase and exchange of "notes, securities, etc." For the purpose of identifying Atkins, his signature appeared on the margin of the letter. There were also taken from each of the defendants blank copies of "buy orders," also purporting to be on the stationery of "J. E. Barrett Company, San Francisco," as follows:

> "Buy for me * * * the above-named securities on my behalf. Delivery guaranteed in * * * days. [Signed] ———."

[1] Appellants' first contention is that defendant Mitchell neither aided nor abetted defendant Revley in procuring the $350 from Mrs. Stowell; nor was he present at the time it was procured—from which it is argued that the conviction of defendant Mitchell was unlawful. The evidence, however, as heretofore outlined, warrants the conclusion that, at least as between the two defendants, a general plan of action had been agreed upon by which, through fraudulent means, they would obtain money from many different persons including Mrs. Stowell. The mere fact that defendant Mitchell was not present at the time Mrs. Stowell gave the $350 to defendant Revley does not necessarily exonerate defendant Mitchell from criminal liability. It was unnecessary to show his personal participation in the offense at the exact moment of its commission. Section 971 of the Penal Code covers just such a state of facts as is here presented, in that it provides that "the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." And to the same effect, see the following cases: People v. Nolan, 144 Cal. 75, 77 Pac. 774; People v. Lewis, 9 Cal. App. 279, 98 Pac. 1078; People v. Billings, 34 Cal. App. 549, 168 Pac. 396; People v. Ah Gee, 37 Cal. App. 1, 174 Pac. 371; People v. Sartori, 43 Cal. App. 304, 184 Pac. 879; also section 31, Penal Code.

[2] Naturally, it would be impossible to reproduce word for word the agreement or understanding which existed between the two defendants, respecting the proposed commission of the crime. Such agreements are usually made in secret conference, with no intention of broadcasting even the ultimate conclusion. The existence of such understandings must be shown by circumstances, and by acts, conduct, and such admissions of the parties as may be obtainable. In the instant case, if sufficient facts were adduced

from which the inference of defendant Mitchell's guilt as an aider or abettor, with criminal intent, is either irresistible, or which convinced the jury of his guilt beyond a reasonable doubt, the demands of the law were met and he cannot complain of the verdict against him on that account. The evidence showed that defendants met and made certain arrangements previous to calling upon the complaining witness; that they assumed fictitious names for the purpose of negotiating the transaction; that the J. E. Barrett Company which defendants claimed to represent was known to them to be wholly fictitious; that defendants had upon their persons at the time of their arrest certain paraphernalia consisting of cards, buy orders, and a spurious letter purporting to authorize defendant Mitchell, under the name of A. L. Atkins, to represent the said J. E. Barrett Company, and to accept on behalf of that company bonds or other securities; that defendants obtained from Mrs. Stowell $350; that defendants were together at the home of Mrs. Arfuedson for the purpose of making a similar deal with her; that after the arrest of defendants they admitted the nonexistence of the J. E. Barrett Company; that their names were not what they had pretended them to be, but were respectively Mitchell and Revley; and that they knew the transaction with Mrs. Stowell was not as represented to her by them. Assuming that the jury believed the evidence, it is inconceivable that a different result than conviction of the defendants could have been reached.

[3, 4] The next point for reversal relied upon by appellants is that a fatal variance exists between the allegations contained in the information and the proof in that in the information defendants are charged with attempting to obtain Mrs. Stowell's holdings in Hamilton No. 3, while the evidence shows that it was a certificate of stock in Hamilton No. 4 which was the object of the felonious attempt. One of the objections, however, to appellants' argument in that regard is that defendants are not charged with an attempt to commit a criminal offense, but rather that they did in fact commit one, consisting not in the larceny of either a certificate of stock in Hamilton No. 4 or a certificate of stock in Hamilton No. 3, but in the sum of $350 lawful money of the United States. The plan to get possession of the certificate, while possibly part and parcel of the main scheme, was but incidental to the much more important feature to defendants of acquiring possession of the money. The success of establishing the crime of obtaining money by false pretenses does not depend upon the proof of every fact alleged in the information, but it is sufficient if one material false representation by the defendant is shown to have been made, which was relied upon by the victim and induced him to part with his property. People v. Ward, 5 Cal. App. 36, 89 Pac. 874; People v. Meadows, 22 Cal. App. 311, 134 Pac. 337; People v. Griesheimer, 176 Cal. 44, 167 Pac. 521.

The question relating to whether the certificate of stock owned by Mrs. Stowell was Hamilton No. 4 or was Hamilton No. 3 had nothing to do with any alleged misrepresentations made by the defendants to Mrs. Stowell. It is apparent that it would have been impracticable, if not impossible, to have misled Mrs. Stowell as to whether she owned shares of stock in Hamilton No. 4 or in Hamilton No. 3. That matter concerned the description of part of the property which it was alleged that defendants were attempting to feloniously obtain from Mrs. Stowell; and in view of the fact that the information contains no allegation of the accomplishment of the fraud as to the certificate of stock, whether of Hamilton No. 4 or Hamilton No. 3, or of any other certificate of stock, the variance, if it may be so designated, is not of great importance. Whether or not the proposition advanced by defendants, or by either of them, to Mrs. Stowell was that she trade her certificate of stock in Hamilton No. 4 or her certificate of stock in Hamilton No. 3 for Southern California Edison Company stock or bonds, and pay to defendants a certain sum of money representing the difference in the assumed respective values of the two commodities, was not the gist of the offense charged. The real point was whether, by means of certain alleged misrepresentations made by defendants to Mrs. Stowell, she was induced to and did part with the sum of $350; and the evidence strongly supports the conclusion reached by the jury that such was the case. The fact that a mistake was made in the information in the description of a part of the property of the complaining witness which defendants schemed to procure, cannot avail them in their efforts to escape criminal liability for obtaining, by false pretenses, another part of the property which was properly described. Had the subject-matter of the transaction related to live stock and money, instead of stock of a corporation and money, and had the information contained the allegation that defendants attempted to feloniously obtain three sheep and $100 from the victim, but succeeded in getting only the $100, and had the evidence on the trial shown that it was not three sheep, but that it was three goats and $100 which defendants were seeking to thus acquire, but that the $100 was all that was actually obtained by defendants—it would approach a straining at a shadow to hold that the variance was of such great consequence that defendants' rights were materially injured or prejudiced thereby.

The protection which the law affords to

those accused of the commission of criminal offenses is not intended to be enlarged by the invocation of mere legal technicalities which do not sound in the violation of some substantial right; and we are unable to perceive that there was any infringement upon any of the rights of either of the defendants, by virtue of the matter of which complaint is made.

[5] It is next contended that the trial court erred in giving to the jury the following instruction:

> "It is not necessary, in order to prove a conspiracy, to show a meeting and actual agreement of the conspirators to commit a crime. The fact that a conspiracy was formed may be inferred from all circumstances tending to show the common intent.
>
> "The existence of such a conspiracy may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence."

As heretofore pointed out, the evidence justifies the assumption by the court, for the purpose of instructing the jury, of the possibility that the defendants were operating under a common design of accomplishing a purpose of a criminal nature. There were many other instructions given to the jury bearing upon the subject of conspiracy, and while, perhaps, the subject is not completely covered thereby, certainly the essentials thereof applicable to the evidence were fairly presented. The instruction of which appellants complain is but a small portion of the entire body of instructions which deal with the subject of conspiracy. It merely directs attention in a general way to what may be considered by the jury in determining whether or not a conspiracy existed. No authorities are presented which suggest the impropriety of the criticized instruction. On the other hand, there are many authorities which in principle uphold it, among which may be cited People v. Donnolly, 143 Cal. 398, 77 Pac. 177; People v. Eldridge, 147 Cal. 782, 82 Pac. 442; People v. Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193.

[6] But it is urged that the instruction is erroneous in that, under the terms of section 182 of the Penal Code, a conspiracy to commit a crime is made a criminal offense; and from which it is argued that the fact that such conspiracy existed could be shown only in an action brought under that section; and specifically, that evidence of its existence could not be introduced in an action against a defendant charged with the offense of obtaining money by false pretenses, for the reason that evidence as to the existence of a conspiracy necessarily involves facts showing the commission of a crime, different from that with which defendant was charged in the information, and upon which he was being tried. The authorities are not harmonious as to whether or not, in circumstances such as are here presented, a merger is effected as to the offense of conspiracy to commit a crime, and the completed act contemplated by the conspiracy; nor is it deemed necessary to a decision of the point involved that consideration be given to the question of possible merger of the two offenses.

[7] Even where no relationship exists as between two offenses, if the offered evidence be pertinent to the proof of the offense charged, it is admissible. People v. Sanders, 114 Cal. 230, 46 Pac. 153; People v. Argentos, 156 Cal. 725, 106 Pac. 65; People v. Cook, 148 Cal. 341, 83 Pac. 43; People v. Ebanks, 117 Cal. 663, 49 Pac. 1049, 40 L. R. A. 269; People v. Walters, 98 Cal. 141, 32 Pac. 864; People v. McPherson, 6 Cal. App. 270, 91 Pac. 1098; People v. Rowland, 12 Cal. App. 19, 106 Pac. 428; People v. Tomalty, 14 Cal. App. 234, 111 Pac. 513; People v. Kizer, 22 Cal. App. 15, 183 Pac. 516, 521, 134 Pac. 346; People v. Klopfer (Cal. App.) 214 Pac. 878.

Viewed in the light that there was no merger of the two offenses, while the evidence may have tended to prove the crime of conspiracy, it also tended to prove that the defendants were guilty of the crime of obtaining money by false pretenses; and in such circumstances, as is said in the case of People v. Sanders, 114 Cal. 230, 46 Pac. 157, "the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime." If it may be considered that the consummation of the act which the conspiracy was initiated to perform constituted a merger of the crime of conspiracy with the crime of obtaining money by false pretenses, so that the defendants, if guilty of the commission of any offense were guilty of but the offense included within the completed act, and consequently that no prosecution could be predicated upon the crime of conspiracy, it would necessarily follow that no error was committed in the reception of evidence relating to the alleged conspiracy, nor in the giving of instructions to the jury relating thereto.

[8] Appellants also specify prejudicial error in that at the trial, in a discussion among the judge and counsel for the respective parties, the judge said: "I cannot agree with you. The complaining witness testified that they both (defendants) came on the same errand, and both came together subsequently." It is claimed that anything occurring after the completed misrepresentation was no part of the "corpus delicti," nor any "part of the res gestæ of the pretense here complained of." A review of the testimony immediately preceding the making of the remark to which objection is made shows that it related to admissions and confessions of guilt made by both the defendants. The relevancy of the remark to the

testimony of the witness is not readily apparent, but may be considered as a response to a part of the arguments of counsel for defendants in urging his objection to the admissibility of the evidence. That part of the remark of the court which referred to the fact that defendants "came together subsequently," was covered by the immediate statement made by the deputy district attorney who was in charge of the prosecution, wherein he said, "there is no testimony they came together subsequently in her house," which was at once followed by the judge stating, "it don't have to be in her house." Considering the entire matter, we think the error (even assuming it to be such) is of no great importance, and certainly not grave enough to warrant a reversal of the case on that account.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying the motion for new trial be and the same are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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67 Cal. App. 381

STANDARD LIVESTOCK CO. v. BANK OF CALIFORNIA, NATIONAL ASS'N.

(Civ. 4821.)

(District Court of Appeal, First District, Division 2, California. May 22, 1924. Hearing Denied by Supreme Court July 21, 1924.)

1. Banks and banking 🔑259—National bank cannot lease land.

Although a national bank has right to take conveyance of land to secure a pre-existing debt, land so obtained may not be retained as an investment, and a lease of land by bank is wholly invalid, under Rev. St. U. S. §§ 5133, 5137 (U. S. Comp. St. §§ 9658, 9674).

2. Banks and banking 🔑258—National banks can exercise only powers expressly granted and incidental powers.

National banks can rightfully exercise only powers expressly granted by Rev. St. U. S. § 5133 et seq. (U. S. Comp. St. § 9658 et seq.), or such incidental powers as are necessary to carry on national bank business.

3. Banks and banking 🔑261(3)—Ultra vires contract cannot be enforced against national bank.

Ultra vires contract cannot be enforced against a national bank, such as warranty of quiet enjoyment in lease of land held as security by bank.

4. Mortgages 🔑497(1)—Effect of judgment of foreclosure of mortgage on lessee.

Where mortgagees commenced foreclosure proceedings and made owner and lessee parties defendant, and owner filed answer and cross-complaint against lessee, and lessee appeared and answered and pleaded lease but did not set any value thereon nor make any attempt to have court ascertain damages for being disturbed in quiet enjoyment of premises, a subsequent action by lessee to recover damages for disturbance of quiet enjoyment was barred, lessee having right to litigate in foreclosure proceedings its claim against surplus fund, and it was immaterial that in a subsequent action special damages are prayed for.

5. Action 🔑57(1)—One may not voluntarily split action.

One may not voluntarily split his cause of action or so divide it as to make it subject to two or more actions, and this is true though claimant is involuntarily summoned into court and commanded to set forth his claim.

On Hearing in Supreme Court.

6. Frauds, statute of 🔑116(5) — Assistant cashier must have written authority to bind bank by signing lease.

Assistant cashier of a bank had no authority to bind bank by making lease in his own name as lessor in absence of written authority, and bank cannot be held as undisclosed principal in view of Code Civ. Proc. §§ 1967, 1971, 1973.

Appeal from Superior Court, Mendocino County; R. L. Thompson, Judge.

Action by the Standard Livestock Company against the Bank of California, National Association. Judgment for plaintiff, and defendant appeals. Reversed in District Court of Appeals and hearing denied in Supreme Court.

Thomas, Thomas & McCowen, of Ukiah, and Pillsbury, Madison & Sutro, of San Francisco (W. P. Thomas and Hale McCowen, both of Ukiah, and Frank D. Madison and Marshall P. Madison, both of San Francisco, of counsel), for appellant.

Preston & Duncan, of San Francisco, for respondent.

STURTEVANT, J. For some years prior to August 9, 1917, L. B. McMurtry owned the Ridgewood ranch, located between Willitts and Ukiah, in Mendocino county. Prior to that date the owner had become financially involved. He owed the First Federal Trust Company, on notes past due secured by mortgage on the ranch, over $85,600. At the same time he owed the Bank of California $52,500 on unsecured notes. Other creditors existed and were pressing their claims. On the date last mentioned McMurtry executed to William R. Pentz a grant, bargain, and sale deed conveying to Pentz the entire title. At the same time Pentz executed a defeasance reciting that the deed was made as security for McMurtry's indebtedness to the bank and agreeing that the property should be reconveyed upon the payment of the indebtedness. Pentz was one of the assistant cashiers of the bank, and, it may be added, he was the brother-in-law of McMurtry. McMurtry received the defeasance but did not record it. The deed to Pentz was duly recorded. After these things had occurred, B. P. Noonan and McMurtry discussed the making of a lease under the terms of which the entire ranch would be leased to Noonan, except that McMurtry would reserve hunting and fishing privileges, the right to remove tanbark, and also 30 acres on which stood the farmhouse occupied by McMurtry and his family. Before the lease was ready to be signed, Noonan was informed of the deed to Pentz and was told by McMurtry that the lease could be drawn in Pentz's name and that Pentz would execute it. Accordingly the lease was so drawn. It was dated November 1, 1917, and by its terms it purported to lease the lands from December 1, 1917, to June 1, 1923. The rent provided therein was $5,000 per annum payable in semiannual installments. Plaintiff paid the first two installments to Pentz and both were immediately turned over to McMurtry. Plaintiff never paid any other installment of rent. No paper purporting to be an authority of agency to Pentz to execute a lease was executed by any person, natural or artificial. The lease as drawn up was presented to Pentz by McMurtry and was signed at his request. At the same time Pentz signed a consent to the assignment of the lease by Noonan to the plaintiff. On June 29, 1918, Noonan loaned McMurtry $10,000 and McMurtry agreed that said amount might be credited as rent on the lease. A paper to that effect was drawn up to be signed by Pentz, but Pentz refused to sign it. Nevertheless, the money was loaned to McMurtry. Respondent was in possession at all times after December 1, 1917. In November, 1918, McMurtry having failed to pay either principal or interest upon the notes held by the First Federal Trust Company of San Francisco, an action in foreclosure was commenced by that company and the action resulted in a judgment in favor of the mortgagee. In that action the plaintiff made McMurtry, his wife, Pentz, Noonan, Standard Livestock Company, and others defendants. Pentz and the Bank of California appeared and answered and filed a cross-complaint. Noonan and the Standard Livestock Company appeared and filed an answer, and also an answer to the cross-complaint. After the court had entered its judgment a sale was had. After the sale and after certain objections had been heard and disposed of by the Supreme Court (Sullivan v. Superior Court, 185 Cal. 133, 195 Pac. 1061), a writ of assistance issued and the Standard Livestock Company was, by the sheriff, physically put off the premises. Claiming that the Bank of California was the undisclosed principal of Pentz, and that the plaintiff had been evicted in violation of its covenant of quiet enjoyment, and that by reason of said eviction the plaintiff had been damaged, the plaintiff commenced this suit to recover damages against the Bank of California. A trial was had in the lower court before the court sitting with a jury; the jury returned a verdict in favor of the plaintiff; judgment was entered accordingly; and from that judgment the defendant has appealed under section 953a of the Code of Civil Procedure. In view of the conclusions which we have reached, we do not find it necessary to discuss every point made by the appellant. The verdict of the jury implies that the jury found that the lease was executed by the defendant. That implied finding has no competent evidence in the record to support it.

As stated above, the record contained no evidence of a written authorization from any person, natural or artificial, authorizing Pentz to act as his agent and execute the lease. On its face the lease purports to be the lease of Pentz as lessor; however, it is the claim of the respondent that Pentz acted as the agent of an undisclosed principal, the Bank of California. Counsel do not cite authorities, and we know of none, that Pentz, by virtue of his office as assistant cashier, had authority to bind his principal, the appellant, by making a lease of the appellant's lands in his own name or in appellant's name. 14a C. J. 440. It will be conceded that in many cases a person is entitled to prove that another is an undisclosed principal. However, in every case that proof cannot be made in exactly the same way. In some cases there is "indispensable" evidence which it is necessary to produce in order to prove the fact.

> "The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts." Section 1967, Code Civ. Proc.
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> "No estate or interest in real property, other than for leases for a term not exceeding one year, * * * can be created * * * otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating * * * the same, or by his lawful agent thereunto authorized by writing." Code Civ. Proc. § 1971.
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> "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents: * * * (5) An agreement for the leasing for a longer period than one year * * *; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged." Code Civ. Proc. § 1973.

The foregoing rules were of particular importance in the instant case. If it had not been that the law prescribed the particular kind of proof necessary to show the agency, if any, of Pentz, there was testimony offered which could have been used to support the contention of the plaintiff, and there was testimony offered which could have been used to support the contention that Pentz was acting as the agent of McMurtry. But none of that evidence was in writing signed by the party to be charged, and therefore it did not meet the calls of the statute. The statute of frauds above quoted was enacted for the purpose of removing from contest in the courts those very questions.

[1] Still claiming that the lease was not its contract, the appellant claims that as it is a national bank it had no power under the provisions of the National Bank Act and the decisions of the federal courts, to make, and that it did not make or execute, the lease; and in this connection the appellant claims that the rules defining and limiting its powers are to be found in the federal statutes as construed by the federal courts. To this point the respondent replies that even a national bank may accept a conveyance of land to secure an existing indebtedness. To that reply the appellant answers that, admitting for the sake of argument that Pentz, acting for the bank, received the deed as a mortgage to secure the bank for the moneys already loaned, that then and in that event the lease was invalid whichever way one looks at it. If the conveyance is treated as a mortgage, manifestly a mortgagee, not in possession, may not execute a lease. And, although the appellant had a right to take a conveyance to secure a pre-existing debt, nevertheless lands so obtained may not be retained as an investment because the National Bank Act provides:

> "But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years." Rev. Stats., § 5137 (Comp. St. § 9674).

Notwithstanding the above provision, the deed from McMurtry to Pentz was dated August 9, 1917, and the lease was dated November 1, 1917, and by its terms it did not expire until June 1, 1923—nearly a year after the time would have expired during which the bank was legally entitled to hold the title. If the bank could so transcend the provisions of the statute for the period of ten months, it could do the same thing for ten years, or any other period of time. In reply to this proposition it may be said that, conceding the lease was not valid for the full period of time for which it was written, that it would be a valid lease to August 9, 1922. But such a contention is not sound. Such a lease is not merely voidable, but is wholly void and of no legal effect. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 59, 60, 11 Sup. Ct. 478, 35 L. Ed. 55. Being void, it is clear that the lease could not be valid for any length of time whatsoever.

[2] Moreover, conceding that the bank would have the right to take title to the land for the purpose of protecting itself against loss, nevertheless, in so taking and holding the title, the bank was not entitled to enter into any speculative contract. These contentions are supported by the provisions of the Revised Statutes and by the decisions hereinafter referred to. The Revised Statutes, § 5133 et seq. (U. S. Comp. St. § 9658 et seq.), constitute the measure of the authority of national banks, and such banks cannot rightfully exercise any powers except those expressly granted, or such incidental powers as are necessary to carry on the national bank business. Logan County Bank v. Townsend, 139 U. S. 67, 73, 11 Sup. Ct. 496, 35 L. Ed. 107; California Bank v. Kennedy, 167 U. S. 362, 366, 17 Sup. Ct. 831, 42 L. Ed. 198. It is not even contended that the Revised Statutes contain a clause authorizing a national bank to purchase land to secure itself from loss or otherwise, and thereafter execute a lease to the land and insert in the lease a covenant for quiet enjoyment as against the acts of those holding the paramount title. It is patent therefore that the bank did not have the express power. It will not be disputed that the bank had every necessary incidental power to carry on a national bank business; but, it is hardly open to argument that the power to enter into a contract containing the covenant in question is not necessary to the transaction of a national bank business. It is patent that it is not necessary. National banks have been in existence in nearly every county in nearly every state in the union for many years. The transactions of those banks have included the bulk of the business transacted in America. In preparing this case, although the attorneys on each side have been most industrious and have prepared most extensive and comprehensive briefs, neither counsel has been able to find a single case where a national bank had entered into such a contract. Not being contented with the search made by counsel, this court has made an independent search and has not been able to locate a single case on the subject. We think that the absence of authorities, itself, lends much support to the proposition that the exercise of the alleged power in question is not necessary to the transaction of a national bank business. As was said by Mr. Dillon:

> "Any fair reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied."

The reason for the restrictions on the powers of national banks was stated in National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188. At page 626 the court said:

> "The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law."

The restrictions were again stated, the reasons were again given, and the right and duty on the part of the bank to plead, as a defense, its want of authority, were again repeated and summarized in California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. At page 367 (17 Sup. Ct. 833) the court said:

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an ultra vires act. The cases of Thomas v. Railroad Company, 101 U. S. 71; Pennsylvania Railroad v. St. Louis, Alton, etc., Railroad, 118 U. S. 290; Oregon Railway & Navigation Co. v. Oregonian Railway Co., 130 U. S. 1; Pittsburgh, Cincinnati, etc., Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24; St. Louis, etc., Railroad v. Terre Haute & Indianapolis Railroad, 145 U. S. 393; Union Pacific Railway v. Chicago, etc., Railway, 163 U. S. 564, and McCormick v. Market Nat. Bank, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 59 to 60:

"'A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This language was also cited and expressly approved in Jacksonville, etc., Railway v. Hooper, 160 U. S. 514, 524, 530.

"As said in McCormick v. Market National Bank, 165 U. S. 538, 549:

"'The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. [Pearce v. Madison & Indianapolis Railroad, 21 How. 441; Pittsburgh, Chicago, etc., Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 384; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48.]'

"The doctrine thus enunciated is likewise that which obtains in England. [Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; Attorney General v. Great Eastern Railway Company, 5 App. Cas. 473; Baroness Wenlock v. The River Dee Company, 10 App. Cas. 354; Trevor v. Whitworth, 12 App. Cas. 409; Ooregum Gold Mining Co. of India v. Roper (1892) App. Cas. 125; Mann v. Edinburgh Northern Tramways (1893) App. Cas. 69.]"

As showing how strictly the federal courts have ruled the questions concerning attempts on the part of national banks to exceed the powers conferred upon them, and as showing that the contract in the instant case was void, we call attention to the following additional cases:

In Burrows v. Niblack, 84 Fed. 111, 28 C. C. A. 130, the Circuit Court of Appeals for the Seventh Circuit was called upon to consider a transaction in which the Chemical National Bank of Chicago attempted to purchase 100 shares of its capital stock from one of its stockholders. There was no claim that the stockholder owed the bank or that the purchase was made to protect the bank against a pre-existing debt. The trial court held that the purchase was invalid and that the receiver of the bank should have judgment for the moneys paid on the purchase. The Circuit Court of Appeals affirmed the judgment.

In the case entitled Edward P. Allis Co. v. Standard Nat. Bank (C. C.) 110 Fed. 47, the court was called uopn to determine the liability of the defendant bank growing out of a contract made by the bank to save itself from loss on a pre-existing debt. The debtor became insolvent. To protect itself the defendant entered into a purported contract under which it attempted to join with others in operating a sawmill that had formerly been operated by the debtor. Instead of collecting the debt of $15,000, it sunk $36,601 more, and the plaintiff claimed the right to recover yet other moneys. The court held that the defendant bank, even under the facts stated, had no power to carry out the terms of such a contract.

In the case of Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402, the Circuit Court of Appeals of the Eighth Circuit had under consideration the act of a board of directors of a national bank in handling loans made to a mining company. The bank had loaned the company moneys and had thereafter obtained judgment in the sum of $4,500. The bank caused one of its directors, who was also cashier, to take and hold title to the mining claims. Thereafter the directors caused the accumulated waters to be pumped out of the mine and the mine to be thus placed in salable condition. Other facts stated by the court are:

"The unfortunate part of this case is that they did not stop here. When the shaft had been cleared of water and the machinery had been put in operation, when the property was in proper condition for examination and for sale, and when no purchaser was found, they proceeded to expend $18,864.82 more in prospecting for paying ore upon property in which none has ever been discovered. It was not only beyond their authority as officers of the bank, but ultra vires of the bank itself, to carry on ordinary mining, manufacturing, or trading business—much more, to expend its money in such a speculative venture as prospecting for ore where none of value ever had been found."

In the case of First National Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537, the court was considering these facts: In May, 1884, the Northwestern Manufacturing & Car Company was a corporation engaged in the manufacturing business at Stillwater, Minn. At the date mentioned the car company owed a large amount of debts which it was unable to pay, among which was a sum due to the First National Bank of Ottawa. In the financial distress that followed, the creditors, including the bank, formed the Minnesota Thresher Manufacturing Company and the bank took stock therein, exchanging its claim against the car company therefor. Later the thresher company became insolvent and the suit was brought to collect a stockholder's liability. The thresher company inserted in its articles of incorporation that it was to purchase and hold the stock of the Northwestern Manufacturing & Car Company and that it was to manufacture and sell steam engines. The court held that the business of the thresher company was speculative, and then the court says:

> "To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a pre-existing debt, does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done."

In Merchants' National Bank v. Wehrmann, 202 U. S. 295, 26 Sup. Ct. 613, 50 L. Ed. 1036, the court was considering these facts: A partnership had been formed to purchase, improve, divide in lots, and sell a leasehold. The partnership was formed under the laws of Ohio and included 40 shares, each of which was represented by a transferable certificate. The bank, to secure a pre-existing debt, took nine of the shares as security and afterwards became the owner of them in satisfaction of the debt. In the trial court it was found that the partners must contribute to pay the debts of the firm, and some of them being solvent the bank was charged with the full share of a solvent partner. The Supreme Court of Ohio held this to be wrong, but decided that the bank was liable for nine-fortieths of the debts. The Supreme Court of the United States considered the analogy between a corporation and the partnership and then, commencing at page 300 (26 Sup. Ct. 614), the court says:

> "But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. [National Bank v. Case, 99 U. S. 628, 631; Pullman v. Upton, 96 U. S. 328.] This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership it means that the transferee at once becomes a member of the firm and *goes into its business with an unlimited personal liability*, in short, does precisely what a national bank has no authority to do. This the Supreme Court of Ohio rightly held beyond the powers of the bank. [U. S. Rev. Stat. §§ 5136, 5137.] It is true that it has been held that a pledgee may escape liability if it appears on the certificate and books that he is only a pledgee. [Pauly v. State Loan & Trust Co., 165 U. S. 606; Robinson v. Southern National Bank, 180 U. S. 295; Rankin v. Fidelity Trust Co., 189 U. S. 242, 249.] No doubt the security might be realized without the pledgee ever becoming a member of the firm. It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the common double liability, in satisfaction of a debt. [First National Bank of Ottawa v. Converse, 200 U. S. 425.] A fortiori, it cannot take shares in a partnership to the same end." (Italics ours.)

The Revised Statutes provide that a national bank shall not "transact any business, except such as is incidental and preliminary to its organization, until it has been authorized by the controller of the currency to commence the business of banking." Before receiving such authorization from the controller, the Market National Bank of Chicago attempted to lease premises for its banking business. In an action brought to recover rent under that purported contract it was held that no recovery could be had. McCormick v. Market Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817.

[3] It is quite impossible, after reading the foregoing cases, to form any other conclusion than this, that a national bank may not exercise any powers except those expressly granted or such incidental powers as are necessary to carry on the national bank business; that the Supreme Court of the United States has the power to examine into that question whenever it is presented; that the scope of such examination by that court extends to an examination not only of the contracts or purported contracts but of the statutes both state and federal which in any way enter into and form a part of the purported contract; that when from such an examination it appears that the national bank has entered into a contract in excess of

its delegated powers and which in truth and in fact is speculative, that is, carries "an unlimited personal liability," that then and in that event the Supreme Court of the United States will decline to uphold a judgment enforcing any liability against the bank. We think this lease must be so classified.

The appellant in its answer pleaded in bar the judgment in the foreclosure proceedings hereinabove referred to. Thereafter on the trial of the case the issue as to the effect of said judgment was fully litigated. At this time the appellant claims that the verdict of the jury was against the law and the evidence because the judgment in the foreclosure proceeding was an absolute bar. The effect of that judgment was before the Supreme Court and that court fully expressed itself on the subject in Sullivan v. Superior Court, 185 Cal. 133, 195 Pac. 1061. In that decision, among other things, the court said:

> "No provision was made by this decree to protect the leasehold of the Standard Livestock Company, or for the application of any of the proceeds of the sale to its interest in the premises. The decree, however, directs if there remain any balance after applying the proceeds as therein specifically directed, the same 'be returned into court to abide the further order thereof.' * * *
>
> "It seems to us that the main issue in this proceeding, namely, the right of the purchaser at this sale to possession of the entire interest and estate in these premises on receipt of his deed, freed from the leasehold or other subsequent interests, is not open to dispute. The decree was allowed to become final without appeal, motion for new trial, or other attempt to avoid or modify it. The owners of the leasehold were parties to the action. Their interest was declared subject and subordinate to plaintiff's mortgage. The entire interests covered by the mortgage and lease were subject to sale and ordered sold and foreclosed in satisfaction of plaintiff's claim. No provision was made for making this sale subject to the leasehold interest, and the court could no more have subordinated the rights of plaintiff to that of the lessees in making this sale than it could to the rights of the subordinate lienholders under subsequent mortgages. Each, in the order of preference of his claim, was entitled to redeem but no redemption was made. As to all lien claimants other than the plaintiff, the leasehold was decreed to be prior and superior, and the lessees should have been entitled to take precedence to these in the distribution of the surplus proceeds of the sale after plaintiff's demand had been satisfied. * * *
>
> "We are satisfied that petitioner is entitled to possession of the premises *freed from the claims of this lease.*
>
> "No judgment of court in ejectment or unlawful detainer could give him any clearer right to possession than he has under this judgment and sale. This is not a case where the rights of parties in possession who are not bound by the record in the foreclosure action are involved, and where an independent title or right of possession is claimed. Here the rights of the contenders for possession have been fully adjudicated and it only remains to put the plain provisions of such adjudication into execution." (Italics ours.)

But the respondent contends all of that language is obiter.

With this contention we do not agree. We think it was of the very essence of the mandamus proceeding that the Supreme Court should have ascertained whether the appellant had any rights that had not been litigated. In so ascertaining the Supreme Court used the language quoted. We have examined that language most carefully and do not find that the Supreme Court used a word as obiter. However, be that as it may, we still think that the language used was sound and that this court should follow it whether the language is obiter or otherwise. In 15 Cal. Jur. 136, § 189, it is said:

> "In the latter case (a judgment pleaded in bar) a final adverse judgment on the merits operates and is pleadable as a complete bar to the second action, regardless of what may or may not have been presented in support or defense of the claim in the prior action."

In Crew v. Pratt, 119 Cal. 139, at page 149, 51 Pac. 38, 42, the court said:

> "It may be stated as a general proposition, that a judgment is conclusive, not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided."

The rule applies to matters both in respect to those of claim and those of defense. Estate of Bell, 153 Cal. 331, 340, 95 Pac. 372. In a case very similar in some respects to this case, the whole subject received careful consideration by the Supreme Court of New York. Pakas v. Hollingshead, 184 N. Y. 211. 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 1045, 112 Am. St. Rep. 601, 6 Ann. Cas. 60.

[4] As stated above, when the Federal Trust Company commenced the action in foreclosure it made Pentz and the Bank of California, and Noonan, and the Standard Livestock Company, parties defendant. When Pentz and the Bank of California appeared, they filed an answer and cross-complaint and made Noonan and the Standard Livestock Company cross-defendants. Thereafter Noonan and the Standard Livestock Company appeared and answered the cross-complaint. They pleaded the lease in hæc verba, but they did not in their pleading set any value thereon, nor did they make any attempt to have the trial court, in the foreclosure proceeding, ascertain their damages and cause their claim to be paid out of the surplus moneys after the foreclosure sale had been held. In Sullivan v. Superior Court, supra, the Supreme Court points out that fact and rests its decision thereon. When

this plaintiff was made a party in the foreclosure proceeding, it was entitled to come forward and make its claim for damages for being disturbed in its quiet enjoyment of the premises. In 27 Cyc. 1767 it is said:

> "The surplus proceeds of a foreclosure sale, after satisfying the mortgage debt, represent the equity of redemption and are constructively real property and belong to * * * the owner of an interest, title, or estate in the premises distinct from but superior to that of the mortgagor. * * *"

The respondent says that it does not claim that it had a lien and therefore that it had no standing in the foreclosure proceeding to ask the trial court to make its claim secondary to that only of the Federal Trust Company. But it was not necessary that it should have a lien. It was sufficient to give it a proper status that it was "the owner of an interest, title, or estate in the premises" distinct from, but superior to, that of the Bank of California. Williams v. Pratt, 10 Cal. App. 625, 103 Pac. 151, rules the principle. In that case the trustees, after exercising the powers of sale under a trust deed, had a surplus of moneys in their hands. The question before the court was as to who was entitled to share therein. The appellant, Raymond, contended that by reason of certain payments she had made on an executory contract of purchase that she was entitled to share in the fund. The trial court made no finding on her claim. For that reason the judgment was reversed to enable the trial court to ascertain and protect the amount of her claim. Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18, also rules the principle. Condemnation proceedings were commenced against the Reed Orchard Company, Komano, and others. Komano did not, in his pleading, set forth the value of his alleged leasehold interest. In its verdict the jury did not ascertain or determine the value of said interest. Later Komano applied for a writ of supersedeas to protect his alleged rights. At page 661 (128 Pac. 16) the court said:

> "It would also seem clear that the defendants had the burden of alleging and proving their interests and the value thereof, and that only the defendant meeting that burden should be permitted in this proceeding to question the disposition of the fund. The People's Savings Bank and Komano having been regularly served with summons, and having failed to appear and urge any claim to whatever fund might be awarded, should not be indulged now to stay this public improvement on the ground that the jury did not find the value of an interest which was not alleged to have any value and did not award these defendants money which in the lower court they declined to claim. If the owner of a mortgage or of a leasehold interest can lie by in this way until after judgment and successfully interpose such an objection, it it is manifest that fraud is likely to be encouraged thereby at the expense of the public welfare."

Several cases have been decided in New York which are directly in point. Clarkson v. Skidmore, 46 N. Y. 297, is probably the leading case. Larkin v. Misland, 100 N. Y. 212, 3 N. E. 79, is particularly in point. The defendant Agnes Misland complained regarding the report of a referee who did not report her rights in the surplus fund. On the hearing of the matter the lessee did not make any proof of the value of her leasehold interest. The court held that the special term was justified in ruling that the lessee had shown no loss by the extinction of her estate which should be compensated out of the surplus. In the case of Title Guarantee & Trust Co. v. Twenty-First Street & Fifth Avenue Corporation, 110 Misc. Rep. 126, 180 N. Y. Supp. 358, the court said:

> "Furthermore, where the breach of a covenant for quiet enjoyment is due to the foreclosure of a mortgage on the property, a tenant is entitled to recover substantial damages, measured by the value of the unexpired term, less rents reserved, and to look for reimbursement to the surplus moneys which may be realized on the foreclosure sale."

In the case of Dorb v. Modern Folding Co. (Co. Ct.) 183 N. Y. Supp. 639, 640, the court said:

> "The rule of damages in proceedings of this kind is clearly set forth by Judge Rapallo in the case of Clarkson v. Skidmore, 46 N. Y. 297. It was decided in this case that the measure of damages is the value of the use of the premises for the remainder of the term, less the rents reserved. The right of the lessee to the fund is paramount to the right of the owner of the equity of redemption. She is therefore entitled to a first lien upon the surplus fund."

No case to the contrary has been cited to us, and we know of none. We think it is clear, therefore, that the respondent was entitled to litigate in the foreclosure proceedings its claim against the surplus fund, and having failed to do so that it may not now complain.

[5] The fact that it does not seek general damages in this case, but merely special damages, does not better its condition. To hold otherwise would be in effect to hold that the respondent is entitled at will to split its cause of action. In the case at bar it is not even claimed that there was more than one breach of the covenant of quiet enjoyment. For that one breach the respondent was entitled to maintain one action and not several. 1 C. J. 1111, § 285; Herriter v. Porter, 23 Cal. 385, 387. Its cause of action ripened and the respondent was entitled to sue thereon immediately after the foreclosure proceeding had been commenced and the respondent had been made a party thereto. McGary v. Hastings, 39 Cal. 360, 367, 2 Am. Rep. 456; McAlester v. Landers, 70 Cal. 79, 83, 11 Pac. 505; McCormick v. Marcy, 165 Cal. 386, 389, 132 Pac. 449; Agoure v. Lewis, 15 Cal. App.

71, 73, 113 Pac. 882; Sullivan v. Superior Court, supra. It will not be contended seriously that when a person has a cause of action he may voluntarily split it or so divide it as to make it the subject of two or more actions. 1 C. J. 1106 and 1111. The rule remains the same, even though such a claimant is involuntarily summoned into court and commanded to set forth his claim.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

On Hearing in Supreme Court.

PER CURIAM. [6] The application for a transfer and hearing by this court after decision by the District Court of Appeal is denied. We are satisfied with the conclusion reached by the district court upon the first question discussed in its opinion, namely, that the defendant bank cannot be held liable as an undisclosed principal upon the covenants of warranty in the lease executed by Pentz, in the absence of any written authority therefor. This conclusion is determinative of the case and renders unnecessary a consideration of the other questions discussed in that opinion. For this reason we neither approve nor disapprove what is said in that opinion upon the other two points discussed therein.

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67 Cal. App. 263

PEOPLE v. LAMB. (Crim. No. 751.)

(District Court of Appeal, Third District, California. May 13, 1924.)

1. Criminal law 🔑747—Function of jury to determine weight of conflicting testimony.

It is the province of the jury to determine the weight of conflicting testimony.

2. Criminal law 🔑1159(2)—Appellate court cannot disturb verdict based on evidence sufficient to sustain it.

If there is testimony, which, if believed by the jury, is sufficient to sustain its verdict, the appellate court cannot disturb that verdict, though there were more witnesses for defendant than against him.

3. Criminal law 🔑739(2)—Defensive testimony held for jury's consideration.

Testimony, showing an alibi and testimony as to accused's good character, was addressed to the jury for its determination.

4. Intoxicating liquors 🔑236(11)—Evidence held sufficient to sustain conviction for violation of Wright Act.

Evidence *held* sufficient to sustain conviction for violation of Wright Act.

5. Intoxicating liquors 🔑242—Judgment sentencing accused to jail without option to pay fine for first violation of Wright Act held authorized; "or."

Under Wright Act, which adopts penal provisions of Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), the court may impose for first offense either a fine or imprisonment, in view of section 29 of Volstead Act, providing for the imposition of a fine not exceeding a certain maximum, "or" imprisonment, etc., so that for a first offense a straight jail sentence without option of paying a fine was authorized; "or" meaning one or the other of two propositions (citing Words and Phrases, First Series, "Or.")

6. Criminal law 🔑1159(1)—Acquittal of two charges not considered in determining guilt of third charge.

The fact that accused, informed against for three violations of the Wright Act, was acquitted as to two charges, could not be considered by the appellate court in determining whether he was guilty of the offense of which the jury found him guilty.

7. Criminal law 🔑992—Jury's recommendation of mercy held no part of verdict.

Jury's recommendation of mercy *held* no part of verdict, and not to limit court's power to impose jail sentence for violation of Wright Act.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Manuel C. Lamb was convicted of a violation of the Wright Act, and he appeals from the judgment of conviction and from an order denying a new trial. Affirmed.

Mark L. Burns, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was tried and convicted of the offense of violating what is commonly known as the Wright Act (St. 1921, p. 79) of the state of California. His motion for a new trial being denied, the defendant appeals therefrom and also from the judgment of conviction. It appears from the transcript that three separate and distinct informations were filed against the defendant charging him with three separate and distinct violations of the act above mentioned. The informations were numbered respectively 8056, 8060, and 8083. By stipulation made in open court, when the cases were called for trial, all three cases were tried at the same time and upon the testimony introduced at one trial. The defendant was acquitted of the offenses charged under the informations numbered 8056 and 8083, but was convicted of the offense charged in the information numbered 8060.

[1, 2] Two points are made for reversal: First, that the verdict is not supported by the evidence; second, that the court had no jurisdiction to pronounce judgment of imprisonment in the county jail. In support of the appellant's contention that the judgment is not supported by the evidence, or rather that the judgment is against the evidence,

our attention is called to the testimony of the witnesses introduced on the part of the defendant, and no reference is made whatever to the evidence introduced by the prosecution. It is argued at length that the weight of the evidence is strongly in favor of the defendant; that this court should set aside the verdict and direct a new trial. It is not sufficient to warrant the reversal of a judgment by an appellate court that the verdict is against the testimony introduced by the defendant, nor is it a question whether an appellate court, if sitting in such a capacity as to enable it to weigh the testimony, would conclude that the verdict should have been in favor of the defendant. If upon an inspection of the transcript it appears that there is sufficient testimony, which if believed by the jury, to sustain a verdict, then and in that case an appellate court must adopt the verdict of the jury as being correct. It is exclusively the province of the jury, where the testimony is conflicting, to weigh and determine the same. It is never a question of whether more witnesses testified for one side or the other. The jury may believe witnesses who testified for the prosecution and disbelieve the testimony of three or four times that number who may testify for the defense. If the testimony of witnesses for the prosecution, if believed by the jury, is sufficient to make out a case and sustain a verdict, the fact that three or four times that number have testified oppositely is of no consequence. This is practically what we find to have occurred in the case at bar.

[3-5] The witnesses C. W. Horstmeyer and A. B. Silvius testified that they went to the defendant's residence at 328 S. street at about 9:30 p. m., June 18, 1923; that upon arriving at said place the witness Silvius got out of the automobile in which the two witnesses were riding and went to the store kept by the defendant next door to his residence; that the defendant came out of the store, went up the stairs into his residence; was there a short period of time, and came back with a bottle of wine and handed it to the witness Horstmeyer, who then and there paid the defendant the sum of $1; that the bottle of wine was in a paper sack; that the following conversation took place when the defendant came to the automobile, with the wine, in which the defendant Horstmeyer was sitting. The witness asked: "What is the damages?" The defendant replied: "$1." The witness Horstmeyer then said: "It is getting kind of hard to buy wine." The defendant replied: "Yes, I have had a chance to sell quite a few bottles to-day, but they are after them and I am pretty scared." The defendant then further said: "As long as there is a grapevine growing in California I am going to have my wine." The defendant, also, had a small bottle and a glass, and said: "Well, here, have a drink on me" and he gave the witnesses Silvius and Horstmeyer each a drink. The bottle of wine was then marked and kept until the trial, and introduced as People's Exhibit No. 1. The witness, A. J. Affleck, to whom the exhibit in question was delivered for analysis, testified that it contained 13.59 per cent. alcohol by volume. The sale in question was shown to have taken place in the city and county of Sacramento. Upon this testimony the jury had a right to base its verdict, if it believed that the witnesses referred to were telling the truth. The transcript shows that a number of witnesses testified that the defendant was not in the place in question at the time of the sale, but that he was in attendance upon some moving picture show. A number of witnesses also testified to the previous good character of the defendant. These were all matters to be addressed to the jury and for the jury to decide. If the jury believed the two witnesses for the prosecution who testified to the sale and purchase of the wine, then it necessarily followed that the testimony of the witnesses for the defense should be laid aside. Both alleged states of facts could not be true. This is always the case when the defense of an alibi is tendered for consideration by the jury. The jury, by its verdict, has found that the witnesses who testified to the sale told the truth, and this court is bound by that determination. The second contention made by the appellant is that the court erred in the imposition of a jail sentence, instead of a sentence in the alternative; that is, that the defendant is entitled, as a matter of right, to escape a jail sentence by the payment of a fine. To support this position reliance is had upon the case of In re Frankovitch, 190 Cal. 440, 213 Pac. 39, the syllabus of which case, in 65 Cal. Dec. 150, reads as follows:

> "A judgment upon conviction of selling liquor in violation of the Wright Act that the defendant pay a fine of $500 or be confined in the city jail for the period of six months upon failure to pay the fine, is one imposing a sentence of imprisonment for six months, but gives the defendant the opportunity of escaping such punishment by the payment of the fine. * * *"

This is very far from holding that the act in question gives any such privilege to the defendant as is contended for in this case. An examination of the opinion in the Frankovitch Case shows further that the court uses no language which could possibly be construed to support the appellant's contention. The words there used are as follows:

> "The Volstead Act provides that for the first offense the person who sells liquor shall be fined not more than a thousand dollars, or suffer imprisonment not exceeding six months. It is claimed that this provision, adopted by our Wright Act, does not justify the alternative judgment imposed upon Frankovitch, because such judgment, in effect, provides for

imprisonment for the nonpayment of the fine. On the other hand, we think the judgment, properly construed, is one imposing a sentence of imprisonment for six months, but gives the party convicted the opportunity of escaping such punishment by the payment of a fine. Having failed to pay the fine he is in no position to complain of the imprisonment."

The first paragraph of section 29 of the act of October, 1919, commonly known as the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½p), reads as follows:

> "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years."

A reading of this subdivision shows clearly that for the first offense either one or the other of two penalties may be imposed, to wit, a fine of not more than $1,000, or, instead of a fine, imprisonment not exceeding six months, but, when the defendant is convicted of a second offense, then and in that case the court has no election in the imposition of a fine or imprisonment, but must both fine and imprison.

As defined by Webster, the word "or" is said to be a co-ordinating particle that marks an alternative generally corresponding to either as either this or that. In other words, it means one or the other of two propositions. A number of definitions and illustrations of the word "or" may be found in volume 6 of Words and Phrases, beginning with page 5002. These definitions are so numerous that quotation thereof would be unduly burdensome, but all go to the effect of defining the word as above given, where the use appears to be the same as in the statute now under consideration. In the Penal Code of this state the word "or" is quite frequently used in giving an election to the court imposing sentence as to whether it will simply require the payment of a fine or prescribe imprisonment in the county jail. Section 19 of the Penal Code relating to misdemeanors is a good illustration of this point. That section reads:

> "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

[6, 7] The words, "or by both," do not in any wise limit the discretion vested in the trial court to punish the convicted person by either a fine or by the imposition of a jail sentence. We think that no one would seriously contend that any such construction could be given to section 19 of the Penal Code. For all practical purposes, excluding the words, "or by both," it reads to the same effect as the Volstead Act, which, by reason of the Wright Act has become a part of the penal statutes of this state. If the interpretation heretofore given to the Penal Code of the state of California that, when the Code provides for either a fine or imprisonment, the election of which punishment shall be imposed is vested in the trial court, we do not see how it can be consistently argued that the election of which punishment the defendant will suffer is vested in the defendant and taken away from the trial court by language which is to all intents and purposes identical with that used in various sections of the Penal Code. The Volstead Act does not read that for a first offense a defendant shall be punished by a fine not exceeding $1,000 and in the event that he does not pay such fine he shall be imprisoned for a period not exceeding six months. It explicitly and plainly states and specifies that a person convicted of the offense referred to in the paragraph of the Volstead Act which we have quoted shall be punished in one of two ways, and the determination of the way is left to the court pronouncing the judgment. The defendant in this case, as we have stated, was acquitted as to two charges and convicted upon one. The fact that he was acquitted as to two charges cannot be considered by this court in determining whether he was or was not guilty of the offense of which the jury found him guilty. We find no merit in the contention made by appellant that because the jury recommended mercy the court should not have imposed a jail sentence. Such recommendation is no part of the verdict.

We think the order denying appellant's motion for a new trial herein and the judgment pronounced upon the defendant should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

67 Cal. App. 303

PEOPLE v. PAGNI. (Cr. 749.)

(District Court of Appeal, Third District, California. May 15, 1924.)

1. Criminal law 🔑369(6)—Rule prohibiting proof of other similar crimes held applicable in prosecution for sale of liquor.

The general rule prohibiting proof of other similar crimes applies in a prosecution for a particular sale of intoxicating liquor.

2. Intoxicating liquors 🔑131—In prosecution for sale, state not required to prove intent.

In a prosecution for a particular sale of intoxicating liquor, the state was not required to prove the issue of intent.

3. Criminal law 🔑1169(11)—Admission of evidence of sale other than one charged held error but not to result in miscarriage of justice.

Evidence of sale of intoxicating liquor other than the one charged *held* inadmissible, but not to result in miscarriage of justice, where proof of another sale on the same occasion remained unchallenged, the court limited the testimony to the question of intent, and defendant's admissions on cross-examination showed habit of keeping intoxicating liquor.

4. Intoxicating liquors 🔑242—Sentence to imprisonment without option of paying fine held not beyond court's jurisdiction.

In prosecution for sale of intoxicating liquor, trial court's sentence of accused to imprisonment in county jail for term of six months without option of payment of a fine *held* not beyond court's jurisdiction.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Mary Pagni was convicted of selling intoxicating liquor, and she appeals from the judgment of conviction and the order denying a new trial. Affirmed.

Merlin W. Stewart and Clifford A. Russell, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with a single unlawful sale of intoxicating liquor, alleged to have been made in April, 1923. She was convicted, and this appeal is from the judgment of conviction and the order denying her motion for a new trial.

Allen B. Silvius, a detective employed by the grand jury during April, 1923, testified that in the early evening of April 21st he went to defendant's residence and asked for wine; that defendant said she was afraid to sell any wine, but gave the witness a drink, for which she made no charge, and "said to come back a little later"; that he returned at about 11 o'clock the same evening and asked her for a bottle of wine; that she then gave him a bottle of wine, for which he paid her $1; and that he turned the bottle of wine over to the chief of police. The bottle of wine was admitted in evidence. A chemist testified that the wine contained 11.95 per cent. of alcohol by volume.

H. A. Rodness, a police officer of Sacramento, testified that on the 28th of February, 1923, he and a "lady operative" went to defendant's residence. His examination then proceeded as follows:

"Q. And did you see Mrs. Pagni at that time? A. We did.

"Q. Have any conversation with her? A. We did.

"Q. And what was that conversation? * * * A. Went there with a lady friend the first time, at 10:30, and we went in there and knocked on the door, and the first thing she says, she says: 'What do you want?' I says: 'We want some drinks,' and she asked what I wanted, and I said I wanted wine. She dished us each out a glass of wine, and I gave her a dollar for the two glasses of wine.

"Mr. Stewart: Well, Mr. Henderson, what is the purpose of that?

"Mr. Henderson: We are introducing this testimony * * * to show intent to violate the law.

"The Court: To show an intent to make a sale?

"Mr. Henderson: To show an intent to make a sale. * * *

"Mr. Stewart: For the sake of the record, I make the objection that it is incompetent, irrelevant, and immaterial.

"The Court: Objection will be overruled. * * * The evidence of this sale is not admissible to prove that the defendant made the sale as charged in the indictment, but, if there is evidence introduced that satisfies you that she did make the sale alleged in the information, then this evidence may be considered by you in ascertaining or determining the intent of the defendant in making the sale."

The district attorney then proceeded, without objection, to prove that on the same occasion the defendant treated the police officer and his lady friend to wine, and that he purchased a bottle of wine from defendant. This bottle of wine was admitted in evidence, and the testimony shows that it contained 13½ per cent. of alcohol. Counsel for defendant objected to the admission in evidence of the bottle of wine, and the objection was overruled. The defendant testified on direct examination as follows:

"Q. I will ask you, Mrs. Pagni, if you know Allen B. Silvius? A. No, I don't know him.

"Q. Referring to People's Exhibit 1, I will ask you if you, on the 21st day of August, sold this to Mr. Silvius, for the sum of $1? A. I didn't sold it to him; this is mine, but not the other one. * * * I paid the fine already for that. * * *

"Q. I will ask you, Mrs. Pagni, if, on the 28th day of February, 1923, you sold this bottle to Mr. Rodness? A. I sold to the lady that he was with him, because she was my friend all the time."

On cross-examination she testified:

> "Q. Referring to People's Exhibit 1, Mrs. Pagni, did you say that you did not sell that to Mr. Silvius? A. No; I had no such a quality as the wine in my house. My wine were black.
>
> "Q. Your wine is black? A. I had it, just a half gallon, that the policeman took away from me.
>
> "Q. Now, you have been accustomed to having wine upon your premises, Mrs. Pagni, haven't you? A. Some time I go from washing in another person's house, and they give me, sometimes, a gallon of wine, for my own use. * * *
>
> "Q. Now, this second bottle, People's Exhibit 2, Mrs. Pagni, you say you did sell that bottle to a woman with Officer Rodness because she was a friend of yours? A. The first bottle, I mean to say.
>
> "Q. Well, which one is the first?
>
> "Mr. Stewart: Well, if the court please, I want it understood that the first bottle merely goes to the intent. * * *
>
> "Q. Then, People's Exhibit 2 was the bottle that you sold to Mr. Rodness and the woman that was with him? A. Yes, some time, if she will bring me a bottle of brandy, * * * the sort I would not wash my hand in, rather than I would give that bottle of wine to her. And the man that he was with that lady, he threw up a dollar on the table for me. Then I went away. I told him I didn't want any money whatever."

[1-3] Appellant contends that the court erred in admitting evidence of other sales than the one charged. In a prosecution for a particular sale of intoxicating liquor, the general rule prohibiting the proof of other crimes, though of a similar character, governs. People v. Smith (Cal. App.) 221 Pac. 405; People v. Amort, 60 Cal. App. 29, 212 Pac. 50; People v. Morales, 45 Cal. App. 553, 188 Pac. 58; People v. Clark, 28 Cal. App. 670, 153 Pac. 719; People v. Dial, 28 Cal. App. 704, 153 Pac. 970. These decisions are in accord with the great weight of authority in other jurisdictions, although there are decisions to the contrary. There are exceptions to the general rule, as in prosecutions for other crimes, but this case does not fall within any of the exceptions. (For numerous cases bearing upon the general rule and the exceptions thereto see First and Second Decennial Digests, Criminal Law, §§ 369[6], 371[10] and 372[2], and note, 18 Ann. Cas. 846.)

Rodness testified, without objection, that he purchased two glasses of wine from defendant on the 28th of February. After a conversation between counsel for defendant and the district attorney, the former entered an objection "for the sake of the record," but at no time moved to strike out the testimony. Thereafter, without objection, Rodness testified that on the same visit he purchased a bottle of wine from defendant. The defendant objected to the admission of the bottle of wine in evidence, but did not move to strike out the proof of the sale thereof. Since the proof of the sale to Rodness of the two glasses of wine remained unchallenged in the record, it is not probable that the jury was further influenced by the proof of an additional sale to the same person at the same time. The court limited the testimony of Rodness to the question of intent, an issue which the prosecution was not required to prove in this case. If the jury obeyed this instruction, the defendant was not prejudiced by the proof of other sales. The danger to be apprehended from the proof of other offenses is that the jury may draw unwarranted inferences therefrom.

The admissions volunteered by the defendant while under cross-examination were probably more damaging to her case than the proof of other sales. The jury would have been justified in inferring therefrom that she was in the habit of keeping intoxicating liquors at her residence. It may be further noted that while Silvius testified that he purchased wine from defendant on the 21st of April, her denial is that she sold him wine on the 21st of August. This difference in dates may be due to an error in the reporter's transcript, but no suggestion has been made to that effect. It seems clear that proof of other sales was not material to any issue in this case, but the defendant should have made seasonable objection thereto, or, if there was no opportunity to object, she should have made a motion to strike out the objectionable testimony. In view of the whole record, it cannot be said that the errors complained of have resulted in a miscarriage of justice.

[4] The court sentenced the defendant to imprisonment in the county jail for a term of six months. It is contended "that the trial court exceeded its jurisdiction in meting out a sentence of imprisonment alone; * * * that the sentence should be in the alternative; that in addition to the jail sentence * * * she should be given the right to escape this sentence by the payment of a fine," citing In re Frankovitch, 190 Cal. 440, 213 Pac. 39. The contention has been held untenable by this court in the case of People v. Lamb, 227 Pac. 969, filed May 13, 1924.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

(67 Cal. App. 346)

PEOPLE v. MATTOS. (Cr. 753.)

(District Court of Appeal, Third District, California. May 17, 1924.)

1. Intoxicating liquors 🔑226—Evidence whether accused had license to conduct grocery store immaterial.

Where it was shown, in a prosecution for selling intoxicating liquor at a grocery store, that defendant himself sold the liquor and owned the store, testimony as to whether he had a license to conduct the grocery store was immaterial.

2. Criminal law 🔑1169(1)—Admission of testimony on question of license of grocery store where liquor was sold held not to require reversal.

In a prosecution for a sale of intoxicating wine to witness, in front of accused's grocery store, the erroneous admission of evidence as to whether accused had a license to conduct the store *held* not a miscarriage of justice, because such testimony did not prove anything bearing on the alleged sale.

3. Criminal law 🔑1036(1), 1038(1), 1044, 1055—Accused held not entitled to complain of irrelevant testimony for want of objection, motion, or exception below.

Where accused did not object to irrelevant testimony at the trial, nor move to strike it out, and did not except to the argument of the district attorney based thereon, or request an instruction to disregard such testimony, *held*, that he could not object on appeal.

4. Intoxicating liquors 🔑224, 236(5)—Possession not prima facie evidence of keeping for sale.

It is not the law that the possession of liquors is prima facie evidence that the liquor was kept to be sold, etc., and that the burden of proof is upon accused to prove he lawfully acquired, possessed, and used such liquor; the Wright Act having adopted only the penalties of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), and instruction to that effect was improper, especially where the prosecution presented merely a question of sale.

5. Criminal law 🔑1172(6)—Erroneous instruction as to possession as prima facie held not to result in miscarriage of justice.

In a prosecution for a sale of intoxicating liquor, an erroneous instruction that possession was prima facie evidence that the liquor was kept for the purpose of being sold, etc., and that the burden was upon the possessor to prove lawful acquisition, possession, and use could not result in a miscarriage of justice because inapplicable.

6. Intoxicating liquors 🔑242—Sentence to term in jail without option of paying fine held not erroneous.

In a prosecution for sale of intoxicating liquor, sentence of accused to a term in the county jail without option of paying fine *held* not erroneous.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Ed Mattos was convicted of selling intoxicating liquor, and he appeals from the judgment of conviction and from the order denying a new trial. Affirmed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the offense of selling intoxicating liquor contrary to the laws of the state of California, upon an information charging the commission of such offense at a certain building or house situated at 2030 Third street in the city of Sacramento, county of Sacramento, state of California. The defendant's motion for a new trial being denied, the defendant appeals from the order denying his motion for a new trial and a judgment entered upon the verdict finding him guilty of the offense charged in the information just referred to. Three points are assigned by the appellant as grounds for reversal herein: First, that the court erred in the admission of testimony; second, that the court erred in its instructions given to the jury; and, third, that the court erred in pronouncing judgment of imprisonment in the county jail, in that the appellant should have been given the right to escape a jail sentence by the payment of a fine.

The testimony in behalf of the people is to the effect that the witness Lohman, accompanied by a man by the name of Reynolds, on the evening of the 28th day of July, 1923, went to the place of business owned and kept by the defendant, to wit, a grocery store, and upon arriving at said place found the defendant in front of his store; that the witness Lohman then and there asked the defendant to sell him two bottles of wine; that the defendant went around in back of the building to some place not known by the witness Lohman, and shortly returned with two bottles of wine for which the witness paid the defendant $2. The man Reynolds, who accompanied the witness Lohman, was not called at the trial. These bottles of wine were taken by the witness Lohman, who thereafter, accompanied by Reynolds, went to a dance. It appears that before going to the dance they went out on the Natomas boulevard and cached or secreted one bottle of wine, the other bottle they proceeded to drink. After the dance they returned to where one of the bottles of wine had been cached, as just stated, procured the same, but were thereupon apprehended by one of the police officers of the city of Sacramento. The witness Lohman testified to the matters hereinbefore stated. The bottle was analyzed, was found to contain a prohibited quantity of alcohol, and was admitted as one of the exhibits in the case. The defendant endeavored to meet the case made out by people by introducing testimony tending to show that he was not at his place of business on the evening of July 28, 1923, at the time designated by the witness Lohman as about the hour when he made the purchase of the two bottles of wine. The witness Lohman also testified that he knew the defendant, and had previously seen him at the grocery store conducted by the defendant.

[1-3] Upon cross-examination of the defendant the court, over his objection, permitted the prosecution to interrogate the defendant as to whether he had or had not a license for the conducting of any business at 2030 Third street, which premises are also known as 231 U street. To these interrogatories the defendant answered that he had a license for the sale of ice cream, candies, and cigars. After these questions had been propounded and the answers given by the defendant that he had obtained such license, the district attorney then asked the defendant if the license, above referred to, was in his own name, and the defendant answered that it was issued in the name of a man by the name of Smith to whom he had intended to sell the place, but to whom the place was not sold. This testimony was referred to by the district attorney upon his argument to the jury, and the admission of such testimony and the argument of the district attorney founded thereupon is urged as such prejudicial error as has resulted in a miscarriage of justice and requires a reversal of the judgment herein. It having been shown that the purchase of the wine was made in front of the grocery store owned by the defendant himself, and not by any agent or employee of his, and that the defendant owned the premises, it became utterly immaterial as to whether the defendant did or did not have a license. Had it been shown that the sale was made by some employee of the defendant, and it was sought to hold the defendant as principal, then the question of license and the ownership of the store and the conducting of the business would have been material, and inquiries tending to elicit such testimony would have been both relevant and material. As the case was presented, the guilt of the defendant in no wise depended upon whether he did or did not have a license. The objection urged by the defendant to such testimony should have been sustained. Did the failure of the court to sustain the defendant's objection to such testimony constitute reversible error? We think not. For the reasons which we have just stated above, i. e., that the guilt of the defendant did or did not in any wise depend upon whether he had a license or whether he owned or conducted the store, it was simply a mere question of making the sale, as stated by the witness Lohman. Whether the defendant had a license did not in any wise tend to show either the guilt or innocence of the defendant or whether he did or did not make a sale of the two bottles of wine as alleged in the information. For these reasons we cannot see that any miscarriage of justice resulted therefrom, because the testimony did not tend to prove anything bearing upon the alleged sale of the two bottles of wine. When we come to the real pith of the question and the vice of the alleged inadmissibility of the testimony, we find that no objection was made thereto by the defendant. The questions and answers which brought out the fact that the license was issued in the name of some one designated as Smith were not objected to, and the argument of the district attorney based thereon was not objected to, nor was the court requested to charge the jury in relation thereto, nor was any motion made to strike out the testimony that the license referred to was issued to a man by the name of Smith. Not having been objected to in the court below, no motion having been made to strike out the improper testimony, no exception being taken to the argument of the district attorney founded thereupon, and no request being made to the trial court to instruct the jury to disregard the same, we think it is now too late to raise the question upon appeal.

[4, 5] At the request of the people the court gave to the jury the following instruction:

> "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title, and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

This instruction should not have been given. The act of the Legislature commonly known as the Wright Act (St. 1921, p. 79) adopted only the penalties of the act of Congress commonly known as the Volstead law (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.). The instruction above given is to all intents and purposes a literal wording of one of the sections of the Volstead Act in relation to procedure in federal courts. It was not adopted into our system of procedure by the Wright Act, and is not a correct statement of the law of this state. The case at bar presents simply a question of sale and not of unlawful possession. However, this instruction was entirely outside the record, and, even though erroneous, it had no application to any fact tendered for the consideration of the jury, and could not have been considered by them or applied to any of the facts in the case in arriving at a verdict, and for this reason could in no wise have been instrumental in bringing about a miscarriage of justice.

[6] As to the third assignment of error, to wit, the sentence of the defendant to a term in the county jail, the question presented is identical with that considered in the case of People v. Lamb, 227 Pac. 969, heretofore decided by this court, opinion filed May 13, 1924. For the reasons therein stated, the objection of the appellant on such ground must be held untenable.

Finding no legal cause for reversal herein, the order of the trial court denying defendant's motion for a new trial and the judgment pronounced in this cause will be and the same are hereby affirmed.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

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67 Cal. App. 351

PEOPLE v. SILVA et al. (Cr. 762.)

(District Court of Appeal, Third District, California. May 19, 1924.)

1. Indictment and information 🔑110(31)—Indictment charging unlawful sale in language of statute held sufficient.

An indictment charging the unlawful sale of intoxicating liquor substantially in the language of the statute *held* sufficient within Pen. Code, §§ 950–952.

2. Criminal law 🔑370—When evidence of sales other than one charged is admissible.

Generally, proof of other sales is not admissible in support of a charge of a specific sale of liquor; but, where the sale charged was made by an employee of a defendant, evidence of other sales is admissible as tending to show knowledge and consent of the employer and his authorization.

3. Criminal law 🔑695(1)—Admission of evidence of sales other than one charged held not erroneous, where objection was general and not by defendant entitled to object.

In a joint prosecution against proprietor and bartender for selling intoxicating liquor, based on sale by bartender, admission of evidence of other sales *held* not error, where the objections were general and no separate objection was made in behalf of bartender nor request made that the consideration of such evidence be limited to proprietor's complicity.

4. Criminal law 🔑1169(1)—Admission of conversation between state witness and accused's agent held not error.

In a prosecution for selling intoxicating liquor, admission of evidence that defendant's "lookout" refused to sell a state witness a "bottle" *held* not reversible error, being of little importance.

5. Criminal law 🔑417(13)—Statement of accused's employee to another employee in course of employment held admissible against employer.

In a prosecution for selling intoxicating liquor, evidence that defendant's bartender directed another employee to act as lookout *held* properly admitted as tending to show manner in which business was conducted, in connection with positive testimony that witness knew such employee was defendant's lookout, especially where defendant was present.

6. Witnesses 🔑246(1)—Trial judge should exercise great caution in examining witness.

The trial judge should exercise great caution in examining a witness to avoid throwing weight of his influence to the one side or the other.

7. Criminal law 🔑660—Privilege and duty of attorney to object to improper question by judge.

It is not only the privilege but the duty of an attorney to make a seasonable objection for his client to any improper question asked by the judge.

8. Intoxicating liquors 🔑132—Nonpenal provision of Volstead Act not adopted by Wright Act.

Volstead Act, § 33 (U. S. Comp. St. Ann. Supp. 1923, § 10138½t), prescribing a rule of evidence, was not adopted by the Wright Act, which adopted only the penal provisions of the Volstead Act, and instruction in language thereof should not have been given.

9. Criminal law 🔑1172(1)—Giving of instruction predicated on nonpenal provision of Volstead Act held not prejudicial error.

In a prosecution for unlawful sale of liquor, giving of instruction predicated on Volstead Act, § 33 (U. S. Comp. St. Ann. Supp. 1923, § 10138½t), as to possession as prima facie evidence of unlawful possession, which instruction was not authorized by the Wright Act *held* not prejudicial error, where defendant's possession could not have been lawful.

10. Criminal law 🔑304(20)—Court will take judicial notice of alcoholic contents of jackass brandy.

Under Code Civ. Proc. § 1875, the court will take judicial notice of the alcoholic contents of jackass brandy.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

M. J. Silva and another were convicted of the unlawful sale of intoxicating liquor, and each appeals from the judgment of conviction against him and the order denying a new trial. Affirmed.

Clifford A. Russell, of Sacramento, and L. M. Shelley, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were jointly charged with an unlawful sale of intoxicating liquor. They were jointly tried and were convicted. This appeal is from the judgments of conviction and the orders denying their motions for new trials.

[4] The indictment charges that the defendants sold "a certain amount of intoxicating liquor for beverage purposes, and not for sacramental or medicinal purposes, the said intoxicating liquor then and there containing more than one-half of 1 per cent. of alcohol by volume." The defendants demurred to the indictment on the grounds that it does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, that it does not state a public offense, and "that more than one offense is charged." Appellants contend that the indictment is defective in that the defendants "were entitled to know what class or kind or amount of intoxicating liquor they were charged with selling." The indictment substantially follows the language of the statute and is sufficient. Matter of Application of Anixter, 166 Cal. 762, 138 Pac. 353; People v. Johnson (Cal. App.) 218 Pac. 449; People v. Bassetti, 58 Cal. App. 390, 208 Pac. 696; Massey v. United States (C. C. A.) 281 Fed. 293; Booth v. United States, 197 Fed. 283, 116 C. C. A. 645.

At the time of and prior to the alleged sale, the defendant Silva was the proprietor of the Waldorf Club, where he dispensed soft drinks and cigars. Defendant Luxton was one of his bartenders. The witness Harry White was another bartender employed by defendant. George Dahm, a detective employed by the district attorney, testified that on the 31st of October, 1923, at about 10:30 o'clock p. m., he purchased from Luxton, at Silva's bar, a drink of whisky each for himself and White, paying 50 cents for the two drinks, and that the liquor was served in "a regular whisky glass." It was of this sale that the defendants were convicted. Silva testified that he was "standing at least 15, 20 or 15, feet from" Dahm at the time the drinks were served, and that there was no "jackass brandy or whisky served to Dahm or Harry White" on that occasion. Luxton testified that he did not serve them with jackass brandy, and White testified that they were not served with whisky, but that he and Dahm each had a bottle of near-beer on the occasion referred to by Dahm. Dahm testified that at that time Luxton said to White, "You are playing the part of the Indian to-night," meaning the "part of a lookout, to give the signal"; that the witness knew personally that White was "one of the lookouts there and gives signals"; and that the witness went back a second time and asked White for "a bottle, and he says: 'No, * * * I will not sell a bottle to you or even to my own brother.'" N. C. Kazar, another detective, testified that on the same evening, at about 10:30 p. m., he visited the Waldorf Club in company with another person; that Luxton was behind the bar and Silva about 20 feet away from him, at the end of the bar; that "we went in and asked him (Luxton) for a drink of whisky, and they said, 'Nothing doing,' the federal agents were out; they wasn't selling anything at all"; that the witness "was told that they wasn't serving any, on account of the federal agents. That was part of it, between themselves"; that on the 27th of October, 1923, he visited the Waldorf Club and saw there a large number of members of a fraternal order, of which Silva was secretary, drinking from whisky glasses; that the witness on that occasion asked Luxton for a drink of whisky and "got a drink of jackass" for which he paid 25 cents. Luxton testified that he did not sell jackass brandy to Kazar.

[2] It is argued that it was error to admit proof of the sale of jackass brandy to Kazar on the 27th of October. The general rule is that proof of other sales is not admissible in support of a charge of a specific sale; but where the evidence discloses that the sale charged was made by an employee of a defendant, evidence of other sales is admissible as tending to show the knowledge and consent of the employer and that he had authorized his employee to make unlawful sales. In Smith v. State, 5 Okl. Cr. 67, 113 Pac. 204, it is said:

> "Where the state charges and relies upon a particular sale, the general rule is that proof of other sales, for the purpose of establishing the particular sale charged, is not admissible."

In Tucker v. State, 7 Okl. Cr. 634, 124 Pac. 1134, 125 Pac. 1089, the defendant was convicted of an unlawful sale made by his wife. It was held that proof of other sales was admissible to show that the wife was acting for the defendant in making the sale.

In Bundy v. State, 16 Okl. Cr. 481, 184 Pac. 795, the defendant was convicted of an unlawful sale made by an employee. It was held that evidence of other unlawful sales was admissible to show that the sale charged was made with defendant's knowledge and consent.

In Thompson v. State, 189 Ind. 182, 125 N. E. 641, an employer and his employee were jointly charged with a specific sale made by the latter. The court said that, if the defendants had been tried separately, it would have been reversible error to admit proof of other sales in the trial of the employee, but that such evidence would have been admissible against the employer to show his complicity in the sale which was made by the employee.

In State v. Stamper, 159 Mo. App. 382, 141 S. W. 432, a druggist was prosecuted for a sale made by his clerk. It was held that proof of other sales by the clerk was properly allowed as tending to show the druggist's tacit consent to the making of unlawful sales by the clerk.

[3] The objections made to the proof of other sales were general as to both defend-

ants, and no separate objection was made in behalf of defendant Luxton, nor was any request made that the consideration of such evidence be limited to the question of Silva's complicity in the offense charged. Under such circumstances, the admission of the evidence was not error.

[4, 5] It is contended that it was error to admit proof of the foregoing conversations between witnesses for the prosecution and Luxton and White. Admittedly, Luxton and White were Silva's bartenders, and therefore his agents in the conduct of his business. The statement of White that he would not sell "a bottle" to Dahm was of little, if any, importance. Luxton's statement to White to the effect that the latter was to act as lookout was in the nature of a direction as to White's duties for the night and was made in the course of Luxton's employment and, presumably, in the performance of his duties. It was not a narration by an agent of a past transaction, but was a part of the transaction itself. The statement was admissible as tending to show the manner in which Silva's business was conducted. Taken in connection with the positive testimony of Dahm that White was employed as a lookout, the testimony tends to show that Silva knew that illicit sales were being made, because a lookout is not usually employed in the conduct of a legitimate business. It must also be kept in mind that Silva, according to his own testimony, was at that time but 15 or 20 feet distant from Luxton. Silva was about 20 feet away when Kazar asked Luxton for whisky and "was told that they wasn't serving any, on account of the federal agents." It is even uncertain from the evidence whether Silva did not participate in the conversation with Kazar.

[6, 7] It is contended that the court committed prejudicial error in questioning the witness White. The defendants interposed no objections to any of the questions asked by the court, and it does not appear from the record that the defendants' rights were prejudiced by any of such questions. Of course, the trial judge should exercise great caution in the examination of witnesses, lest by the nature or form of the questions asked he throw the weight of his influence to the one side or the other. It may be further said that it is not only the privilege but the duty of the attorney for a party to make seasonable objection to any improper question asked by the judge.

[8, 9] The court instructed the jury substantially in the language of section 33 of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½t). The Wright Act (Stats. 1921, p. 79) adopted only the "penal provisions" of the Volstead Act. Ex parte Brambini (Cal. Sup.) 218 Pac. 569. Since section 33 is not one of the penal provisions of the Volstead Act, but prescribes a rule of evidence merely, the same was not adopted by the Wright Act, and the instruction should not have been given. People v. Mattos, 227 Pac. 974, decided by this court May 17, 1924. Under no provision of the Volstead Act could Silva have had possession of intoxicating liquor at his place of business lawfully. Since his possession, if any, must have been unlawful, it is highly improbable that the rights of the defendants were in any manner prejudiced by the erroneous instruction.

[10] It is contended that the court erred in permitting Dahm and Kazar to testify as to the character of the liquors which they purchased without requiring proof that they knew the taste of such liquors. Yet, at page 55 of the transcript there appears Dahm's positive testimony that he was familiar with the taste of beer, wine, and whisky, and on page 59 appears the testimony of Kazar to the same effect. Kazar asked for whisky and "got a drink of jackass." It is now argued that there is no evidence to show the alcoholic contents of jackass brandy, and that courts cannot take judicial notice thereof. The courts do take judicial notice of "the true signification of all English words and phrases." Code Civ. Proc. § 1875. If there is any person at this late day who does not know that jackass brandy is a distilled liquor containing a high percentage of alcohol, he must have lived far from the haunts of the bootlegger and outside the zone of circulation of the daily press.

Other grounds urged for a reversal are manifestly without merit.

The judgments and the orders are affirmed.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

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67 Cal. App. 405

PEOPLE v. PETROVICH. (Cr. 743.)

(District Court of Appeal, Third District, California. May 22, 1924.)

1. Intoxicating liquors ⚿233(2)—Evidence of possession after sale charged held admissible to corroborate evidence of sale.

Where, in a prosecution for illegal sale of wine contrary to Wright Act, testimony of the sale on the date alleged was introduced, testimony, thereafter introduced, that accused 10 days after the alleged sale had large quantities of wine on his premises, which fact he admitted as well as that he paid the fine on account of the possession of such wine, *held* properly admitted in corroboration of the testimony as to the sale.

2. Criminal law ⚿807(1)—Instruction held properly refused as being argumentative.

In a prosecution for selling wine contrary to Wright Act, proposed instruction *held* properly refused as being argumentative.

3. Criminal law 🔑807(1)—Neither state nor accused entitled to argument from court in form of instruction.

Neither the people nor accused is entitled to an argument from the court in the form of an instruction.

4. Criminal law 🔑829(1)—Refusal to give instruction proposed held not prejudicial where correct portions thereof were given.

Refusal to give proposed instruction *held* not prejudicial where the correct portions thereof were given.

5. Intoxicating liquors 🔑242—Judgment sentencing accused to jail without option to pay fine for first violation of Wright Act held authorized.

Judgment sentencing accused to jail without option to pay fine for first violation of Wright Act *held* authorized.

6. Criminal law 🔑1169(2)—In prosecution for selling wine, admission of evidence showing visitors at accused's home held not prejudicial.

In a prosecution for sale of wine in violation of Wright Act, where accused on direct examination admitted many people visited his home because he had roomers and a family and because his son was sick, reception of evidence in rebuttal showing merely that he had had additional visitors could not be prejudicial.

7. Criminal law 🔑1186(4)—Erroneous admission of testimony of officer as to his observations of accused's home before sale charged held not sufficiently prejudicial to warrant reversal.

In a prosecution for selling wine contrary to Wright Act, testimony of police officer that a few days before the alleged sale he stood across the street from accused's home to ascertain whom accused was selling to, and that he saw a man come out of accused's home with a package wrapped in a newspaper, should have been excluded as immaterial; but its admission *held* not sufficiently prejudicial to warrant reversal in view of Const. art. 6, § 4½, as whether the man had a bottle of wine was conjectural.

8. Criminal law 🔑1171(6)—Reference to accused's foreign lineage and indisposition to conform to American laws and customs held not to warrant reversal.

Reference by counsel to jury to accused's foreign lineage and the indisposition of foreigners to conform to American customs and laws, though improper and subject to be excluded, *held* not to result in miscarriage of justice so as to require reversal.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

J. R. Petrovich was convicted of a liquor offense in violation of the Wright Act, and he appeals from the judgment of conviction and from the order denying a new trial. Affirmed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was tried and convicted on an information charging him with having on or about the 3d day of July, 1923, in the county of Sacramento, state of California, unlawfully sold two bottles of wine contrary to the provisions of what is commonly known as the Wright Act of the state of California (St. 1921, p. 79). The defendant's motion for a new trial being denied, he prosecutes this appeal therefrom and also from the judgment of conviction in said cause.

As grounds for reversal the defendant alleges improper admission of testimony, erroneous instructions, and illegality of sentence.

The testimony introduced by the people is to the effect that the two bottles of wine were sold by the defendant, at the time stated, at his place of residence, to wit, 500 Q street in the city of Sacramento. It appears that the witness Horstmeyer, a police officer of the city of Sacramento, who was acquainted with the premises and had visited the same prior to the 3d day of July, 1923, went to the defendant's residence at about the hour of 9 p. m. on the day in question and personally solicited of the defendant the purchase of two bottles of wine. The witness and the defendant went into the dining room of the defendant's residence and some conversation was had as to the kind of wine desired by the purchaser, whether he wanted sweet or dry wine. The witness replied that he wanted a bottle of each. He also testified that the defendant went into another part of the building and returned with two quart bottles, delivered them to the witness, and the witness paid the defendant the sum of $2 for the two bottles of wine. These bottles of wine were subsequently analyzed and found to contain a much greater quantity of alcohol than that allowed in the Volstead Law (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.). The two bottles of wine in question were properly identified and admitted in evidence. After this evidence had been introduced the prosecution placed upon the stand a witness by the name of E. J. Cox, also a member of the police department of the city of Sacramento. This witness testified that he went to the premises of the defendant on or about the 13th day of July with a warrant of arrest for the defendant and also with a search warrant authorizing him to make a search of the premises known as 500 Q street and then occupied by the defendant; that upon making a search of the premises he found and seized forty-five bottles of wine, five demijohns of wine, and three barrels of wine. All of the wine seized, excepting one or two bottles, was found in the basement of the premises occupied by the defendant.

The defendant denied the sale of the wine and in explanation, or as an attempt to refute the testimony of the witness Cox as to the possession of the large quantity of wine, introduced in evidence a permit to make 200 gallons of grape juice. The defendant further in his testimony admitted the possession of the wine, part of which he described as claret and part as white wine, and also that one of the barrels of wine had fermented and become vinegar. The defendant also, upon cross-examination, without any objection being interposed, testified that he had paid a fine of $200 on account of the illegal possession of the wine in question.

[1-3] It is strongly urged by the appellant that the testimony as to the possession of a considerable quantity of wine herein referred to 10 days after the date of the alleged sale, was not only erroneous but was seriously prejudicial. In behalf of this contention we are cited to a number of cases, notably People v. Smith, 221 Pac. 405, and People v. Amort, 60 Cal. App. 29, 212 Pac. 50, where it is held that upon a prosecution for an unlawful sale of liquor, evidence of other sales is inadmissible. So far as this case is concerned, we do not need to either limit or expand the principle there announced or question the correctness thereof for the simple reason that those cases are inapplicable to the issue here presented. This case involves the question of possession and is more nearly allied with the principle of law enunciated in many cases showing preparation and readiness to commit crime. While our attention has not been called to any cases in this state having to do with this question, it is by no means new. Other courts in considerable numbers have admitted such testimony.

In 33 Cor. Jur. 752, a general rule is stated as follows:

> "On a trial for keeping liquor for unlawful sale, maintaining a liquor nuisance, carrying on the business of liquor dealer, or other like offense in violation of the liquor laws, evidence as to defendant's ownership or possession of intoxicating liquors, or of appliances or apparatus used in the manufacturing or selling of such liquors, at or within a reasonable time before or after the alleged offense, is ordinarily admissible, unless it refers to a time after the beginning of the prosecution, although it has been held that evidence of possession after the alleged offense is not admissible to prove possession at that time. Unless such evidence is too remote in time to be admissible, the disparity in time between it and the time of the alleged offense affects only its weight or probative value. In a prosecution for an illegal sale or disposition of liquor evidence of ownership or possession is admissible only in corroboration of other evidence as to the fact of a sale, and hence is incompetent and irrelevant, for the purpose of showing whether or not an unlawful sale or disposition was made, unless it is introduced in connection with other evidence of such sale or disposition."

Only one case is referred to in the notes to the text just quoted holding that such testimony is inadmissible. It will be noted that in the case at bar, testimony as to the actual sale was first introduced and then, under the rule stated, testimony as to possession may be admitted for the purpose of corroborating the evidence as to the sale.

In the case of State v. Legendre, 89 Vt. 526, 96 Atl. 9, the Supreme Court of the state of Vermont held as follows:

> "In a prosecution for the unlawful sale of intoxicating liquors, the evidence of the search of defendant's shop made by the officers thirteen days after the alleged unlawful sale, and of the whisky and empty bottles then found there, was admissible, as tending to show that intoxicating liquor had been kept there for illegal traffic, and as connecting defendant in ownership with the whisky sold at the time alleged"—citing in support of these statements Commonwealth v. Van Stone, 97 Mass. 548.

In Reub v. State, 93 Tex. Cr. R. 345, 247 S. W. 867, testimony of prosecuting officers that they went to the premises of the defendant and found intoxicating liquor was admissible. The court said:

> "We have frequently held that testimony of the manufacture by the accused of intoxicating liquor is admissible and has probative force when the charge against him is the selling of intoxicants."

The defendant in that case was charged and convicted of the offense of unlawful selling of intoxicating liquor.

In Holmes v. State, 12 Ga. App. 359, 77 S. E. 187, the court stated two propositions of law relative to the discovery of liquor in the possession of the defendant after the date of the alleged sale. The first is:

> "That the mere possession of liquor in any quantity or at any place was not a circumstance from which the jury might infer that the possessor had already been guilty of selling it."
>
> Secondly: "That it was competent to introduce in evidence the bottles of whisky found in the house of the accused where the alleged sale had taken place. This evidence of itself alone was worth little, but taken in connection with the testimony as to the sale, it might have some corroborative value."

In the case of Smith v. State, 12 Ga. App. 482, 77 S. E. 651, the Supreme Court of Georgia held that—

> "On the trial of one charged with the sale of intoxicating liquor, evidence that on the premises where the sale was alleged to have been made were found numerous empty bottles which had contained whisky, and other bottles and jugs which did contain whisky, was admissible in corroboration of the testimony in behalf of the state that a sale had been made."

Again, in the case of Craig v. State, 9 Ga. App. 233, 70 S. E. 974, the court held that—

> "On the trial of one charged with illegally selling whisky, it is not error to admit evidence that the house where the accused lived was searched by an officer subsequently to the day on which the alleged sale was made, and that bottles of whisky and empty bottles which had contained whisky were found therein. * * * The fact that the direct evidence was of a sale some months previous to the search of the house where the accused lived would only affect the weight or probative value of the circumstances that whisky and empty whisky bottles were found in the house. * * *"

A number of cases are there cited in support of such ruling.

In Wooten v. State, 17 Ga. App. 333, 86 S. E. 740, the same court again held that evidence of a large quantity of whisky discovered in a trunk belonging to the defendant was admissible upon a trial for the illegal sale of whisky.

In State v. Boynton, 155 N. C. 456, 71 S. E. 341, the Supreme Court of North Carolina held that—

> "In a prosecution for the illicit sale of whisky, evidence that prior to the sale charged defendant had whisky in his possession at different places in the city, and that at the places under his control whisky was being sold and drunk, and that persons who had been in his places of business had seen whisky and beer therein, is admissible to show that defendant had whisky on hand in prohibited territory and was prepared to make the illegal sale charged by the indictment."

Practically to the same effect is the case of De Graff v. State, 2 Okl. Cr. 519, 103 Pac. 538, where testimony was admitted showing that whisky and beer glasses, corks and bottles that looked like whisky and beer bottles were seen in the place and that in the back yard and on the same lot prohibited liquors were found.

In the case of Myers v. State, 52 Tex. Cr. R. 558, 108 S. W. 392, the Supreme Court of Texas held that—

> "Evidence of contemporaneous possession of whisky or other intoxicants by accused is admissible, where he is being prosecuted for a sale of intoxicating liquors. * * *"

But also held that testimony of possession of such liquors one to six weeks after the alleged sale was not so contemporaneous as to render such evidence admissible.

The same court, in Black v. State, 68 Tex. Cr. R. 151, 151 S. W. 1053, held in a prosecution for the unlawful sale of intoxicating liquor evidence was admissible to show that the defendants had access to a quantity of whisky at the time of the alleged sale.

Also, in the case of McCuen v. State, 75 Tex. Cr. R. 108, 170 S. W. 738, it was held by the same court that whisky found on the person of the defendant on the second day after the alleged sale was admissible as a circumstance to show that the defendant had made the sale as charged.

In the case of Patton v. State, 66 Tex. Cr. R. 259, 145 S. W. 1189, the Supreme Court of Texas held that evidence was admissible on a trial for selling whisky to show that a large quantity of whisky had been received by the defendant.

A number of courts have held that evidence of the receipt of liquor prior to the date of the alleged sale to be admissible following the rule announced in the Texas case just cited.

In the instant case the defendant admitted the possession of wine. The mere fact that the wine was illegally in the possession of the defendant, and established his guilt of having intoxicating liquors in his possession unlawfully, constituted no reason why the testimony should not be admitted as corroborative evidence of the testimony as to the illegal sale charged in the information.

[4] The defendant also urges that the court committed prejudicial error in refusing to give the following instructions:

> "You are instructed that all presumptions of law are in favor of the innocence of persons accused of the commission of crime, and every person so accused is presumed to be innocent until the contrary is shown, and until his guilt is established by the evidence in the trial of the case, to your entire satisfaction and beyond all reasonable doubt.
>
> "The law is tender and careful of the lives and liberties of our people, and, in order to justify you in rendering a verdict, the effect of which may deprive a citizen of his life or liberty, every material fact necessary to establish the guilt of the defendant of the offense charged against him, whereby he may lose his life or liberty, must be established by those who are intrusted with the duty of prosecuting him, to a moral certainty and beyond all reasonable doubt. The law does not place upon the shoulders of a defendant in a criminal action the burden of proving that he is innocent of the offense charged, but it does impose upon the prosecution the necessity of proving his guilt so thoroughly and conclusively as to satisfy the minds of the jury that he is guilty to a moral certainty and beyond a reasonable doubt, else he should be acquitted."

All the correct portions of said proposed instruction were included in other instructions given by the court. As proposed by the defendant, the instruction is argumentative in form and the court very properly refused to give the same. The law is too well settled that neither the people nor the defendant is entitled to an argument from the court in the form of an instruction to require any citation of authorities.

[5] We have heretofore, in the recent case of People v. Lamb, 227 Pac. 969, considered and disposed of the objection that the court has no jurisdiction to impose a jail sentence for a first offense in selling liquor. We there held such objection untenable. Fur-

ther consideration of that question is therefore unnecessary.

[6, 7] During the course of the trial the witness Horstmeyer was allowed to testify as follows:

> "I went to the defendant's place on the night of the 30th of June. Q. And what did you see that night in reference to people going into the house, Mr. Horstmeyer?"

To this question the defendant objected that it was immaterial and not proper rebuttal. The objection was overruled, and the witness answered:

> "I stood across the street for the purpose of trying to find out whom he would sell wine to."

Mr. Russell, counsel for the defendant, made objection to that question as being a voluntary statement and the opinion and conclusion of the witness and asked that it be stricken out. The court denied the motion at this time, stating:

> "Proceed to finish your answer, and then I will rule. A. I stood across the street in the darkness of the shadow of a tree there, and I saw a car pull up; it was an Essex car; it pulled up, not directly in front of the house, but a little past the front of his house, and three young fellows got out, and two went in and one on the front stairs, and went right—
>
> "Mr. Henderson (interposing): And were they carrying anything when they went in, Mr. Horstmeyer, that you noticed? A. Not anything; no.
>
> "Mr. Russell: Now, then, just a minute, if the court please. May I refer back to the previous question?
>
> "Counsel for the people interrupted: I desire to make a motion.
>
> "The Court: Yes.
>
> "Mr. Russell: Now, your honor, I desire to move to strike out the first portion of the witness' answer to the previous question in reference to his conclusion and his observation 'I stood there across the street for the purpose of observing'—May I have the exact wording, Mr. Reporter, please?
>
> "Mr. Henderson: I will submit, if your honor please, that it is not any conclusion; that was just his object in standing there. He stood there, and he knows why he stood there.
>
> "The Court: The motion to strike out will be denied.
>
> "Mr. Russell: I move to strike out the entire answer, and those portions of it in reference to his standing there, as being not responsive to the question.
>
> "The Court: Motion is denied.
>
> "Mr. Henderson: All right.
>
> "Q. You say these young men that got out of the Essex car didn't have anything in their hands when they went in. A. Nothing; their hands were free.
>
> "Q. Did you see anything in their hands when they came out of the house, Mr. Horstmeyer? A. In one of them—in one of the young men's hand, he had a package, wrapped up in newspaper."

On direct examination the defendant testified that he had a great many visitors. One of his answers was:

> "Well, I got some roomers, and my family, and always I had visitors; you know, that time, my boy is sick in bed, you know, we have about 50 visitor every day."

[8] From this it follows that the mere fact of showing visitors additionally upon rebuttal could in no sense be prejudicial. That the testimony we have here set out should have been practically all excluded by the court is beyond question. The reasons for the witness standing there and the reasons which actuated him had nothing to do with the guilt or innocence of the defendant. Of course, it is apparent that the prosecution desired the inference to be drawn from the fact that one of the young men emerged from the residence with a package wrapped in a newspaper, that the defendant had then and there sold a bottle of wine; but as that was simply a matter of conjecture, we do not think it sufficiently prejudicial, in view of section 4½ of article 6 of the Constitution, to warrant a reversal. We think the same is true in relation to the reference made by counsel for the people in his address to the jury concerning the foreign lineage of the defendant, and the indisposition of such persons to conform to American customs and laws. Such remarks are improper and should have been excluded by the court, but, though improper, did not, in our opinion, result in a miscarriage of justice, and furnish no grounds for a reversal of the judgment.

We think the order denying the motion for a new trial and the judgment entered herein should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

194 Cal. 797

MEMORANDUM DECISIONS

1

In the Matter of the Application of Lynn F. SEILER for a Writ of Habeas Corpus. (Cr. 2660.) (Supreme Court of California. June 28, 1924.) In Bank. Application for writ of habeas corpus, prayed to be directed to the sheriff of Los Angeles county, to secure release of petitioner from custody on a commitment for contempt of court. Writ granted. Charles D. Wallace, of Long Beach, for petitioner. Edward T. Bishop, County Counsel, and Roy W. Dowds, Deputy County Counsel, both of Los Angeles, amici curiæ, in support of petition. Asa Keyes, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent. P. E. Keeler, Spicer, Meacham & Mason, Knight, Lane & Goddard, McWhinney & Clock, and Doyle, Clark & Thomas, all of Long Beach, amici curiæ.

LENNON, J. This is an application for a writ of habeas corpus to secure the release of petitioner from detention made upon an order of commitment of the superior court of the county of Los Angeles for contempt of said court. Petitioner was regularly served with a subpœna duces tecum issued in an action pending before the superior court of Los Angeles county, department 28 thereof, purporting to sit in the city of Long Beach, pursuant to an order made by the judge of said department directing the issuance of said subpœna. Petitioner failed and refused to respond to such subpœna and was thereafter brought before the court upon an attachment. Petitioner was for such refusal adjudged guilty of contempt by said court and sentenced to pay a fine, and in default of the payment of such fine was remanded to the custody of the sheriff. An identical case in point of law and fact was presented to the District Court of Appeal, Second Appellate District, and there the court, in an opinion rendered by Mr. Justice Houser, decided adversely to the respondent's contentions made therein. In the Matter of the Application of William G. Brady for a Writ of Habeas Corpus, 224 Pac. 252. Every point presented here was considered there, and no other or different argument is made here than was made there. We are satisfied with the conclusion reached in the Brady Case, and are in substantial accord with the reasoning generally upon which that conclusion is based. Upon the authority of that case, it is ordered that the petitioner herein be and he is hereby discharged from custody.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.

2 67 Cal. App. 801

In the Matter of Frank GOMA, on Habeas Corpus. In the Matter of the Application of Jose REYES for a Writ of Habeas Corpus. (Cr. Nos. 1069, 1083.) (District Court of Appeal, Second District, Division 2, California. June 4, 1924.) Applications for writs of habeas corpus to require the release of petitioners, imprisoned upon a charge of violating Stats. 1923, p. 695. Petitioners remanded. Two original applications for writs of habeas corpus, made to the District Court of Appeal for the Second Appellate District, Division 2. Scott McReynolds, of Ventura, for petitioner Goma. Edward Henderson, Dist. Atty., and James C. Hollingsworth, Deputy Dist. Atty., both of Ventura, for respondent in Goma matter. L. A. Enos and John R. Stowe, both of San Luis Obispo, for petitioner Reyes. U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for respondent in Reyes matter.

WORKS, J. Each of the petitioners in the above-entitled proceedings is imprisoned upon a charge of having violated the provisions of a statute (Stats. 1923, p. 695) forbidding the possession by unnaturalized foreign-born persons of firearms of a certain character and description. Petitioners contend that the act is unconstitutional on various grounds, but its constitutionality has recently been upheld by a decision of the Supreme Court, which passes upon every question presented by them. See

In re Rameriz, 226 Pac. 914, decided by the Supreme Court May 29, 1924, where the provisions of the statute in question are more particularly set forth. In each of these proceedings, the writ is discharged, and the petitioner is remanded.

We concur: FINLAYSON, P. J.; CRAIG, J.

67 Cal. App. 800

Ex parte Charles PRENOSIL, alias, on Habeas Corpus. (Cr. 1162) (District Court of Appeal, First District, Division 1, California. June 3, 1924.) Application for writ of habeas corpus, prayed to be directed to the sheriff of the city and county of San Francisco, to secure release of petitioner from custody on a charge of violating chapter 339, Statutes of 1923, section 2. Petitioner remanded. Albert Picard, of San Francisco, for petitioner. Matthew Brady, Dist. Atty., Leo R. Friedman, Dep. Dist. Atty., both of San Francisco, for respondent. R. M. J. Armstrong, of San Francisco, for sheriff of city and county of San Francisco.

TYLER, P. J. Application for writ of habeas corpus. The petitioner was prosecuted for the violation of the provisions of chapter 339, Statutes 1923, which is an act to control and regulate the possession, sale, and use of pistols, revolvers, and other firearms capable of being concealed upon the person. He was held to answer by one of the judges of the police court of the city and county of San Francisco upon this charge. Thereafter an information was filed by the district attorney under which petitioner was accused of the crime of felony, to wit, violation of section 2 of said act, and he claims that he is unlawfully and illegally imprisoned, for the reason that the act is unconstitutional and void, as it makes the possession of a firearm on the part of an alien a felony, while an infraction of the law by a citizen is only made a misdemeanor by the express terms of the act. This precise question has been passed upon by our Supreme Court in the Matter of the Application of Rameriz (Crim. No. 2636) 226 Pac. 914, decision filed May 29, 1924. Under the authority of that case, the writ herein is discharged, and the petitioner remanded.

We concur: KNIGHT, J.; ST. SURE, J.

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194 Cal. 127

OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED, OF LONDON, ENGLAND v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (L. A. 7963.)

(Supreme Court of California. July 15, 1924. Rehearing Denied Aug. 14, 1924.)

1. Insurance 🔑435—Employer's policy construed to cover death of employee tunneling for sewer.

Workmen's compensation policy issued to contractor *held* to cover death of employee engaged in tunneling for a sewer, in view of St. 1917, pp. 831, 857.

2. Insurance 🔑146(3)—Construction of ambiguous contract against insurer.

Under Civ. Code, § 1654, where provisions of an insurance contract are not free from uncertainty, they must be construed most strongly against insurer who framed it and caused the uncertainty to exist.

In Bank.

Proceeding under the Workmen's Compensation Act by Angela Sevillano Teso and others, claimants, for the death of Manuel Gejo Teso, her husband, opposed by E. J. O'Donnell, employer, and the Ocean Accident & Guarantee Corporation, Limited, of London, England, insurer. Order of the Industrial Accident Commission granting an award, and insurer brings certiorari. Affirmed.

George H. Moore, of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, and R. L. Horton, of Los Angeles, for respondents.

RICHARDS, J. This is an application by the Ocean Accident & Guarantee Corporation, Limited, for a writ of review of a certain record and award of the Industrial Accident Commission, whereby Angela Sevillano Teso, Maria del Los Angeles Gejo, Antonio Gejo, Jose Gejo and Alfonso Gejo, the widow and children of one Manuel Gejo Teso, deceased, were allowed an award against the petitioner herein as the insurer of one E. J. O'Donnell, who was the employer of said Manuel Gejo Teso at the time the latter suffered the injuries which resulted in his death. There is no dispute between the parties to this proceeding over the amount of said award or over the fact that Manuel Gejo Teso met his death while in the employ of said O'Donnell and in the course of his employment; the only question presented being as to whether the petitioner herein was liable as the insurer of said O'Donnell for the amount of said award under the terms of its policy.

The petitioner herein sets forth:

> "That there is no dispute in the evidence that on or about March 20, 1922, one Manuel Gejo Teso, while employed as a laborer by the defendant E. J. O'Donnell, was engaged in the work of digging a tunnel for a sewer in West Sixth street in the city of Los Angeles, California, and that while the said deceased was actually engaged in said labor in said tunnel, and while standing in water in said tunnel he took hold of an electric bulb or electric wire used by said employer in lighting said tunnel, and in so doing was electrocuted and met his death."

The petition herein also sets forth in full the insurance policy issued by the petitioner to said O'Donnell, and in force at the time of the death of his said employee. The respondents have embodied the record of the proceedings before the Industrial Accident Commission in their return and have also presented a demurrer to the sufficiency of the petition. The record does not vary materially from the averments of the petition. The insurance policy insures the said employer against liability for injuries sustained by his employees in the course of certain specified employments, which are set forth in certain "Declarations" therein under the head of "Classification of Operations." The policy also contains the provision that:

> "This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

thereto or connected therewith, whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with or in relation to such work places."

The policy also contains the provisions that:

> "The premium is based upon the entire remuneration earned, during the policy period, by all employees of this employer engaged in the business operations described in said declarations, together with all operations necessary, incident or appurtenant thereto; excepting, however, the remuneration of the president, any vice president, secretary, or treasurer of this employer, if a corporation, but including the remuneration of any one or more of such designated officers who are actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman. If any operations as above defined are undertaken by this employer, but are not described or rated in said declarations, this employer agrees to pay the premium thereon, at the time of the final adjustment of the premium in accordance with condition C hereof, at the rates and in compliance with the rules of the Manual of Rates in use by the company upon the date of the issue of this policy."

Under the general title of "Declarations" and under the special heading therein of "Classification of Operations" in said policy appears the following statement of the operations with respect to which the employer is insured, viz.:

> "1 (a) Ditch digging—no sewer or canal building or excavation for water or gas mains—no blasting.
>
> "(6225)
>
> "Waterworks—laying of mains and surface or house connections (no tunneling or blasting).
>
> "(6321)
>
> "Gasworks—laying of mains and connections (no tunneling or blasting).
>
> "(6324)."

[1] It is the contention "of the petitioner herein that the foregoing Declarations" as to the employments and character of work covered by the terms and limitations of the policy in question expressly deny its benefits to the insured, and hence to his employee, when the occupation in which the latter was engaged when injured was that of tunneling for a sewer as averred in the petition herein and shown by the respondents' return. The respondents, on the other hand, contend that the descriptions in the "Declarations" above quoted, as to the classes of occupations in which the insured may engage are to be read and construed in the light of the other provisions of the policy above set forth, in which it is provided that "if any operations as above defined are undertaken by this employer but are not described or rated in said declarations, this employer agrees to pay the premium thereon at the time of the final adjustment of the premium in accordance with condition C hereof"; and that the classifications above mentioned are not to be held as limiting the list of operations in which the insured may engage, but only as fixing a premium rate applicable to the particular operations described therein; and that, even though the insured was engaged in tunneling for a sewer at the time of the injury to his employee, and was thus doing work outside of the terms and limitations expressed in said classifications, the effect of these was not to take him or his employee outside of the protection of the policy, but was only to require him to pay a different or higher premium than that provided for the particular employments specified in said "Declarations."

When the policy in question is read as a whole, and particularly when the portions thereof above quoted are read together, it will be seen that there is much persuasiveness in this view as to the proper interpretation to be placed upon this policy, since if the scope of the insurer's liability is to be confined to the employments named in the "Declarations," or even to those incident thereto, the language of the foregoing clause, providing for an adjustment of premiums for other employments not named in the declarations nor incident thereto, becomes meaningless. This court evidently took this view as to the proper interpretation of these two clauses in a similar policy when read together in the case of Worswick v. Industrial Accident Commission, 181 Cal. 550, 185 Pac. 953, wherein in construing a similar clause in the policy there under review and designated therein as "clause F," and which was substantially identical with clause A in the present policy, this court said:

> "The clear intention of the whole paragraph, clause or condition designated 'F' was to so enlarge the coverage of the policy as to include any change in or extension of the business described in the policy, provided always that such enlargement should not in any event be held to include work expressly specified as excepted."

In the case last above cited the court pointed out that the operations of the insured employer, out of which the application for an award in that case arose, were expressly specified as excepted by a proviso in clause F itself and were for that reason not within the coverage of that particular policy. There is no such proviso or limitation in clause A of the present policy, but the petitioner herein contends that such express exception and limitation is to be found within the language of the "Classifications" clause in said policy, which, as we have seen, reads as follows:

"1 (a) Ditch digging—no sewer or canal building or excavation for water or gas mains—no blasting.

"(6225)

"Waterworks—laying of mains and surface or house connections (no tunneling or blasting).

"(6321)

"Gasworks—laying of mains and connections (no tunneling or blasting).

"(6324)."

It is the contention of the respondents herein, however, that the clauses in the foregoing "Classification of Operations," apparently exempting sewer or canal building or excavation for water or gas mains and also tunneling and blasting from such classification, was not intended to have that meaning or effect, but that these exceptions were merely intended to differentiate these operations from "ditch digging" or "waterworks" or "gas works" as to the rate of premium to be paid by the insured; or, in other words, to protect the insurer against any claim of the insured that the specified premium paid by him for coverage while engaged in "ditch digging" would suffice for coverage while building sewers or canals or making excavations for water or gas mains, or for blasting, in connection with any of the operations, or that the specified premium paid for coverage while laying mains and connections for waterworks or gasworks should suffice for coverage for the more dangerous operations of tunneling or blasting, if carried on during these occupations. A critical examination of this "Classification of Operations" shows plainly on its face that such and such only was the purpose of the several apparent "exceptions" embraced therein. For example, the first of these classifications specifies "ditch digging," but exempts from this classification "sewer or canal building or excavation for water or gas mains." It was evidently not intended to thereby exclude "excavations for water or gas mains" from coverage by this policy since the next two clauses in said classification expressly permit and embrace the laying of mains and connections for water and gasworks.

[2] In view of these facts, the utmost that can reasonably be claimed by the petitioner herein is that these classifications are uncertain as to just what operations were intended to be included within or excluded from their provisions, and this being so, under section 1654 of the Civil Code, the policy is to be construed most strongly against the insurer who drew the policy and caused the uncertainty to exist. Maryland Casualty Co. v. Industrial Acc. Comm., 178 Cal. 491, 173 Pac. 993. There is also some evidence in the record before us relating to a contemporaneous interpretation placed upon the coverage of this policy by the action of the parties to it. It seems that upon two occasions prior to the casualty which gave rise to this proceeding workmen of the insured, while engaged upon this particular job, had received minor injuries which, while not serious enough in their nature to come before the Industrial Accident Commission, were sufficiently serious to require medical attention, and that in each of these cases the injured employees had been sent to the official physician of the insurer for treatment and had received such treatment, which facts were reported by the insured to the representatives of the insurer. The record also discloses that the employer was a general contractor and as such had been carrying insurance with this petitioner for several years prior to that in which the injury to his deceased employee occurred, and during which time he was engaged in such various occupations as digging ditches, bricking up stream boilers, laying concrete floors and sidewalks, cleaning tanks, repairing elevators, etc., and during which various employments his pay rolls were periodically inspected by his insurer and his premium rates fixed and paid according to the classification in general use by all companies carrying workmen's compensation insurance, wherein the amount of premium is based upon the hazard of the particular occupation.

This evidence is in harmony with the interpretation which the respondents herein would have us place upon this insurance policy read as a whole, and which we think should be placed thereon. It is also in harmony with the provisions of section 29 of the Workmen's Compensation Act as revised and amended in 1917 (Stats. 1917, pp. 831, 857), which requires that every employer coming within the terms of said act shall secure the payment of compensation to his employees by insuring and keeping insured against liability, either in one or more of the insurance carriers duly authorized to write compensation insurance in this state, or by securing from the commission a certificate of consent to self-insure, under penalties for failure so to do. Reading this insurance policy as a whole, in the light of the record before us and of the general policy of the law touching the matter of compensation insurance, we are satisfied that the interpretation which the petitioner would have us place upon its liability under the form of this policy cannot be approved.

The award is affirmed.

We concur: MYERS, C. J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

194 Cal. 171

ERNSTING et al. v. THE UNITED STAGES et al. (L. A. 7645.)

(Supreme Court of California. July 28, 1924.)

1. Trusts ⟹371(1)—Amended complaint in equitable action to impress corporation's property with trust held to state a cause of action.

In equitable action by owners of auto stages to impress property of corporation with trust to extent of value of rights which had been diverted by alleged fraudulent acts of plaintiffs' agent in obtaining franchise to operate auto stages in name of the corporation of his own creation, amended complaint *held* to state a cause of action.

2. Public service commissions ⟹19(1)—Orders and judgment of Railroad Commission on matters within its jurisdiction are conclusive.

Orders and judgments of Railroad Commission on matters that clearly fall within its jurisdiction are final and conclusive.

In Bank.

Appeal from Superior Court, Imperial County; Marvin W. Conkling, Judge.

Action by Frederick Ernsting and others, members of United Stages, an association doing business under the name of United Stages, against The United Stages, a dissolved corporation, and others. From a judgment of dismissal, plaintiffs appeal. Reversed.

Robert G. Hill, of El Centro, for appellants.

S. W. Thompson and Herbert Kidd, both of Los Angeles, for respondents.

SEAWELL, J. Appeal from a judgment dismissing action, after demurrer sustained to the fourth amended complaint without leave to amend. The complaint contains two counts. The action was brought to enjoin a sale threatened to be made by defendant Thomas Morgan of a franchise conferring the right to operate auto stages over a described section of certain public highways of Imperial, San Diego, Los Angeles, and Santa Barbara counties, and to prevent the leasing of another section, both of which, it is claimed, are parts of a general system owned by plaintiffs; also to reform a lease of said franchise made between certain party litigants, and to quiet title to said franchises, for an accounting, and general relief.

The demurrer was general. The amended complaint is nebulous, and, had it been demurred to on any one of the special grounds named in subdivisions 7, 8, and 9 of section 430, Code of Civil Procedure, such a demurrer could have been properly sustained. We have given much time to an examination of the pleadings, with the view of determining whether it is sufficient as against a general demurrer. It is quite voluminous, and contains much irrelevant and immaterial matter, which has contributed to a confusion of the issues. This matter was permitted to remain without objection. No brief has been presented on behalf of respondents.

[1] It seems to be the theory of appellants, and perhaps the complaint contains allegations sufficiently direct and positive to support it, that appellants, after the adoption of the Auto Stage and Transportation Act, approved May, 1917 (chapter 213, p. 330, Stats. 1917), which placed with the Railroad Commission the supervision and regulation of auto stage transportation, appointed Thomas Morgan their attorney in fact and representative to appear before the commission in their behalf in the matter of fixing rates, fares, charges, classifications, rules, and regulations, and to represent them in all matters necessary to be done by said act. It is alleged that each of the appellants, including the "United Stages," was actually operating in good faith a transportation business over and upon certain of the routes in contest on May 1, 1917, and therefore, as in said act provided, were licensees under the act, and were not required to obtain from the commission a certificate of public convenience and necessity.

It is also alleged that appellants, long prior to May 1, 1917, were associated in operating an auto stage transportation business in the name of the "United Stages," and as such had earned, through the operation of said auto stages by its members and by the association as such, permits and licenses to do so; further, that said Morgan was appointed the attorney in fact of appellants and authorized and empowered to make application to the Railroad Commission for appellants in the name of "United Stages," to be placed under the supervision and regulation of said commission in the conduct of its business by authority of the license and privilege which it had theretofore earned, but that said Morgan, in violation of his duty and trust, made said application in the name of the "United Stages, Inc.," a corporation of his own creation, and in which the appellants had no interest whatsoever and that all of the rights, privileges, and prerogatives to which said "United Stages" was entitled were, by the fraud and deceit of said Morgan, obtained for and on behalf of said "United Stages, Inc.," and have since been used, exercised, and enjoyed by said corporation, to the exclusion of appellants, and that all the property rights which they rightfully owned in the way of franchises, permits, and privileges were made use of wrongfully to influence the commission to transfer them to the use and benefit of said corporation and to deprive the appellants thereof. In short, appellants are seeking by an equitable action to impress the property of said corporation with a trust to the extent of the value of the rights which they claim have been diverted by reason of the alleged fraudulent transaction.

[2] While we recognize the infirmities of the pleading, we are of the opinion that appellants have sufficiently alleged matters of a substantial character to permit them to go to trial. We do not wish to be understood by our ruling that this court will review the orders or judgments of the commission in matters that clearly fall within the jurisdiction of that body. In such cases its judgments are final and conclusive.

The judgment is reversed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.; WASTE, J.

(194 Cal. 134)

FAMOUS PLAYERS LASKY CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 11017.)

(Supreme Court of California. July 16, 1924.)

Master and servant ⚷367—Special employer of aeroplane pilot, furnished by general employer, held liable for compensation.

Aeroplane pilot, furnished by aircraft corporation to drive its plane one day in service of moving picture corporation, who, while so engaged and acting under direction of picture corporation, sustained injuries, *held* entitled to recover compensation of picture corporation as special employer, though compensation for his services was to be paid to aircraft corporation.

In Bank.

Certiorari to review an award of the Industrial Accident Commission.

Proceeding for compensation before the Industrial Accident Commission of the State of California by Harvey M. Pugh, claimant, opposed by the Famous Players Lasky Corporation, the State Compensation Insurance Fund, and others. The Commission awarded compensation, and the corporation named and the State Compensation Insurance Fund applied for certiorari. Award affirmed.

F. J. Creede and T. W. Slaven, both of San Francisco, and J. L. Kearney, of Los Angeles, for petitioners.

W. H. Pillsbury and Walter Christie, both of San Francisco, for respondents.

RICHARDS, J. The petitioners herein apply for a writ of review, whereby they seek to have reviewed and annulled a certain award made by the respondent commission in favor of one Harvey M. Pugh for injuries alleged to have been received by the latter while acting under the special employment and direction of the petitioner Famous Players Lasky Corporation. There is no material dispute as to the facts out of and in connection with which the injuries suffered by said Pugh arose. In March, 1923, the Famous Players Lasky Corporation was engaged in producing a moving picture film upon the Monterey peninsula, in the course of which certain scenes were to be filmed at Pebble Beach, near Carmel. It was deemed desirable by the representatives of the corporation to secure the use of two aeroplanes to fly within the range of the camera during these scenes, in order to give the desired effect. In seeking to procure these aeroplanes, the representatives of the corporation came into communication by telephone with the Williams Bros. Aircraft Corporation of San Francisco, which had at times operated a commercial flying field at San Carlos, but which was chiefly engaged in the business of the manufacture of aeroplane accessories, and which had a few areoplanes in stock at said place, which were used by it mainly for experimental flights in testing out aeronautical devices and equipment. They had no pilots on their regular staff, but when the request came from the Lasky Corporation they agreed to furnish them 2 aeroplanes, for which they agreed to find pilots for a total charge of $90 for the planes and pilots for the day. They accordingly sent the two aeroplanes, each with a pilot, one of which was Pugh, and each accompanied with a member of the Aircraft Corporation.

The only direction given to the pilots was that they were to fly from the San Carlos field to a polo field at or near Del Monte, where they were to report to the Lasky Corporation for instructions. This they did, and after some little delay were taken by the representatives of the Lasky Corporation over to the point at Pebble Beach where the scenes were being filmed and where their flight was to take place. Arriving there, the pilots were directed by those in charge of the filming to look through the camera to get its range of vision, and to direct their flight accordingly, so as to come within the picture. This they did, but after making one trial flight and landing were told that their planes would have to fly further out and lower in order to be in the picture. It was Pugh's better judgment that to fly lower would be dangerous, but he finally yielded to the request of the representative of the Lasky Corporation to bring his flying down to 75 feet in order to come within the scene. While making this flight the plane struck an air pocket and crashed to the ground, killing the representative of Williams Bros., who was a passenger with him, and seriously injuring Pugh. It would seem that, after reaching the scene of the flight, neither of the members of the Williams Aircraft Corporation exercised any control or direction over either of the pilots, and all of their instructions as to the time, place, and method of their flight were given them by the representatives of the Lasky Corporation.

The first contention of the petitioners herein is that the Williams Bros. Aircraft Corporation occupied toward the Lasky Corporation the relation of an independent contractor, supplying these aeroplanes with their pilots to the petitioner herein for a day's service and for a fixed price; that its employees were not the employees of the petitioner, and hence that for whatever injuries their employee, Pugh, suffered in the course of that employment, the petitioner herein cannot be held liable. That this is the general rule with respect to the employees of independent contractors there can be no doubt, but this general rule has this important limitation. Where either by the terms of the contract or during the course of its performance the employee of the alleged independent contractor comes under the control and direction of the other party to such contract, and suffers injury in the course of and in consequence of such direction and control, the relation of both general and special employer may be held to exist, and the injured employee has been held entitled to compensation from both the general and the special employer. This court had occasion to deal with this subject, and did so exhaustively, in the case of Employers' Liability Assurance Corporation v. Industrial Accident Commission, 179 Cal. 432, 177 Pac. 273, and therein pointed out both the general principle and the limitation thereof, and the reason for both, and also pointed out the distinction between that case and the case of Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, upon which the petitioner herein strongly relies, a distinction which has also application, we think, to the case at bar. In the case of Employers' Liability Assurance Corporation v. Industrial Accident Commission, supra, this court quotes approvingly from the case of De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992, wherein that court, in reconciling its decision in that case with the case of Nolan v. Cranford, 219 N. Y. 581, 114 N. E. 1074, said:

> "Even where no property of the general employer is intrusted to the employee to be used in the special employment, the general employer pays the compensation, may direct the employee when to go to work, and may discharge him for refusal to do the work of the special employer. The Industrial Commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees. Comerford's Case, 224 Mass. 571, 573, 113 N. E. 460. Thus at one and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may, under the common law of master and servant, look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards."

This court further said in reference to the case from which the above excerpt is taken:

> "While we have heretofore held that an independent contractor is not entitled to compensation under the Workmen's Compensation Law, we find nothing in our decisions which would prevent our following the rule announced by the Court of Appeals of New York in the case of De Noyer v. Cavanaugh, supra, and recognizing the fact that in some cases where, at the time of the accident, both the general and special employer exerted some measure of control over the injured person through their respective foremen or employees, both should be held liable."

In the more recent case of Pruitt v. Industrial Accident Commission, 189 Cal. 459, 209 Pac. 31, this court, while recognizing the rule to be as above stated that where, at the time of the accident both the general and the special employer exercised some measure of control over the injured employee, both should be held liable, held upon a review of the facts of that case that the applicant had not brought himself within the rule entitling him to hold the general employer, but did uphold the award against the insurance carrier of the special employer. The evidence in this proceeding substantially showed that the general employer of the applicant for an award contracted to supply two aeroplanes with pilots to go to the location of the petitioner herein, at or near Carmel, there to make a flight under the direction of the representatives of the petitioner while they were engaged in filming a scene for a moving picture; that such flight was to be conducted at such height and at such distance from the camera being used in filming the scene as would bring said planes within the range of said camera, thus forming "atmosphere" for the background of the scene; that while the pilots of said planes in going to said location and while making their flight thereat were accompanied by two officials of the Williams Bros. Aircraft Corporation, they gave to the pilots of said planes no other direction than that they should put themselves under the direction of the representatives of the petitioner herein as to the details of said flight; that, while they doubtless might have vetoed the instructions given by petitioner, they did not do so, but rather tacitly concurred therewith; that from the time of the arrival of the pilots with their planes and passengers at the place where the flight was to be undertaken the pilots did in fact conduct both their flights under the direction of the representatives of the petitioner herein; that the first flight was unsuccessful, for the reason that the planes flew too high and too near to come within the range of the camera, wherefore the petitioner's representatives directed the pilots to make another flight lower and farther away than before. The pilots, after some demurring as between themselves upon the ground that such lower flight would be dangerous, but after no conference with or direction from the representatives of the general employer, obeyed the instruction of the representatives of the petitioner who were directing the filming of the scene, and flew across its range of vision much nearer the surface than they themselves deemed safe, with the result that toward the close of the flight the plane which the pilot Pugh was driving was caught in an air pocket and crashed to the earth, killing the passenger and seriously injuring the pilot Pugh.

We are of the opinion that these facts, as shown in the record before us, fully justify the application of the doctrine approved by this court in the cases above referred to, holding that, when the relation of both a general and a special employer is shown to exist, the award may be sustained as against both. In the case of the general employer, such award has heretofore been upheld by this court. It will also be upheld in the case of the petitioner herein, for the reasons above set forth.

The award is affirmed.

We concur: MYERS, C. J.; WASTE, J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.

194 Cal. 123

ANGLO LONDON PARIS CO. et al. v. JOHNSON, State Treasurer. (S. F. 11207.)

(Supreme Court of California. July 8, 1924.)

1. States 🔑153—Statutes providing for notice by publication of sale of bonds held substantially complied with.

State Highways Act of 1915, adopted by Const. art. 16, §§ 2, 3, providing notice of time and place of sale of highway bonds by publication in two newspapers once a week for four weeks preceding sale, was substantially complied with by publication in two newspapers for three weeks and publication in such newspapers as combined on fourth week, where such consolidated newspaper was delivered to every subscriber of either or both of such newspapers, and was distributed in same manner in which both newspapers had been distributed.

2. Statutes 🔑235—Requirements of statute in which public welfare is concerned should be liberally construed.

Requirements of statute in aid of a great public improvement in which general welfare is concerned should be liberally construed.

In Bank.

Application for writ of mandate by the Anglo London Paris Company and another against Charles G. Johnson, Treasurer of the State of California. Writ granted.

McKinstry, Haber & Firebaugh, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

RICHARDS, J. This application is for a writ of mandate, wherein the petitioners seek to compel the respondent herein, as treasurer of the state of California, to sell and deliver to the petitioners certain bonds designated as "highway bonds of the state of California" at the par value of $3,000,000, which said bonds were bid for and purchased by the petitioners at a public sale thereof held at the office of the respondent as such state treasurer on the 26th day of June, 1924, pursuant to certain proceedings for the issuance and sale of said bonds purporting to have been taken and had under the provisions of article 16, sections 2 and 3 of the state Constitution. The facts with relation to said proceedings are set forth in the petition herein, and are conceded to be correctly set forth therein by the return and answer of the respondent. They are briefly these: The provisions of sections 2 and 3 of article 16 of the Constitution in relation to the issuance and sale of state highway bonds adopt the provisions of the act of the Legislature approved May 20, 1915, known as the State Highways Act of 1915 (Stats. 1915, p. 650) relative to the procedure for initiating, advertising, and holding sales of such bonds. Said act provides that "The state treasurer shall give notice of the time and place of sale by publication in two newspapers published in the city and county of San Francisco" (and in certain other newspapers) "once a week for four weeks next preceding the date fixed for such sale." Section 4. The date fixed for the sale of the bonds in question was June 26, 1924. The state treasurer duly published his notices of the sale of said bonds in the other newspapers outside of San Francisco as required by said statute. He also selected and designated as the two within the city and county of San Francisco in which such notices were to be published the San Francisco Journal and Daily Journal of Commerce and the Bulletin, each a newspaper of general circulation therein at the time of the designation and inception of such publication, and such notices were accordingly and in due form published in the San Francisco Journal and Daily Journal of Commerce on May 28, June 4, June 11, and June 18, 1924, and were also published in the Bulletin on May 28, June 4, June 11, and June 18, 1924. Between the dates of June 18, 1924, and June 25, 1924, the said two newspapers combined and consolidated, and on June 25, 1924, the said notice of said sale was published in said combined and consolidated newspapers published on said date, and thereafter under the name of the Bulletin and San Francisco Journal and Daily Journal of Commerce within said city and county of San Francisco. It is alleged in the petition herein, and admitted in the return of the respondent thereto, that said publication was made on said date in each of the six successive editions of said combined and consolidated newspapers issued at various times during said day, and that such combined and consolidated newspapers containing such published notice were delivered or mailed to each and every person who was a subscriber of either or both of said newspapers prior to and at the date of said publication thereof, and also that the said editions and issues of said combined and consolidated newspapers on and after the date of said publication of said notice were generally sold and distributed in each and every community in which prior to the date of the combination and consolidation of said newspapers the editions and issues thereof had been sold and distributed.

[1, 2] We are entirely satisfied that upon the foregoing conceded facts attending the publications of the notices of the sale of said highway bonds at the time and place named therein substantial compliance has been had with the requirements of the said statute relating to the sale of said bonds. It is to be noted that the proceeding which was to culminate in the sale of these bonds was not a proceeding in invitum in which the rights of individuals might be injuriously affected, but that such proceedings were in aid of a great public improvement in which the general welfare was concerned and in respect to which the requirements of the statute should be liberally construed. At the date of the inception of the required publication to be given in the city and county of San Francisco as to the time and place fixed for the sale of said bonds the two newspapers so selected for such publication were being separately conducted and issued, each under its own name, each with its own body of subscribers, and each in all respects qualified to be the medium of such publication as the statute requires. In the merger and consolidation of said two newspapers during the course of such publication the identity of each or either was not intended to be lost, as was evident from the fact that the name of each was preserved, and that the subscribers of each were as fully served by mail or carrier after as before such consolidation. The substantive purpose of the statute was thus as fully subserved as though the publication of each newspaper had been separately continued until after such publication in each had been completed. The language of the Supreme Court of the United States in the case of Sage v. Central Railroad Co., 99 U. S. 334, 347 (25 L. Ed. 394), a case which in certain of its essential aspects is similar to the case at bar has direct application both in reasoning and authority to the instant situation. The court said:

> "The purpose of the order to advertise in that newspaper was publicity, and to reach those persons who saw the paper. That purpose was not defeated by a change of name or a union with another newspaper. This objection, therefore, is formal rather than substantial."

Let the writ issue as prayed for.

We concur: MYERS, C. J.; SHENK, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; STURTEVANT, Justice pro tem.

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194 Cal. 139

OUZOONIAN et ux. v. VAUGHAN et al. (DER BOGHOSIAN, Intervener). (S. F. 11109.)

(Supreme Court of California. July 17, 1924.)

1. Appeal and error 🔑82(1)—Appeal from special order after judgment constituting final adjudication dismissed where not taken in time.

An appeal from an order directing that property in hands of a receiver be turned over to plaintiffs in an action to quiet title to real estate and for recovery of personal property would be dismissed where taken over a year after date of such order; such order constituting a special order made after final judgment in the action and being a final adjudication.

2. Appeal and error 🔑907(3) — Appellate court required to assume that findings are fully supported by evidence where not inconsistent with judgment.

On appeal upon judgment roll alone, there being no bill of exceptions nor reporter's transcript, and findings not being inconsistent with judgment appealed from, appellate court is required to assume that they are fully supported by the evidence.

3. Appeal and error 🔑907(3) — Appellate court required to assume that trial court's omission to find facts favorable to intervener was because of lack of evidence.

Where facts found would not support a judgment in favor of intervener, appellate court was required to assume in absence of a bill of exceptions, or reporter's transcript of the testimony, that trial court's omission to find other facts favorable to intervener's contention was because no evidence was produced which would justify such findings.

In Bank.

Action by James Ouzoonian and wife against J. Vaughan and others, in which John Der Boghosian intervenes. Judgment for plaintiffs, and intervener appeals. On motion to dismiss intervener's appeal. Appeal dismissed.

See, also, 221 Pac. 958.

N. Lindsay South and Geo. G. Graham, both of Fresno, for appellant.

E. C. Loughlin and M. F. McCormick, of Fresno, for respondents.

PER CURIAM. This case comes before us upon a motion of the plaintiffs and respondents to dismiss three appeals on the part of the intervener and appellant. A somewhat extended statement of facts is necessary to an understanding of the questions raised thereby. In 1920 the plaintiffs, being the owners of a ranch property together with certain personal property located thereon and used in the operation thereof, entered into a contract for the sale of said real and personal property to the defendants Vaughan at a price payable in installments, under which contract the defendants entered into possession of said land and personal property. Thereafter, in June, 1921, defendants executed to the intervener a promissory note secured by a chattel mortgage upon the crops to be produced upon said property in the year 1922. In December, 1921, plaintiffs commenced an action against defendants, in which they pleaded the conventional allegations of a suit to quiet title to the premises described in the contract and in addition thereto they set out the contract in hæc verba, alleged various defaults on the part of the defendants in the performance thereof, alleged the commission of waste upon said premises by the defendants in failing to properly farm and care for the same, averred that the appointment of a receiver was necessary to properly care for said premises and the vines growing thereon, and prayed for the appointment of such receiver, for a decree adjudging the contract forfeited, quieting the title of the plaintiffs, and debarring the defendants and all persons claiming under them from asserting any claim whatsoever in and to the premises. In December, 1921, plaintiffs also filed an affidavit alleging that said premises were set to fruit trees and grape vines, that the defendants had neglected and were then neglecting to properly care for the same, by reason of which the premises had depreciated several thousand dollars in value, and that unless a receiver should be appointed to properly care for said trees and vines the same would become an utter loss, alleging the insolvency of the defendants and praying for the appointment of a receiver "to farm said premises during the pendency of this action, to have all powers given a receiver by law." The defendants appeared and filed an answer and a cross-complaint, to which an answer was filed by the plaintiffs. Thereafter, in July, 1922, an order was made appointing a receiver to take possession of the property and to "care for said real property and the vineyards and orchards growing thereon and the crops to be produced on said premises; to sell the said crops at such times and upon such terms as he shall determine to be for the best interests of the parties interested therein * * * and in general to maintain said property in good condition and to hold all of said property and the net proceeds of the sale of any crops produced thereon until the further order of this court." The receiver took possession of the premises, harvested the crops, and sold the same and collected the proceeds thereof. Thereafter, in November, 1922, the intervener, by permission of court, filed his complaint in intervention, setting up the execution of his note and chattel mortgage and praying for the foreclosure thereof and for the sale of the crops upon said premises. The complaint in intervention was unverified, and, so far as appears from the transcript herein, no answer thereto was filed by either the plaintiffs or the defendants. Thereafter, on November 23, 1922, a trial was had, at the conclusion of which the court filed written findings of fact and conclusions of law in which it found in favor of the plaintiffs upon all of the issues of fact as between the plaintiffs and defendants, and concluded that the defendants did not have, either at the time of the commencement of the action or at the time of the making of the findings, any estate, right, title, or interest in or to said real property or said personal property, and that the plaintiffs were entitled to judgment quieting their title against the defendants and each and every person claiming or to claim by, through, or under said defendants, or either of them, and forever debarring and enjoining said defendants, and each of them, and each and every person claiming or to claim by, through, or under them, or either of them, from setting up or asserting any right, title, interest, estate, claim, or equity in or to said property or any part or portion thereof. This was followed by the entry, December 1, 1922, of a judgment to like effect, which provided further that—

> "The court reserves the right to make all necessary further orders, judgments and decrees relative to the appointment of the receiver in this action and the disposition of all properties which have heretofore or may hereafter come into his possession."

The preamble to these findings of fact recites the appearance of counsel for the plaintiffs and defendants, respectively, but does not mention the intervener or his counsel. It is apparent from the record, however, that the intervener and his counsel did appear and participate in said trial. Thereafter the receiver filed his report and account and a hearing was had thereon January 19, 1923, upon notice to all parties, at which hearing the intervener appeared by his counsel in opposition to the confirmation of said report and account, and orally presented objections thereto, and the court made its order overruling said objections, settling the account of the receiver, fixing his compensation, and directing the payment by him of the balance remaining in his hands, amounting to about $2,000, to the plaintiffs. This order was entered January 30, 1923.

Thereafter, on June 27, 1923, other findings of fact were filed, reciting that the cause came on for hearing on November 23, 1922, the parties appearing by their counsel, including the intervener and his counsel, finding the facts as to the execution of intervener's chattel mortgage, and "that plaintiffs are and at all times since the commencement of this action have been entitled to the possession of said real property and all crops produced thereon since the commencement of this action," and concluding that the intervener should take nothing by reason of his complaint in intervention. On June 28, 1923, the intervener filed a notice of appeal from the "judgment of the trial court given in favor of plaintiffs on the 27th day of June, 1923," and "from the order of the court made June 26, 1923, ordering and directing the property mentioned in intervener's complaint paid out to the plaintiffs by the receiver." These appeals were thereafter on motion dismissed upon the ground that the judgment having been entered December 1, 1922, and the order settling the accounts of the receiver and directing the payment of money by him to the plaintiffs January 30, 1923, the appeals therefrom were too late, and that an appeal would not lie from the findings dated June 27, 1923, for the reason that no judgment had been entered thereon. Ouzoonian v Vaughan (Cal. App.) 221 Pac. 958. Thereafter, on February 7, 1924, at the request of intervener, the trial court entered a judgment upon the findings of June 27, 1923, that the intervener take nothing by his said action. Thereupon and on the same day the intervener filed notice of appeal "from the judgment of the trial court given in favor of the plaintiffs and against the intervener on the 7th day of February, 1924, upon the findings of fact and conclusions of law filed June 27, 1923," and "from the order of the court on directing the property mentioned in intervener's complaint to be delivered to the plaintiff by the receiver" and "from the order appointing said receiver as a part of the appeal from the aforesaid judgment." These are the appeals at which the present motion to dismiss is directed.

[1] Intervener now concedes that his appeal from the order appointing the receiver is ineffective because taken too late. He asserts, however, that his appeal from the judgment of February 7, 1924, is in time and that—

> "The appeal from the order directing the property to be turned over to the plaintiffs or the respondents here comes up with the appeal from the judgment and as a part thereof."

The order directing the property in the hands of the receiver to be turned over to the respondents was a special order made after final judgment in the action, and was therefore an appealable order. The intervener has in fact already prosecuted one appeal therefrom and his appeal has been dismissed upon the ground that it was taken too late. (Cal. App.) 221 Pac. 958. Intervener contends, however, that he is now entitled to a review of this order in connection with his appeal from the judgment of February 7, 1924. Respondents reply that the purported judgment of February 7, 1924, is a nullity for the reason that all issues and controversies between the parties were determined and concluded by the judgment of December 1, 1922. Respondents assert that that judgment, which debarred not only the defendants, but "each and all persons claiming or to claim by, through or under them or either of them, * * * from making, setting up, or asserting any right, title, interest, estate, claim or equity in or to said real property or said personal property or any part or portion thereof adverse to paintiffs" was necessarily an adjudication and estoppel against the intervener as to all of his rights and claims herein. It may be inferred from the record that the trial judge was of the contrary opinion. In our view it is unnecessary to determine this question for the reason that if it be assumed that the first judgment was not an adjudication of the claim of the intervener, it follows that the order which was made after the judgment, and which directed the receiver to pay over to the plaintiffs the balance of funds remaining in his hands, was such an adjudication. The intervener was an active party litigant at the hearing which resulted in that order. The only controverted question of importance then before the court for adjudication was whether the funds then remaining in the hands of the receiver should be paid to the plaintiffs or to the intervener. These funds consisted of the proceeds of the crops which had been harvested by the receiver upon the premises in controversy during the year 1922. The plaintiffs claimed to be entitled thereto by virtue of their ownership of the premises and their right to the possession thereof from and after the institution of the action, which was December, 1921. The intervener claimed to be entitled thereto by virtue of his chattel mortgage. The trial court decided this issue in favor of the plaintiffs and against the intervener and made its order directing the receiver to pay over said proceeds to the plaintiffs. This was an adjudication that the claims of the intervener were without right. Whether that adjudication was correct or incorrect it is now final and conclusive against the intervener because the time for appeal therefrom had long since elapsed when this appeal was taken. The only question presented by the present appeal which touches the merits of the case is the question of intervener's rights under his chattel mortgage. That question having been determined by an adjudication which has become final and conclusive upon the parties, it would be a vain and useless thing to retain the appeal in this court for further consideration of a question which is no longer open to reconsideration as between these parties, and the motion to dismiss should be granted.

[2, 3] We arrive at this conclusion the more readily by reason of the fact that an examination of the record upon this appeal convinces us that aside from the matter of estoppel by the previous judgment, we should be compelled to affirm the judgment here appealed from in any event. The appeal is upon the judgment roll alone, there being no bill of exceptions or reporter's transcript. The findings are not inconsistent with the judgment appealed from and we are required to assume that they are fully supported by the evidence. The facts found would not support a judgment in favor of the intervener, and we are required to assume, in the absence of a bill of exceptions or reporter's transcript of the testimony, that the omission of the trial court to find other facts favorable to intervener's contention was due to the fact that no evidence was produced which would justify such findings.

The appeals are dismissed.

(194 Cal. 114)

OFFER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11020.)

(Supreme Court of California. July 8, 1924.)

1. Subrogation 🔑1—When principle of subrogation is applicable stated.

The principle of subrogation applies when one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should be discharged by the latter.

2. Insurance 🔑606(1) — Insurer's right of subrogation arises out of nature of contract of insurance as one of indemnity.

Insurer's right of subrogation against wrongdoer does not rest upon any relation of contract or of privity between them, but upon the nature of the contract of insurance as a contract of indemnity, and arises independently of a provision in the insurance contract which gives insurer the right to recover damages from the person responsible for the loss.

3. Insurance 🔑606(1)—Insurer paying loss is subrogated to insured's right of action only to amount of loss paid.

An insurer paying amount of loss on property insured is subrogated only in a corresponding amount to the insured's right of action against one responsible for the loss.

4. Parties 🔑84(1)—Wrongdoer sued by insurer under right of subrogation may be held liable to insured in another action by latter if nonjoinder of parties waived.

If a wrongdoer in action against him by an insurer for the amount of damages covered by the insurance does not demur or enter a plea in abatement because of nonjoinder of insured, the defect is waived, and he may be liable to insured in another action for the amount of the loss not covered by the insurance policy.

5. Subrogation 🔑41(1)—When court of law may treat plaintiff as assignee and allow him to maintain action of legal nature upon right to which he claims to be subrogated.

A court of law may deal with subrogation as it may with assignment, and when a right of action to which a plaintiff asks to be subrogated is a legal right of action, it may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature upon the right to which he claims to be subrogated.

6. Subrogation 🔑41(1)—Equitable subrogated cause of action must be sued on in equity.

If a cause of action to which plaintiff claims to be subrogated is an equitable one, he must sue in equity, where he can always sue in his own name.

7 Subrogation 🔑41(1)—How right of subrogation may be established.

The right of subrogation is a right which must be established by a proceeding in equity, or, if there is a statute which recognizes the right in any particular class of claims and the right to which the party claiming subrogation is a legal right, then such right may be enforced in a court of law; in other cases the enjoyment of the right depends upon the remedy provided.

8. Subrogation 🔑41(1) — So-called equitable right is enforceable in court of law where law and equity are merged in single forum.

Where there is a merger of law and equity, and a single forum is theoretically capable of taking cognizance of all rights, both legal and equitable, a so-called equitable right may be enforced in a court of law.

9. Courts 🔑125—Action by insurer entitled to subrogation held one at law, not within superior court's jurisdiction unless claim exceeds $300.

Payment by insurer to insured of loss suffered by insured from acts of defendant wrongdoer vested in insurer a complete legal ownership and right of action by subrogation, cognizable in a court of law, in view of Civ. Code, § 954 (Code Civ. Proc. § 367), so that, where such a cause of action instituted in superior court was less than $300 within Code of Civ. Proc. § 112, the superior court in overruling a demurrer to the complaint on theory it had equitable jurisdiction under Code Civ. Proc. § 76, subd. 1 (Const. art. 6, § 5), erred.

10. Pleading ⚷49—Insurer's prayer to be subrogated to insured's rights held not to determine nature of insurer's action.

Prayer of plaintiff insurance company that the court decree plaintiff to be subrogated to rights of insured to whom plaintiff paid losses sustained by him *held* not to determine nature of insurer's action.

In Bank.

Original application for writ of prohibition by Karl Offer against the Superior Court of the City and County of San Francisco and George H. Cabaniss as Judge thereof. Writ granted.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for petitioner.

John Ralph Wilson, C. B. Morris, and H. H. Price, all of San Francisco, for respondents.

LAWLOR, J. This is an application for a writ of prohibition made by the attorney for and on behalf of the petitioner, the party beneficially interested, to restrain the superior court in and for the city and county of San Francisco and Hon. George H. Cabaniss, judge thereof, from proceeding to trial of an action for an amount less than $300, upon the grounds that the superior court has no jurisdiction in the premises, and that the petitioner has no plain, speedy, or adequate remedy in the ordinary course of law. An order to show cause was ordered to issue.

It appears that the Maryland Casualty Company, a corporation, as plaintiff, commenced an action against Karl Offer, as defendant, in the superior court of the state of California in and for the city and county of San Francisco, by filing a verified complaint to enforce the alleged liability of the said defendant, amounting to the sum of $53.25, for damages caused to a certain automobile, the property of one R. C. Lamayson, to whom the plaintiff had theretofore issued a certain policy of insurance, commonly called collision insurance, whereby the plaintiff agreed to pay to said R. C. Lamayson any damages which he might sustain by reason of collision; and it was further agreed that, if said automobile were damaged by collision through the fault of any third person, any amount recovered from such third person on account of said damages should be for the benefit of plaintiff, and that plaintiff should have a right to sue for such damages, and that in any action so brought the said R. C. Lamayson would assist plaintiff to recover. A demurrer to the complaint was overruled on the ground that, although the complaint involved the recovery of a sum of money less than $300, the court nevertheless had jurisdiction, and it is alleged that the trial will be proceeded with if the writ is not issued.

It is claimed in support of the application that the superior court is without jurisdiction (section 5, art. 6, Const.; section 112, Code Civ. Proc.) to entertain or further proceed in said action except to dismiss it for lack of jurisdiction.

Respondents claim jurisdiction upon the ground that section 76, subd. 1, Code of Civil Procedure, and section 5, art. 6, of the Constitution, provide that the superior court shall have original jurisdiction in all cases in equity; that, if a principle of equity is the foundation of the action, the amount of money involved is not controlling; that the right of subrogation is applicable in a case of insurance, but that in the case at bar there was in fact no complete subrogation, but only a right to the amount sued for when recovered. It is apparent from respondents' brief that what is meant by "no complete subrogation" is that the right must first be judicially determined. In answer to the petitioner's claim that the right of subrogation has become cognizable in a court of law, especially when the right of action to which the party asks to be subrogated is a legal one, respondents claim that "it cannot be said that the plaintiff is compelled to seek his remedy at law rather than in equity."

Concerning the right of subrogation it was said in a note in 25 R. C. L. 1391:

> "By the civil law a surety paying the debt is subrogated to the rights of the creditor, ipso facto, but in modern practice the true rule would seem to be that a surety by payment does not become ipso facto subrogated to the rights of the creditor, but only acquires a right to such subrogation, and that before the substitution or equitable assignment can actually take place he must actively assert his equitable right thereto. It is not a substantive tangible right of such nature and character that it can be seized and held and enjoyed independently of a judicial proceeding. It is a right in action only, that is, it must be established by a judicial proceeding. For this purpose resort must be had to a civil action. Strictly speaking, there are two distinct causes of action in such cases—one consists of those facts that show the right to be subrogated to the rights of the creditor in the securities held by the latter; the other consists of those facts which show that the security may be enforced against the principal. In the natural order of precedence, the party must establish his right to be subrogated to the security before he can be permitted to enforce it."

The note goes on to show that in every case the right to subrogation need not be first judicially determined, for if there is a statute providing for subrogation it is not necessary to the recognition of the right that there be a judicial determination thereof. 68 L. R. A. 574, 577, 587.

[1-2] The principle upon which the right of subrogation is founded applies to cases of suretyship, but it is applied in all cases in

which "one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter." Sheldon on Subrogation, p. 2. Thus insurance companies are given the right. Id. p. 333 et seq. This right of the insurer against the wrongdoer does not rest upon any relation of contract or of privity between them, but arises out of the nature of the contract of insurance as a contract of indemnity. The right arises independent of a provision in the contract of insurance which gives the insurer the right to recover damages from the person responsible for the loss. 44 Am. St. Rep. 731-739.

[3] However, it is plain that the insurer on paying the amount of the loss on the property insured is subrogated only in a corresponding amount to the insured's right of action against any other person responsible for the loss. Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Travelers' Ins. Co. v. Great Lakes Engineering Works Co., 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60. It may be suggested that to permit the insurer to sue at law in cases where the extent of the loss is not covered by the insurance policy would result in splitting a cause of action sounding in tort, and thus subject the defendant to two suits upon a single cause of action. It seems, however, that this result may be avoided by joining the insured as a coplaintiff (Fairbanks v. S. F. & N. P. Ry. Co., 115 Cal. 579, 47 Pac. 450), or as a codefendant if the insured refuses to join as plaintiff (Liverpool, etc., Ins. Co. v. S. P. Co., 125 Cal. 434, 58 Pac. 55), and if the plaintiff fails to do so the defendant may protect himself by pleading such defects of parties, either by demurrer or by plea in abatement. See, also, note, Ann. Cas. 1918A, 835. In Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426, Ann. Cas. 1917a, 1302, cited in the note, the wrongdoer had settled the claim of the insured for damages over and above the amount of the insurance which was paid to the insured by the insurers. The insurance companies then instituted a suit against the wrongdoer in their respective names for the amount of the insurance paid. In affirming the judgment it was held that the action was properly brought, the court saying:

> "If the insurance is less than the loss, and the insured has settled the difference between the insurance and the total loss with the wrongdoer, leaving unsettled only the amount of damages, measured by the insurance, that the cause of action for this damage would be in the insurer, for the reason that the insured has parted with all beneficial interest in the right of action, and, while the cause of action was indivisible, it has been divided by the act of the parties."

[4] It would seem to follow that, if the wrongdoer in an action against him by the insurer for the amount of damages covered by the insurance does not demur or enter a plea in abatement because of nonjoinder, the defect is waived, and he might be held liable to the insured in another action for the amount of the loss not covered by the insurance policy.

[5, 6] The development of subrogation is closely analogous to several other modes of remedy. The question often arises whether one who has suffered by being held liable for the tort or breach of contract of another should seek his remedy by an action founded on an express promise of indemnity, if such there was, or on the implied assumpsit raised by his payment of the obligation of the other, or upon the theory of subrogation. In some cases the claimant may have taken an assignment of the demand he has paid; he may have an express contract of indemnity, or an implied assumpsit to rest upon, and yet, perhaps, may have an election to proceed on the theory of subrogation, "which is a sort of assignment by operation of equity." This doctrine of subrogation having grown up out of the doctrine of assignment of causes of action, it may be well to trace the progress of the latter.

Originally the common-law courts would not recognize an assignment of a right of action; the assignee had no standing in court, and the assignor could sue notwithstanding his assignment. Finally, the courts of equity began to recognize assignments and to enforce them as between the parties and as against the debtor. This equitable practice being firmly established, the courts of law, while theoretically respecting the old common-law doctrine that the assignment was void at law, employed the fiction of a suit by one to the use of the other, and gave the assignee an adequate remedy at law. And it was not necessary to first establish the right to the assignment in a court of equity. At this stage, then, the courts of equity refused to entertain a bill brought by an assignee because he had an adequate remedy at law by suing in the assignor's name. That is the situation here. In modern practice, by the adoption of codes of procedure, the assignee is given the right to sue in his own name. The doctrine of subrogation has progressed in much the same way as the doctrine of assignment, but has not reached the same stage of development. At first subrogation was purely an equitable remedy not to be claimed at law. But the courts of law gradually grew to sustain actions founded on the doctrine of subrogation in cases where the claim itself was cognizable at law. The better view is that a court of law may deal with subrogation as it may with assignment, and when the right of action to which a plaintiff asks to be subrogated is a legal right of action a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature upon the right to which he claims to be subrogated. When the common law first adopted the doctrine of subrogation it was held that the party seeking subrogation could not sue at law in his own name—the action must have been maintained for his benefit in the name of the original claimant. In the practice under the codes of procedure, requiring that the real party in interest shall bring the action, the courts allow one claiming subrogation to a legal cause of action to sue at law in his own name. An assignee is allowed to sue in his own name on the same ground. Of course, if the cause of action to which he claims to be subrogated is an equitable one, he must sue in equity, and there can always sue in his own name. Note to French v. Vix, 30 Abb. N. C. 158–176; Dunlop v. James, 174 N. Y. 411, 67 N. E. 60.

In Boyd v. McDonough, 39 How. Prac. (N. Y.) 389, it was said:

> "This right of subrogation is also recognized by courts of law."

In De Brauwere v. De Brauwere, 69 Misc. Rep. 472, 126 N. Y. Supp. 221, the doctrine of subrogation was held to be cognizable at law, as well as in equity, if the recovery is of a sum of money only. In Polhemus v. Prudential Realty Corp., 74 N. J. Law, 570, 67 Atl. 303, it was held that, although when the right of subrogation is in question the remedy is in equity, when the right itself is conceded, and there remains to be enforced only the right of realizing the value of the subject-matter, such right may be within the cognizance of a court of law. See, also, Baker v. American Surety Co., 181 Iowa, 634, 159 N. W. 1044; Black v. Chicago G. W. R. R. Co., 187 Iowa, 904, 174 N. W. 774.

[7-9] Section 954, Civil Code, provides that—

> "A thing in action, arising out of the violation of a right of property, or out of an obligation may be transferred by the owner."

It is clear that in the case at bar the cause of action of the insured arose out of the violation of a right of property and such right of action, or thing in action, is declared by the above Code section to be assignable. In Dibble v. San Joaquin L. & P. Corp., 47 Cal. App. 112, 117, 190 Pac. 198, the court held that the insurer merely had a cause of action arising by way of subrogation or equitable assignment which is declared to be an assignment by operation of law. If the right of the insured is assigned to the insurer by operation of law there is no necessity to go into equity to establish that right. It is to be noted that section 367, Code of Civil Procedure, wherein it is provided that every action must be prosecuted in the name of the real party in interest, has the practical effect of removing all difficulties in the way of assignments, so that the act of the insurance company in paying the amount of the loss suffered by the collision vested a complete ownership and right of action in such insurance company. The right of action to which the insurer was subrogated being legal, that is for the recovery of money for damages suffered, it is enforceable at law. Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Railways, 39 Cal. App. 388, 178 Pac. 974, involved a provision of the Workmen's Compensation Act which authorizes the assignment of a right of action for personal injuries or for death by providing that a lawful claim for compensation against an employer by an injured employee shall operate as a transfer to his employer of the legal title to his claim for damages against his tort-feasor, or to the latter's insurer paying such claim. Answering the argument that the act rendered the right of action acquired by the employer or insurer an equitable cause of action as against the tort-feasor, the court held that when the payment had been made the assignment of the employee's cause of action is consummated by "such subrogation," and that the right accruing to the insurance company is that of maintaining as the assignee of the employee the same action which such employee could have maintained against the tort-feasor had no such assignment been made. The point is that the right of the insurance company was treated merely as the assigned right of action, in spite of the term "subrogated" in the act.

In considering the right of subrogation two theories must be kept in view. The first theory is that it is a right which must be established by a proceeding in equity, or, if there is a statute which recognizes the right in any particular class of claims, and the right to which the party claiming subrogation is a legal right, such right may be enforced in a court of law. This theory regards the right as a matter of substantive law. 68 L. R. A., supra. The other theory makes the enjoyment of the right depend upon the remedy provided. In New York and other jurisdictions as in this state, where there is a merger of law and equity, and a single forum is theoretically capable of taking cognizance of all rights, both legal and equitable, a so-called equitable right may be enforced in a court of law. In King v. Chase, 159 Cal. 420, 115 Pac. 207, section 1639, Code of Civil Procedure, giving the superior court authority in probate to compel the rendering of an account by the personal representative of the deceased executor, was under consideration. In meeting the contention that such authority was confided to equity, the court said:

> "Such power when it did exist was based solely on the lack of any statutory method of accomplishing the same end by proceeding in probate. Now that this lack is remedied the foundation of equity jurisdiction is gone."

The mode of procedure prescribed by section 367, Code of Civil Procedure, and section 954, Civil Code, is just as effective a mode as that prescribed by the Workmen's Compensation Act, above referred to, and the same result is reached without resort to an independent proceeding in equity. 10 Cal. Jur. §§ 1, 7–9.

[10] The fact that the complaint prays that the court decree the insurance company to be subrogated to the rights of the insured does not determine the nature of the action. In essence the action against petitioner herein is a legal action, and he is entitled to have such action tried in a court of law.

Let a writ of prohibition issue. So ordered.

We concur: MYERS, C. J.; RICHARDS, J.; LENNON, J.; SHENK, J.; SEAWELL, J.; WASTE, J.

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194 Cal. 185

HARRINGTON v. SUPERIOR COURT IN AND FOR PLACER COUNTY et al.

(Sac. 3613.)

(Supreme Court of California. July 30, 1924.)

1. Courts 🔑1—"Jurisdiction" defined.

The word "jurisdiction" embraces every kind of judicial action, and hence every movement by court is necessarily the exercise of jurisdiction, but as ordinarily used it may be concisely stated to be the right to adjudicate concerning the subject-matter in a given case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (Of Courts).]

2. Courts 🔑17, 25—Party may submit to jurisdiction of court having jurisdiction of the subject-matter.

Jurisdiction in any proceeding is conferred by Constitution or by statute, and that of subject-matter cannot be given, enlarged, or waived by the parties, but, if a court has jurisdiction of the subject-matter, a party may voluntarily submit himself to the jurisdiction of the court, or by failing to seasonably object thereto may waive his right to question jurisdiction over him.

3. Appearance 🔑20—Process waived by general appearance or by act equivalent thereto.

Process is waived by general appearance in person or by attorney entered in the action or by an act equivalent thereto, such as filing a pleading or otherwise recognizing the authority of the court.

4. Process 🔑1, 23—"Summons" is means of compelling appearance, and issues as matter of course.

The issuance of and service of "summons" in the manner provided by statute is a means whereby courts compel an appearance of defendant before it; it is not a judicial process, and issues as a matter of course upon application to the clerk without an order by the court or judge directed to the clerk.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Summons.]

5. Appearance 🔑20 — General appearance without objection confers jurisdiction of the person.

A defendant has a right to demand that process be issued against him, but, if not so issued, and he appears generally without making objection, his appearance confers jurisdiction on the court.

6. Eminent domain 🔑172—Jurisdiction of condemnation proceedings depends on subject-matter and an opportunity to be heard.

Under Code of Civ. Proc. § 1246, giving all persons interested in property sought to be condemned the right to appear and defend, condemnation proceedings are in the nature of actions in rem, and jurisdiction thereof does not depend on the disclosed identity of parties defendant but on subject-matter and an opportunity to be heard in the exercise of due process on the most effective notice possible.

7. Eminent domain 🔑167(4) — Prescribed method in condemning land must be strictly pursued.

The proceeding to condemn land for public use is special and statutory, and prescribed method must be strictly pursued.

8. Eminent domain 🔑185 — Service of summons not necessary, if defendant appears.

Although Code Civ. Proc. § 1243, provides that in eminent domain proceedings process shall be begun by filing the complaint and issuing summons, in view of sections 581a, 1244, 1245, 1256, where defendant voluntarily appeared, the issuance of summons was not necessary to confer jurisdiction.

9. Eminent domain 🔑124—On failure to issue summons, value of land condemned to be found on date on which defendant appeared.

In eminent domain proceedings, where defendant voluntarily appeared, and no summons was issued, the date for assessing value of the land was the date on which defendant appeared, in view of the fact that it could not be assessed on the date of issuance of summons, as provided by Code Civ. Proc. § 1249.

In Bank.

Prohibition proceeding by Charles W. Harrington against the Superior Court in and for Placer County, W. I. Redding, Judge, and another. Writ denied.

W. J. Burns, of Auburn (Fred C. Peterson, of San Francisco, of counsel), for petitioner.

Orrin J. Lowell, of Auburn, for respondents.

LAWLOR, J. This is an application for a writ of prohibition to prohibit the superior court of the state of California, in and for the county of Placer, and Hon. W. I. Redding, judge thereof, from proceeding further in that certain action to condemn land for the state highway, wherein the said county is plaintiff and Charles W. Harrington et al. are defendants. On December 21, 1923, an application for a writ of prohibition was filed in the District Court of Appeal for the Third Appellate District, which was denied without hearing or opinion. A petition for hearing herein was, on February 18, 1924, interposed and granted, and an alternative writ of prohibition ordered to issue.

On July 17, 1922, the county of Placer filed its complaint, by which ten separate parcels of land out of a larger body of land owned by petitioner were sought to be condemned for public use as a highway. No application for the issuance of summons was made at the time of the filing of the petition, and it does not appear that a summons was ever issued. A paper dated September 20, 1923, and filed on December 8, 1923, was executed on behalf of the said Charles W. Harrington, the defendant. It reads as follows:

> "Comes now defendant, Charles W. Harrington, and makes his appearance in the above-entitled matter, and reserves unto himself ten days from the date hereof in which to demur or answer to the complaint on file herein."

On October 1, 1923, the defendant, petitioner herein, demurred to the complaint. On the same day a stipulation was entered into by the parties for the purpose of attaching to the complaint a map which had been inadvertently omitted, and excluding from the operation of the condemnation suit a triangular piece of ground upon which a septic tank was located. Furthermore, it was "stipulated that the complaint as so altered constitutes the complaint as to which defendant, Charles W. Harrington, accepted service, and appearing on the 20th day of September, 1923, and that all matters and pleadings subsequent to said date be construed and interpreted as to said complaint so altered."

On November 21, 1923, the demurrer was overruled, and the following order made by the court:

> "It is therefore ordered that the plaintiff take immediate possession and use of the property sought to be condemned, and that the sum of $500 be and is hereby fixed as the amount reasonably adequate to secure to the owners of the property sought to be condemned immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property as soon as the same can be ascertained; and that such possession be taken upon deposit by said plaintiff with the clerk of this court of said sum of $500."

On December 3, 1923, the petitioner gave notice of motion for December 8, 1923, and on the latter date the motion was made in the superior court for an order vacating and setting aside all proceedings therein in said suit, including the making of the above order, upon the ground the court had no jurisdiction to hear or determine any of the issues. It is specified that no summons had been issued upon the filing of said complaint, and that under the wording and meaning of section 1243, Code of Civil Procedure, said action had never been commenced, and hence the court had no jurisdiction over the person of petitioner or the subject-matter. The superior court thereupon denied said motion by an order filed on January 3, 1924. On February 11, 1924, petitioner was given ten days to answer the complaint after the final determination by the Supreme Court of the pending petition for a writ of prohibition.

[1] The precise question presented is whether the court acquired jurisdiction to act.

> "The word 'jurisdiction' (jus dicere) is a term of large and comprehensive import, and embraces every kind of judicial action, and hence every movement by a court is necessarily the exercise of jurisdiction. In the sense, however, in which the term ordinarily is used jurisdiction may be concisely stated to be the right to adjudicate concerning the subject-matter in a given case." 7 R. C. L., 1029.

[2-5] Jurisdiction in any proceeding is conferred by law; that is, by the Constitution or by statute. Jurisdiction of the subject-matter cannot be given, enlarged, or waived by the parties. It has been held that, "where the jurisdiction of the court as to the subject-matter has been limited by the constitution or the statute, the consent of parties cannot confer jurisdiction. But, when the limit regards certain persons, they may, if competent, waive their privilege, and this will give the court jurisdiction." Gray v. Hawes, 8 Cal. 568. See Bates v. Gage, 40 Cal. 183. However, if the court has jurisdiction of the subject-matter, the rule is otherwise, and a party may voluntarily submit himself to the jurisdiction of the court, or may, by failing to seasonably object thereto, waive his right to question jurisdiction over him. Process is waived by a general appearance, in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case or by otherwise recognizing the authority of the court to proceed in the action. 7 R. C. L. 1038 et seq. The issuance and service of summons in the manner provided by statute is the means whereby a court compels the appearance of a defendant before it; it is not a judicial process, and issues as a matter of course upon application to the clerk; that is, it is not regarded as an act requiring an order by the court or judge directed to the clerk. Dupuy v. Shear, 29 Cal. 238. A defendant has a right to demand that process be issued against him in the manner provided by law, but if process is not so issued and he appears generally without making objection, such appearance, being the purpose of the process, confers jurisdiction of the person and the court is empowered to act in the premises.

[6] Condemnation proceedings have been described as proceedings in rem, and jurisdiction, therefore, does not depend on the disclosed identity of the parties defendant, but on the subject-matter and an opportunity to be heard in the exercise of due process on the most effective notice possible. 20 C. J. 916. In this state condemnation proceedings are in the nature of actions in rem, for all persons interested in the property described in the complaint, though not named therein, may appear and defend. Code of Civ. Proc. § 1246. It has been declared that—

> "Upon the presentation of a petition to the district court, in accordance with the provisions of the statute, showing a right on the part of the petitioner to acquire the land therein described, under the law of eminent domain, and invoking the action of the court in the premises, the court has jurisdiction of the subject-matter of the proceeding. There is then only wanting to complete jurisdiction in the condemnation proceedings, that, by the means prescribed by statute or otherwise, the parties whose interests are involved should be brought within the jurisdiction of the court. The provisions of the statute relating to the service of notice of the time and place when the petition will be presented to the court for its action, are designed only for the purpose of investing the court with jurisdiction over the persons interested in the proceeding. Defects with respect to the jurisdiction over the person may be waived, and, when waived, cannot afterwards be questioned. Any distinct recognition by a party in the progress of a cause, of the authority of a tribunal to adjudicate therein, is effectual as a waiver of defects going merely to the jurisdiction of the person." Syllabus, Rheiner v. Union Depot, etc., Co., 31 Minn. 289, 17 N. W. 623.

See, also, 7 Ency. Plead. & Prac. 478, and note. The state of Illinois as well as this state is generally referred to as a jurisdiction in which proceedings to condemn lands are instituted by the issuing of a summons, under statutes prescribing the giving of notice in that form. The County of Yolo v. Knight, 70 Cal. 431, 11 Pac. 662; Pacific Coast Ry Co. v. Porter, 74 Cal. 261, 15 Pac. 774; Leibengut v. Louisville, etc., R. Co., 103 Ill. 431; Hercules Iron Works v. Elgin, etc., R. Co., 141 Ill 491, 30 N. E. 1050; 7 Ency. Plead. & Prac 478. In Skinner v Lake View Av. Co., 57 Ill. 151, it was contended that the court had no jurisdiction of the subject-matter The court said:

> "The filing of the petition and the appearance of the parties in interest dispensed with the notice required to be given, of the time and place of hearing. Consent, then, gave jurisdiction of the persons, but not of the subject-matter of litigation. Jurisdiction of the latter was obtained by a compliance with section 9 of the act of 1859, by presenting the petition, properly describing the lands, and praying for the appointment of appraisers to assess the damages. The service of notice was wholly unnecessary, after the appearance of the parties."

In Bowman v. Venice & Carondelet R. Co., 102 Ill. 472, a petition to condemn land was presented in vacation time, and service was had upon the landowner, but not ten days before the day set by the judge for the hearing of the petition as is required by the statute. It was held that the service was not in time for the purposes of a trial, but it gave the court jurisdiction of the person of the defendant, and, the petition having given jurisdiction of the subject-matter, the court had power to continue the case.

We may now examine the law of this state with reference to jurisdiction in condemnation proceedings. No authority has been found dissenting from the general doctrine recognized in the cases we have cited in condemnation proceedings that while jurisdiction over the subject-matter cannot be conferred by the consent of the parties, jurisdiction over the person may be acquired by service of process, by consent, by general appearance, or by waiver through a failure to seasonably object.

[7, 8] The proceeding to condemn land for a public use is special and statutory, and the prescribed method in such cases must be strictly pursued. Cal. Pac. R. Co. v. Central Pac. R. Co., 47 Cal. 549; McCarty v. S. P. R. Co., 148 Cal. 211, 82 Pac. 615. The law of eminent domain in this state is prescribed by part 3, title 7 of the Code of Civil Procedure, embracing sections 1237 to 1264, inclusive. Section 1243 declares that the jurisdiction in proceedings under title 7 must be commenced in the superior court by filing a complaint and issuing a summons. Section 1244 provides what the complaint shall contain:

> "1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff. 2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants. 3. A statement of the right of the plaintiff. 4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding. 5. A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property. All parcels of land or other property or interest in or to property, lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. * * *"

Section 1245 is as follows:

> "The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of

the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner."

Section 1249 declares:

> "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial."

From the foregoing it appears that differing from an ordinary action (section 405, Code of Civ. Proc.) it is prescribed that a proceeding in condemnation must be commenced by filing a complaint and issuing a summons. The question to be first decided is whether the requirement of section 1243 that a summons be issued is necessary to the vesting of jurisdiction of the subject-matter. In other words, is the court without jurisdiction to act at all if the summons is not issued, or is the requirement to be confined, as in other forms of action, to jurisdiction over the person? If the alternative is to be accepted, then the court had complete jurisdiction of the subject-matter by the filing of the complaint and over the person by the appearance of petitioner. At common law process was necessary before jurisdiction of the subject-matter attached, but, since the whole system of common law writs is abolished and only one form of action is now permitted, the issuance of the writ does not determine jurisdiction; it is the filing of the complaint. We think it clear from the context of the statute and the purpose to be served by the issuance of summons it was not intended that, if the defendant appeared, the issuance of the summons would be necessary to the vesting of jurisdiction, but that the only purpose of the requirement, besides providing a mode for the giving of notice, is to fix the date at which the value of the land is to be assessed. Section 1249. The complaint is required to contain all and more than is requisite to the summons, and under section 1245 the complaint must be referred to in the summons for descriptions of the respective parcels of land. This in effect is a requirement that the complaint shall be served on the several owners. Such a construction is not opposed to the terms of the statute, and hence the usual rule of practice would apply. Section 1256. Section 1245 declares that in particulars not provided for therein the summons must be in the form of process in civil actions, and that it must be served in like manner. Neither in section 1256 nor elsewhere in the statute in eminent domain proceedings is there any provision for dispensing with the issuance or service of summons in any given contingency, and it would seem to follow that in a proper case the provision of section 581a that, if an appearance is made within three years, the action may be prosecuted in the same manner as if summons had been issued and served, would apply.

The courts have never regarded the issuance of summons as an element of jurisdiction that could not be waived. Hayes v. Shattuck, 21 Cal. 52, was an action in ejectment. Section 22 of the Practice Act declared that an action is commenced by the filing of a complaint and issuing a summons. Section 39 provided that a voluntary appearance shall be equivalent to personal service of summons. There had been no issuance of a summons in the action, but the defendant had answered. The court said:

> "Putting in an answer is an appearance; and such an appearance must be held to be a waiver of the mere formality of issuing a summons, the service of which in such cases becomes unnecessary. The only purpose of the summons is to bring the defendant into court. It is constantly said by courts, when actions are commenced by the service of process, as by capias ad respondendum, that a voluntary appearance waives all defects of process, even when objection is taken in the same action."

The identical situation is involved in the proceeding herein, and there seems to be no reason why the same conclusion should not be reached here as in that case. Section 405, before it was amended, provided that an action was commenced by filing a complaint and issuing a summons; section 406 required the summons to be issued within one year. It was held that the issuance of such summons was mandatory, and that, if the defendant appeared specially to dismiss after the year had expired, the action must be dismissed, but that the issuance of such summons could be waived by a general appearance. Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245; Kimball v. Bd. of Supervisors, 46 Cal. 19.

Furthermore, it is not required that the complaint shall be filed and the summons issued at the same time. While it is provided that the proceeding must be commenced by filing a complaint and issuing the summons, the language of the statute does not in its implications negative the construction that, where the defendant voluntarily appears, it will be necessary to issue the summons in order to commence the action or vest the court with jurisdiction to act. Examining the statute in its entirety we are not prepared to hold that the filing of the complaint did not vest the court with jurisdiction of the subject-matter. The purpose of the summons is to give the defendant notice of the pendency of the proceeding. Section 1243 by its terms is not a requirement for complete jurisdiction, for it does not prescribe the service of the summons. The provision therein that "all such proceedings must be commenced by filing a complaint and issuing a summons" is a description of the steps required to secure jurisdiction—the filing of the complaint giving authority over the subject-matter, and the issuing of the summons meaning no more than a step toward acquiring jurisdiction over the person of the defendant, which may be dispensed with if the defendant has appeared. In other words, his appearance obviates giving him notice of the proceedings by process.

[9] We have said that the purpose of requiring the issuance of a summons is to fix a date at which the value of the land is to be assessed. The only provision in the statute dealing with the date at which the value of the land is to be assessed is contained in section 1249, which section also has relation to the contingency that the action may not be tried within one year after it is commenced. The question naturally arises that, if the purpose of the requirement that a summons be issued is to fix a date at which the value of the land is to be assessed, and no summons has been issued, as in this case, at what date will the value of the land be assessed? The answer is that, as the requirement is but a step in the direction of giving the defendant notice of the proceeding, the date for assessing the value of the land will be the date he appeared in the action.

The application for a peremptory writ of prohibition is denied.

We concur: MYERS, C. J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.; WASTE, J.; HOUSER, Justice pro tem.

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194 Cal. 146

TRUCK OWNERS & SHIPPERS, Inc., et al. v. SUPERIOR COURT OF SAN DIEGO COUNTY et al. (S. F. 11090.)

(Supreme Court of California. July 18, 1924.)

1. Courts 🔑26—Court having jurisdiction empowered to define right sought to be protected.

If the superior court has jurisdiction to entertain an action, it has right to define the right sought to be protected.

2. Courts 🔑1—"Jurisdiction" defined.

The jurisdiction of a court is the power to hear and determine and is not contingent upon the regularity of its exercise, nor upon the correctness of its decision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (of Courts).]

3. Prohibition 🔑3(2) — Incorrect judgment may be reversed on appeal, but not on prohibition.

If a judgment of the superior court is incorrect, it may be reversed on appeal, but not on prohibition.

4. Carriers 🔑18(6)—Superior court held to have jurisdiction of action against transportation company, in absence of action by railroad commission.

Where the railroad commission had taken no action under the Auto, Stage, and Truck Transportation Act and Public Utilities Act, enacted pursuant to Const. art. 12, §§ 22, 23, the superior court, as a court of general jurisdiction, under Const. art. 6, § 5, and not a county governing body, within art. 12, § 23, had jurisdiction of action by a transportation company, operating under a certificate of public conveyance and necessity, to restrain defendants from transporting freight without the required certificate.

In Bank.

Application for writ of prohibition by the Truck Owners & Shippers, Inc., and others, against the Superior Court of San Diego County and Hon. W. P. Cary, as Judge thereof. Peremptory writ denied.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for petitioners.

H. J. Bischoff, of San Diego, for defendants.

Hugh Gordon and Carl I. Wheat, amici curiæ, both of San Francisco, Attorneys for Railroad Commission.

SHENK, J. This is an application for a writ of prohibition to restrain the superior court of San Diego county and the Honorable W. P. Cary, judge thereof, from taking further proceedings in the matter of the enforcement of a judgment, and particularly with reference to a citation for contempt, in an action pending in said court.

The Coast Truck Line, a corporation, commenced an action in the respondent court against M. Haydis, Truck Owners & Shippers, Inc., a corporation, and Haydis Forwarding Company, a corporation, wherein the complaint alleged, so far as pertinent here, that the plaintiff was a corporation engaged in the business of transporting freight for compensation over the public highways between the cities of San Diego and Los Angeles, and between other points in the counties of San Diego and Riverside; that the plaintiff had applied for and obtained from the railroad commission a certificate of public convenience and necessity, authorizing it to operate motor trucks for the transportation of property for compensation on and over said highways, pursuant to the provisions of "An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway by automobiles, jitney busses, auto trucks, stages, and auto stages," etc. Stats. 1917, p. 330, and referred to as the Auto Stage and Truck Transportation Act; that the defendants were engaged in the business of transporting freight by auto truck for compensation between Los Angeles and San Diego, without having obtained from the railroad commission a certificate of public convenience and necessity as required by said act; that the defendants were soliciting business from the customers and patrons of the plaintiff, were depriving the plaintiff of much business that would otherwise come to it, and if such practice were to continue, the plaintiff would suffer great and irreparable injury. The plaintiff prayed for an injunction restraining the defendants from transporting freight by motor truck for compensation between the points mentioned in the complaint. After trial of the cause on the merits the court found the foregoing allegations of the complaint to be true, except as to the defendant Haydis, and of date March 4, 1924, rendered judgment restraining the defendant companies from operating auto trucks for transportation of property for compensation on said public highways, in competition with the plaintiff, until they shall have obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation. Thereafter, for an alleged violation of the injunction, the court issued an order requiring the defendant Haydis Forwarding Company, its officers and agents to show cause why they should not be adjudged guilty of contempt of court. Application was then made to this court for a writ of prohibition, wherein the petitioner sets forth the pendency of the action in the respondent court and the proceedings for the enforcement of the judgment therein. It is also alleged in the petition that the Truck Owners & Shippers, Inc., is a nonprofit cooperative corporation, and that its business is the transportation of freight over the public highways for its members only; that no freight other than the freight of its members is by it so transported and that the Haydis Forwarding Company is a member of Truck Owners & Shippers, Inc. The answer of the defendants in the pending action is not before us, but it is assumed, in view of the findings of the court, that one of the issues determined by the court was whether or not the defendant companies, petitioners herein, were transportation companies as contemplated by the said Auto Stage and Truck Transportation Act (St. 1917, p. 330), and were doing business as such. The court found against the petitioners on that issue, and also found that they were subject to supervision and regulation by the railroad commission. It is alleged in the return of the respondents herein, and is not denied, that the railroad commission has never exercised any jurisdiction over the said petitioners.

It is the contention of the petitioners that the superior court had no jurisdiction to determine the cause now pending before it, and, therefore, no jurisdiction to entertain the contempt proceedings to avoid which this application is made. It is urged that the constitutional amendment enlarging the powers of the railroad commission and the acts of the Legislature, passed pursuant thereof, show an intention, on the part of the people of this state and of the Legislature, to provide a complete scheme for the determination by the railroad commission of all transportation questions within the purview of said amendment and acts, and that the jurisdiction of the railroad commission thereunder with reference to such questions is exclusive.

The superior court is a court of general jurisdiction and its jurisdiction in equity is conferred by the Constitution. In section 5 of article 6, the Constitution provides:

> "The superior court shall have original jurisdiction in all cases in equity. * * *"

The cause pending in the respondent court is a suit in equity and that court has jurisdiction to hear and determine the same and to enforce its judgment therein, unless it has been divested of such jurisdiction by some provision of the Constitution or by the Legislature acting in pursuance of some constitutional authority. It is not seriously contended by petitioners that the amendment to the Constitution relating to the railroad commission and to public utilities (art. 12, §§ 22, 23) contains language sufficient in itself to divest the superior court of its equity jurisdiction to hear and determine a cause involving a complaint against a transportation company, but it is insisted that, because of the broad powers lodged in the Legislature under said section 23, and its exercise of such powers in the enactment of the Public Utilities Act (Stats. 1915, p. 115) and the said Auto Stage and Truck Transportation Act, the sole recourse of the plaintiff in the injunction suit was to file its complaint with the railroad commission and there have its rights determined. A brief outline of the provisions of the Constitution and the statutes relied upon by petitioner will therefore be indicated.

Section 22 of article 12 of the Constitution provides that the railroad commission shall have power to hear and determine complaints against transportation companies. Section 23 of the same article provides that:

> "From and after the passage by the Legislature of laws conferring powers upon the railroad commission, respecting public utilities, all powers respecting such public utilities vested

in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, * * * shall cease, so far as such powers shall conflict with the powers so conferred upon the railroad commission."

Said section 23 also provides that the Legislature shall have the right to confer upon the railroad commission power respecting public utilities, unlimited by any provision of the Constitution. Section 31 of the Public Utilities Act vests in the railroad commission the power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary and convenient in the exercise of such power and jurisdiction. Section 54 authorizes the commission to issue certain writs and all process necessary in proceedings in contempt, in like manner and to the same extent as a court of record. Section 60 authorizes the commission of its own motion or on behalf of others to hear and determine any complaint against a public utility claimed to be in violation of law or any order or rule of the commission. Section 61 (a) gives the commission power to conduct hearings in matters within its jurisdiction and to make and file its order containing its decision. Section 65 makes the orders and decisions of the commission final in all collateral actions and proceedings. Section 67 provides for a writ of review in the Supreme Court to determine only whether the commission has regularly pursued its authority or violated any provision of the state or federal Constitutions. This section further provides:

> "No court of this state (except the Supreme Court, to the extent herein specified) shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

Section 72 makes it the duty of the commission to see that the provisions of the Constitution and statutes affecting public utilities, the enforcement of which is not vested in some other officer or tribunal, are enforced and obeyed. Section 75 authorizes the commission to direct its attorney to proceed in the superior court against any public utility, either by way of mandamus or injunction, where, in its opinion, the public utility is failing or refusing to do anything required of it by law. Section 80 provides that the attorney of the commission shall bring actions in the superior court to recover penalties accruing under the act. The Auto Stage and Truck Transportation Act in section 1 defines a "transportation company" as one engaged in the business of transporting persons or freight by automobile, stage, or truck for compensation over the public highways, "between fixed termini or over a regular route," and not operating exclusively within the limits of an incorporated city, and that a finding of the commission as to whether a transportation company is so operating shall be final and shall not be subject to review. In section 4 power and authority to supervise and regulate every transportation company in the state is vested in the commission. Section 5 prohibits any transportation company from operating on the public highways without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. Section 7 adopts the provisions of the Public Utilities Act as to applications and complaints made and filed with the railroad commission, process issued, hearings held, opinions, orders, and decisions made and filed, and petitions for rehearings filed and acted upon, and petitions for writs of review or mandates filed with the Supreme Court of the state, considered and disposed of by said court.

It may be assumed that, under the broad grant of powers to the Legislature by the Constitution, that legislative body has the authority to divest the superior court of all jurisdiction respecting the control or activities of public utilities, but the question is: Has it done so?

It is clear that the superior court is not a "governing body" of the county, within the meaning of the term thus used in section 23 of article 7 of the Constitution, and that by the enumeration of the public agencies whose powers over public utilities shall cease and the failure to include the superior court, it must be assumed that it was not intended to include the latter as coming within such automatic divestiture. Also, from a consideration of the foregoing constitutional and statutory provisions, it must be conceded that neither the Constitution nor the Legislature has expressly divested the superior court of its entire jurisdiction in cases affecting public utilities. But the petitioners contend that, from a general survey of the law as a whole, it must be concluded that a general plan has thus been devised and put into operation which has by implication divested the superior court of such jurisdiction and lodged in the railroad commission full and complete and exclusive jurisdiction in such matters; including the right to entertain the complaint of the plaintiff in the injunction suit against the defendants therein, coupled with the exclusive right to determine whether the petitioners are transportation companies operating "between fixed termini or over a regular route," and that the decisions of this court have upheld the view that the jurisdiction of the railroad commission is exclusive.

It is no longer a subject of controversy that, by reason of the provisions of section 67 of the Public Utilities Act, the superior court has no jurisdiction when the commission has acted to "review, reverse, correct, or annul any order or decision of the commission." Jurisdiction in such matters is exclusively in the Supreme Court (Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822). In that case it was contended that the attempt of the Legislature to confer upon the Supreme Court exclusive jurisdiction to review such proceedings and thus deprive the superior court of its constitutional jurisdiction in certiorari was in itself unconstitutional. It was held that the broad powers vested in the Legislature by the Constitution were sufficient to authorize it to limit or destroy the jurisdiction of the courts of the state and also to authorize it to confer upon such courts such jurisdiction as it sees fit in matters cognate and germane to the regulation of public utilities. Petitioners rely on that case as indicating that the superior court has been deprived of all jurisdiction relating to control or restraint of public utilities. But the statement in that case that "the deprivation of jurisdiction of the courts of the state may not be questioned" had particular reference, under the facts there shown, to the deprivation of jurisdiction of the superior court in cases where the railroad commission had acted and could have no bearing upon the jurisdiction of the superior court, in cases where the commission had taken no action whatsoever.

Nor is it open to question that the superior court has no jurisdiction to "enjoin, restrain, or interfere with the commission in the performance of its official duties." In the case of Sexton v. Atchison, etc., Ry. Co., 173 Cal. 760, 161 Pac. 748, application was made to the superior court to restrain the directors of the railroad company from issuing free transportation to the members of the railroad commission, its officers and employees, and to restrain the commission from taking any action against the railroad company for failure to comply with the provisions of the Public Utilities Act relative to such transportation. It was held that the relief sought, if granted, would interfere with the commission in the performance of its official duties, which "no court of the state" could do except as provided in section 67 of the Public Utilities Act.

Again, it cannot be questioned that the superior court has no jurisdiction to compel the commission to act. That right is vested solely in the Supreme Court and was exercised in Western Ass'n, etc., R. Co. v. Railroad Comm., 173 Cal. 802, 162 Pac. 391, 1 A. L. R. 1455, in which this court issued a writ of mandamus directing the commission to exercise its jurisdiction in matters respecting transportation companies when the commission had refused to act.

Petitioners have not cited any case in this state wherein it was held or intimated that the superior court has no jurisdiction to entertain a suit in equity, the purpose of which was to restrain a public utility from unlawfully interfering with the rights of the plaintiff, and in which it appeared that the railroad commission had not acted or had failed or refused to act. On the other hand, the respondents have pointed out that such a question was involved in the case of Yolo Water & Power Co. v. Superior Court, 43 Cal. App. 332, 185 Pac. 195. That was a petition for a writ of prohibition to prevent the superior court of Lake county from hearing and determining an application for an injunction in a suit brought by the district attorney, in the name of the people of the state, against the petitioner, a public utility corporation, to restrain it, among other things, from building a dam across the arm or slough of Clear Lake at a point where the pumps of said defendant were located, and from drawing off the water of the lake any faster than the same would naturally flow therefrom. The application for the injunction was made on the ground that the alleged action of the defendant would constitute a nuisance. The principal contention of the petitioner was that the court could not entertain an action brought by the district attorney, in view of the provisions of section 75 of the Public Utilities Act to the effect that the commission shall direct its attorney to bring proceedings in the superior court against any public utility whenever, in the opinion of the commission, such "public utility is failing to, omitting, or about to fail or omit, to do anything required of it by law." It was argued by the petitioner that the course thus indicated in said section was exclusive, and that section 4156 of the Political Code, authorizing the district attorney to bring actions in the name of the people to abate nuisances, had been repealed by said section 75 so far as public utilities were concerned. By reason of the nature of the proceeding, the question of the jurisdiction of the superior court was necessarily involved and it was held that the grant of a right to the commission to prosecute injunction suits was "not at all inconsistent with the continuance of said right in others who may feel aggrieved by the act of a public utility." An application for a hearing in this court after that decision was rendered was denied. So, here, the argument is convincing that the right of the commission to proceed against the petitioners for operating a transportation company without a certificate of public convenience and necessity, is not inconsistent with the right of the plaintiff in the pending injunction suit to proceed against the defendants therein to protect its alleged rights.

[1-3] We are not here concerned with the nature of the right which the said plaintiff is seeking to enforce. If the superior court has jurisdiction to entertain the action, it has the power to define the right sought to be protected. Nor are we here concerned with the correctness of the judgment of the superior court. The jurisdiction of the court is the power to hear and determine. It is not contingent upon the regularity of its exercise nor upon the correctness of the decision. Lange v. Superior Court, 11 Cal. App. 1, 103 Pac. 908. If the judgment of the superior court be incorrect, it may be reversed on appeal, but not on prohibition. Sutter-Butte Canal Co. v. Superior Court, 183 Cal. 324, 191 Pac. 529.

[4] It is insisted by petitioners that, unless the railroad commission has exclusive jurisdiction to determine the questions of fact involved in said injunction suit and to make its order accordingly, great confusion will arise for the reason that the superior courts in the several counties may make widely divergent decisions touching the same or similar facts. It is particularly urged by counsel for the railroad commission, appearing as amicus curiæ, that it is the peculiar and sole province of the commission to determine the fact as to whether or no any particular individual or company is operating "between fixed termini and over a regular route" and is, therefore, a "transportation company." And it is argued that if the superior court should find, as it has found in the pending case, that the petitioners are transportation companies, and suppose, say counsel, that later on the commission should assume jurisdiction in a proper proceeding before it, and should determine that the said operations were not "between fixed termini and over a regular route," and that still later an application should be made to the superior court to dissolve the injunction and the court should deny the motion, would not such denial be an interference "with the commission in the performance of its official duty?" In answer to the query it should be borne in mind that we are not here dealing with a situation where the commission has acted. It may also be noted that the commission undoubtedly has power to inquire into the methods and activities of the plaintiffs, as well as the defendants, in said action as to their transportation operations, either on its own motion or on the complaint of petitioners. Likewise it may be noted that the functions of the commission may be brought into play by an application by petitioners for a certificate of public convenience and necessity. If such certificate be granted, the injunction in the pending cause would cease, for by its own terms it is enforceable against the petitioners only "until they shall have obtained from the railroad commission of the state of California a certificate declaring that public convenience and necessity require such operation." Furthermore, if the commission should assume jurisdiction in an investigation as to the activities of the petitioner and the injunction plaintiff, or both, and should determine under subdivision (3) of section 1 of the Auto Stage and Truck Transportation Act that the petitioners were not operating "between fixed termini and over a regular route" and, therefore, were not transportation companies as defined by that act, its finding would not be subject to review and it would then have the power, under section 31 of the Public Utilities Act, to make all necessary orders to enforce its decision in the matter.

It may be assumed for the purpose of this proceeding that the court should have included in its injunctive order the further limitation that it should cease upon a finding by the railroad commission that the petitioners are not "transportation companies," and it may be further assumed that any action on the part of the court to enforce the injunction after such finding by the commission would be in excess of its jurisdiction. But with these assumptions it would not follow that the injunction would not be valid until such finding be made. Until that event the injunction would be operative. We are here called upon to determine the jurisdiction of the court under the facts disclosed by the record, and not as they may be at some future time. We entertain no doubt that, when the commission has assumed and exercised its jurisdiction, the court would conform its orders and process agreeably to the action of the commission made within its jurisdiction. When the commission has acted, it may be said, as was very aptly stated in Yolo Water & Power Co. v. Superior Court, supra:

> "Powers conferred by the Constitution upon the railroad commission, to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law, are not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against public utilities. To so hold will not create any conflict between the courts and the commission, because in all such suits the courts will be bound and guided and controlled in all respects in entertaining and deciding or dismissing them as much by section 23 of the Constitution and the Public Utility Act as by any other provision of the law."

We find nothing in the several provisions of the Public Utilities Act or the Auto Stage and Truck Transportation Act relied on by petitioners, which would warrant the conclusion that the legislative branch has so framed the laws respecting public utilities as to divest the superior court of its general jurisdiction in equity under the circumstances here shown. Petitioners have called attention to the fact that in several other jurisdictions the right of control over the activities of public utilities is vested in such a body as our railroad commission, to the exclusion of the jurisdiction of the courts, either wholly or in part. The respondents have pointed out that in an equal or greater number of other jurisdictions the equity powers of the courts of general jurisdiction have continued, notwithstanding similar laws. These cases have been considered, but it is deemed unnecessary to discuss them for the reason, as frankly conceded by the petitioners, that other state courts, which hold that the railroad commission jurisdiction is exclusive, all go further than the courts of this state, because of the peculiar provisions of our constitutional and statutory law. The proper construction of the laws peculiar to this state must, of course, necessarily govern. The question of exclusive control of public utilities is primarily one of legislative policy subject, of course, to constitutional grant or limitation. Where the courts have been denied or have refused to take jurisdiction, it has been said that it was the legislative policy to relegate all such questions to the commission having jurisdiction to entertain the same. For example, in State v. Duluth, etc., 153 Wis. 650, 142 N. W. 184, relied on by petitioners, it was stated with reference to the laws of Wisconsin establishing a railroad commission:

> "The new system did not absolutely take away any of the constitutional jurisdiction of the circuit court; but deference to the legislative will, which is due to a co-ordinate department of the government, requires that such jurisdiction shall not be exercised in any situation—which the Legislature placed, as a matter of administrative power, in that of the railroad commission as regards original actions—in the absence of some extraordinary emergency not liable to arise."

But even in that case the court did not go as far as petitioners here contend. There the lower court had issued an alternative writ of mandamus to compel a street railway company to furnish cars sufficient for adequate service to the public during a strike of its employees. On appeal from an order denying a motion to quash the writ, the Supreme Court of Wisconsin held that the lower court should hesitate to interpose this extraordinary writ to solve such a complicated problem involving property rights, and made the general declaration above quoted, but stated that it did not intend "to suggest that an occasion might not arise, or may have existed in this case, warranting the exercise of the equity authority of the court to solve the difficulty."

In the proceeding before us, due deference to the legislative branch would seem to require that this court neither extend nor limit the policy which the Legislature clearly indicates should be followed in this state. The Legislature under the Constitution has full power to act, and by such action to declare such policy. It has acted and has declared that no court of the state except the Supreme Court shall have power to review the decisions of the railroad commission nor compel it to act, and that no court of the state shall interfere with the commission in the performance of its official duties, except as the action of the Supreme Court might constitute such interference in matters of review, mandamus, etc. In sections 75 and 80 of the Public Utilities Act it expressly recognizes the right of the superior court to exercise its jurisdiction in matters affecting public utilities when such jurisdiction is invoked at the instance of the commission or of its attorney. Having the right to further limit or abolish the jurisdiction of the superior court in such matters and not having done so, and thus having in effect declared its policy on the subject, it is not for the court to say that the Legislature has not gone as far as it should have gone in the matter within its exclusive control. Until it has further exercised its power to divest the superior court of its powers in matters affecting public utilities, it must be concluded that such courts as courts of general jurisdiction are open to others as well as to those upon whom the right to resort thereto is specially conferred by the Public Utilities Act and that, therefore, the respondent court had jurisdiction to entertain and decide the pending action, and to take the necessary steps to enforce its orders and judgment therein.

The peremptory writ is denied.

We concur: MYERS, C. J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.

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194 Cal. 183

PETALUMA MUNICIPAL WATER DIST. v. SUPERIOR COURT IN AND FOR SONOMA COUNTY et al. (S. F. 11237.)

(Supreme Court of California. July 29, 1924.)

Mandamus ⟹4(1)—Will not issue solely to review alleged errors properly reviewable by means of appeal.

The writ of mandamus will not issue solely to serve the purpose of writ of review in order to pass upon claimed errors, committed by respondent court in exercise of its jurisdiction, which are properly reviewable on appeal.

In Bank.

Application by the Petaluma Municipal Water District against the Superior Court in and for the County of Sonoma and another, judge thereof, for writ of mandate to require defendants to proceed with the hearing and determination of an action in eminent domain. Application denied.

George H. Harlan, of San Rafael, for petitioner.

PER CURIAM. Application for a writ of mandate. It is alleged in the petition that petitioner herein, a public agency, commenced proceedings in eminent domain in the respondent court to procure by condemnation for public use a right of entry and occupation of certain lands, together with the right to take therefrom such earth, gravel, stones, or other materials which might be necessary for the public use and for the determination of the character of the foundations of a dam proposed to be erected thereon for the conservation of water; that the defendant in said action demurred to the complaint on the ground that said court had no jurisdiction over the subject-matter of said action; that the respondent court sustained said demurrer with leave to amend; that said demurrer was sustained because of the erroneous belief on the part of the respondent judge that this court had decided in Jacobsen v. Superior Court, 219 Pac. 986, 29 A. L. R. 1399, that the right of entry, occupation, and taking of materials from land which is sought to be condemned in and by the pending proceeding is not subject to condemnation under the laws of California. That case does not so hold, but we will not pause here to consider and determine whether or not the respondent court erred in sustaining the demurrer. This petition is for a writ of mandate directing the respondent court to proceed with the hearing and determination of said action in eminent domain. It having jurisdiction of the pending proceeding has not refused to exercise the same, but has ruled, either correctly or erroneously, in the exercise of its jurisdiction. The writ of mandate will not issue solely to serve the purpose of a writ of review in order to pass upon claimed errors which are properly reviewable by means of an appeal.

The application is denied.

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194 Cal. 243

TREADWELL v. NICKEL. (S. F. 10721.)

(Supreme Court of California. July 31, 1924.
Rehearing Denied August 28, 1924.)

1. Attorney and client 🔑76(2)—Client's death severs all previous relations with attorney.

Death of client severed all previous relations with his attorney of whatever nature.

2. Attorney and client 🔑63—Attorneys' written contract of employment with corporation held modified by executed oral agreement.

Where corporation's general counsel agreed orally with official representing the corporation that his contract of employment should not include services to individual stockholders and parties governed themselves accordingly thereafter, the oral agreement became executed by virtue of Civ. Code, § 1661, and under section 1698 modified the original contract in writing.

3. Attorney and client 🔑76(1)—Contract of employment extinguished by rescission, which may be by consent of parties.

Under Civ. Code, §§ 1688, 1689, subd. 5, providing that a contract is extinguished by its rescission which may be by consent of the parties, if corporation's contract with its counsel requiring performance of services for stockholders was rescinded by mutual consent and new arrangement made and performed, counsel was free to make independent contract with persons interested in stockholder's estate.

4. Contracts 🔑254—Executed parol agreement may rescind contract under seal.

A parol agreement to rescind a contract even under seal is good if such parol agreement is executed.

5. Contracts 🔑350(3)—Parol agreement to abandon or rescind inferable from parties' acts.

Parol agreement to abandon or rescind a written contract may be inferred from acts of the parties.

6. Attorney and client 🔑167(2)—Whether corporation's general counsel was left free to contract for administration of stockholder's estate by abandonment of his employment contract held for jury.

In suit by corporation's general counsel for fees for administering estate of stockholder, whether plaintiff's whole conduct in conducting corporation's affairs showed abandonment and rescission by both parties of his employment contract which required rendition of services to stockholders, leaving counsel free to contract for administration of stockholder's estate for extra compensations, *held* for jury.

7. Appeal and error 🔑1002—Rule for determining sufficiency of evidence to support verdict.

When verdict is attacked for insufficiency of evidence, Supreme Court's power begins and ends with inquiry whether substantial evidence contradicted or uncontradicted, in and of itself, supports the verdict, and, if conflicting on any material point, the jury is assumed to have resolved the conflict in favor of prevailing party.

8. Contracts 🔑350(3)—Rescission by oral contract is provable by mere preponderance of evidence.

Rescission of a written contract by oral agreement, executed and accomplished, need be proved by mere preponderance of evidence, and an instruction requiring clear, positive evidence above suspicion was most favorable to party denying rescission in view of Code Civ. Proc. § 2061, subd. 5.

9. Appeal and error 🔑1005(2)—Sufficiency of evidence to establish fact by clear convincing proof is primarily for trial court and jury; not reviewable.

Sufficiency of evidence to establish a given fact, even where the law requires clear and convincing proof, is primarily for the trial court and jury, and, when supported by substantial evidence, their finding is not reviewable.

10. Attorney and client 🔑167(2)—Whether trustee expressly agreed to pay attorney's fees for administering estate held for jury.

In attorney's suit for fees for administration of an estate, whether defendant, a trustee and beneficiary of testator's property, expressly agreed to pay reasonable value of plaintiff's services, was a question of fact for the jury.

11. Contracts 🔑31—"Express contract" need not be written.

While Civ. Code, § 1620, defines an "express contract" as one the terms of which are stated in words, it need not necessarily be in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Express Contract.]

12. Contracts 🔑176(7)—Interpretation of oral contract in first instance is for jury.

Interpretation of oral contract in the first instance is a question of fact for the jury.

13. Trial 🔑244(2)—Instructions singling out evidence are properly refused, though not prejudicial, if given.

Instructions, framed solely to emphasize some particular portion of evidence and having that effect, are not commendable, and properly refused, though not necessarily prejudicial, if given.

14. Trial 🔑296(7)—Instructions emphasizing particular evidence held cured by general instructions.

Instructions emphasizing particular portions of evidence *held* cured by general instructions apprising the jury that all facts and circumstances in the case were to be considered.

15. Trial 🔑253(1)—Instruction held not erroneous as excluding amended bill of particulars from consideration.

Instruction that issues of fact were precluded by denials made in the answer and allegations in the complaint and affirmative matter pleaded by defendant *held* not erroneous as excluding plaintiff's amended bill of particulars from consideration.

16. Pleading 🔑327—Amended bill of particulars considered as incorporated in complaint.

An amended bill of particulars, furnished to defendants, is an amplification of the complaint, and to determine plaintiff's right of recovery, or admissibility of his evidence, is considered as incorporated therein.

17. Trial 🔑256(3)—Instruction relating to bill of particulars held proper in absence of request to give more specific instruction.

In attorney's action for compensation where court charged that an amended bill of particulars segregated the various services performed, and placed a value upon each, aggregating for all $641,273, reduced in the complaint to $300,000, and no further or more explicit instruction was requested by defendants, they could not complain that they were not given.

18. Evidence 🔑570—Weight to be given expert testimony, stated.

Expert testimony is entitled to weight to which it appears in each case to be justly entitled, just as any other evidence, having little value unless material facts assumed in the hypothetical question are true, but not being wholly valueless because of some variance between assumed and actually proved facts; the weight being for the jury under proper instructions.

19. Trial 🔑235(7)—Instruction to disregard expert testimony unless all the material facts assumed were true held properly refused.

Instruction to disregard expert testimony, unless all the material facts upon which the hypothetical question to the expert was based were true, *held* properly refused.

20. Trial 🔑140(1)—Truth of purported facts in hypothetical question is for jury.

Where the evidence is sufficient as basis for hypothetical question, truth or falsity of purported facts upon which such question is based is for the jury.

21. Attorney and client 🔑167(3)—Trial 🔑253(3)—Instruction that attorney could not recover for ordinary services to trust estate under which bulk of estate passed held properly refused.

In attorney's suit for fees for administering an estate, instruction that plaintiff could not recover for ordinary services to a trust estate, as distinguished from the estate, and, if entitled to recover at all, could only be allowed $1,067.16, as provided by Code Civ. Proc. § 1618, for handling the small estate, *held* misleading and properly refused where the bulk of the estate passed under a deed of trust, since it withdrew issue whether fees for both estates on basis regarded by the Legislature as reasonable in ordinary probate matters were reasonable.

22. Trusts 🔑227—Attorney entitled to reasonable fee.

An attorney for a trustee is entitled to the reasonable value of his legal services as a proper expense out of the trust fund, and whether compensation prescribed by Code Civ. Proc. § 1619, for ordinary probate matters would be reasonable is a question for the jury.

23. Evidence 🔑553(3)—Requirements of hypothetical questions, stated.

In hypothetical questions, considerable latitude must be allowed in choice of facts, and, though every hypothesis contained therein should be sustained by evidence, it need not state all such evidence in the case, and may be framed on any theory deducible therefrom, assuming any facts within the limits of the evidence upon which the expert opinion is desired, and omitting any facts questioner deems immaterial so long as not misleading or unfair.

24. Evidence 🔑553(1)—Hypothetical question to expert witness, misstating fact, held cured by subsequent summary.

In attorney's action for fees for administration of estate, plaintiff's hypothetical question, to expert witness, assuming that plaintiff had saved $83,000 in contesting a claim against the estate, where the evidence showed $53,000, *held* cured by subsequent summary of taxes saved, correcting the error.

25. Trial 🔑83(1)—Objection that no evidence supported question, where evidence was stricken out, held sufficient.

Objection to hypothetical question that there was no evidence to support it, where the evidence supporting it had been stricken from the record, *held* sufficient, since stricken evidence is no evidence.

26. Evidence 🔑553(4)—Hypothetical question to expert witness held not fatally defective because based in part on stricken evidence.

In attorney's suit for fees for administering an estate hypothetical question to expert *held* not fatally defective, because based in part on inconsequential evidence stricken from the record, relating to what another attorney told plaintiff concerning attitude of newspapers, and public, toward litigation against the estate.

27. Trial 🔑243—Instruction held not erroneous though inconsistent with another.

In suit, by general corporation counsel, for fees for administering estate of stockholder, instruction that, even though the contract with the corporation were in force, it would not prevent trustees of the stockholder's estate from making an independent contract with plaintiff to administer the estate, *held* not erroneous, though in apparent conflict with instruction that, unless changed or abandoned the contract with the corporation controlled and prevented a recovery.

28. Appeal and error 🔑882(12)—Giving of conflicting instructions on material point is error, but party cannot complain when other party's instructions correct.

Giving of conflicting instructions upon a material point is error, but a party may not complain of inconsistency, arising through giving of his requested instructions which are inconsistent or contradictory of those given for the other party, which are pertinent to the issues and correct statements of the law.

29. Appeal and error 🔑1064(1)—Conflict in instructions not injuring appellant is harmless error.

Conflict in instructions not injuring appellant is not ground for reversal.

30. Appeal and error 🔑1066—Incorrect instruction not injuring appellant's cause held harmless error.

No injury to appellant's cause appearing by reason of incorrect instruction on an abstract matter of law, the error will be disregarded as unimportant and unsubstantial.

In Bank.

Appeal from Superior Court, San Mateo County; Benj. R. Knight, Judge.

Suit, by Edward F. Treadwell against J. Leroy Nickel and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, Ross & Ross, of Redwood City, and Frank D. Madison and Alfred Sutro, both of San Francisco (Eugene M. Prince, of San Francisco, of counsel), for appellants.

Lucien Shaw, of Los Angeles, and Franklin Swart, of Redwood City (R. S. Laughlin and E. F Treadwell, both of San Francisco, of counsel), for respondent.

WASTE, J. Plaintiff brought suit for $300,000, alleged to be the reasonable value of his services as attorney for the defendants in connection with various inheritance and federal estate tax matters growing out of the trust created by Henry Miller, and covering a period of nearly six years from October, 1916, to August, 1922, and including, also, various matters in connection with the administration of the estate of Henry Miller. The case was tried before a jury upon the issues raised by plaintiff's complaint, his amended bill of particulars, and defendants' answer, and resulted in a verdict and judgment awarding plaintiff the amount prayed for and costs, from which judgment defendants have appealed.

In the year 1907, plaintiff was employed "to act as general counsel for" Miller & Lux, Incorporated, at a designated monthly salary. The contract of employment is embodied in a series of letters passing between plaintiff and the defendant J. Leroy Nickel, as vice president of the corporation. In a letter dated May 14, 1907, plaintiff proposed to take charge of all the general business of the company, to be associated in all cases in which other counsel might be employed, and to devote all his time to the company's business. He also proposed that—

"Any work done by me [plaintiff] for stockholders of the company to be done without extra compensation, the same being a credit to Miller & Lux, Incorporated."

In reply, and under date of May 17th Mr. Nickel wrote to plaintiff:

"Yours of May 14th is received. In reply I beg to say you do not state the terms under which Miller & Lux, Incorporated, engaged your services to act as general counsel exactly in accordance with my understanding. You limit the service to work done for stockholders of the company. The arrangement may be more correctly stated as follows: Any business or service of any nature, which you may be called upon to render either to Miller & Lux, Incorporated, or for any other interests which its officers may deem proper to place in your hands shall be attended to by you, for which you are to receive a monthly compensation of $350.00 net per month, and it is understood that no extra compensation shall be paid for services rendered in addition to the business of Miller & Lux, Incorporated."

Replying to this letter on May 18th plaintiff wrote to Mr. Nickel:

"Your statement of the basis of our agreement is entirely satisfactory to me."

Under this contract plaintiff became general counsel for Miller & Lux, Incorporated. His salary was increased from time to time, in addition to which Miller & Lux provided his offices, necessary stenographers, clerks, and assistants, and paid other office expenses.

Prior to April 17, 1913, Henry Miller was practically the sole owner of the capital stock of Miller & Lux, Incorporated, a Nevada corporation. On the last-mentioned date, by a deed of trust, he transferred this stock to his daughter, the defendant Nellie Miller Nickel, and her husband, the defendant J. Leroy Nickel, in trust, they to collect the rents, issues, and profits thereof and pay the income therefrom to Henry Miller during his life, and after his death to sell sufficient stock to pay certain specific bequests, aggregating about $300,000, the income from the property to be paid to the trustees during their lives. The deed contained further provisions for the disposition of the property after the death of the trustees. On the same day Mr. Miller also made his last will and testament, directing that certain real property be disposed of, and leaving the residue of his estate to the defendants to be held upon the same trusts as provided in the deed of trust.

Henry Miller died on October 14, 1916, being at the time of his death a resident of the state of California. At the instance of the defendants, plaintiff filed the will for probate, recorded the deed of trust, and assumed entire charge of all legal matters and litigation connected with the estate and the trust. The estate of Henry Miller, exclusive of the Miller & Lux stock, which was appraised by federal and state officials in varying amounts up to $48,000,000, and which had been estimated in 1910 by Mr. Miller himself at about $32,000,000, consisted of three pieces of land and certain cash, all appraised at approximately $34,000. The state of California made claim against Miller's estate for inheritance taxes on a property valuation of $40,000,000, on the ground that the deed of trust was made in contemplation of death. The state of Nevada likewise contended that an inheritance tax was due upon the shares of stock of Pacific Live Stock Company, a California corporation owning a large amount of real and personal property in the state of Nevada; all of the stock of that company being held by Miller & Lux, Incorporated. Federal estate taxes, also, were imposed upon the property in the sum of nearly $4,000,000, based upon an appraised value of over $39,000,000. Though failure to file a return, a penalty was levied in an amount equal to half of the tax, which, together with interest and a claimed additional penalty, brought the entire tax to over $6,500,000, demand for the payment of which was made by the collector of internal revenue, with the threat that unless the tax was paid within 10 days the government would proceed to seize and sell the property without suit. Plaintiff expended a large amount of time and labor in contesting the various tax claims and in an effort to have their validity determined, the litigation extending over a period of nearly six years. Plaintiff contends that through his efforts there was eliminated from the amount of taxes, interest, and penalties claimed by the states of California and Nevada, and the United States, more than $17,250,000. Plaintiff was also continuously called upon to furnish legal advice in connection with matters concerning the estate and trust, the property value of which was appraised at more than $41,000, 000. Had the estate of Henry Miller been conducted in the usual manner of probate proceedings, and not almost entirely as a trust, plaintiff would have been entitled to an attorney's fee of more than $200,000 for conducting the ordinary matters of probate. Code Civ. Proc. §§ 1618, 1619. In addition to such ordinary services, he conducted the litigation concerning the various tax claims to a successful termination. During the pendency of these actions it became necessary to determine upon the amount of a reasonable attorney fee for the conduct of the estate and trust, in order that the amount might be deducted from the value of the estate before the inheritance and estate taxes were computed; and the evidence shows that plaintiff and the defendants agreed upon the sum of $300,000 as being a reasonable attorney's fee in the matter. Plaintiff resigned as general counsel for Miller & Lux in 1921, but continued to handle the legal matters of the estate and trust of Henry Miller until they were finally settled.

When the estate of Henry Miller had been finally distributed, and the inheritance tax litigation was practically concluded, plaintiff requested Mr. Nickel to consider and definitely fix his compensation in the matter. Nickel replied, after considering the matter with others, that it had been decided, as a proper recognition of plaintiff's services in connection with the estate litigation, to present him with the sum of $50,000. Plaintiff declined to accept this amount, stating that in the estate tax matters it had become necessary to fix what would be a fair compensation for his work in that connection in order that the estate could get the benefit of the amount of such fee as a deduction. This amount, $300,000, he considered very conservative, and it was his view that an amount approximating that sum should be paid him. There was some further correspondence between the parties relative to the fee, and, no amount being paid, plaintiff brought this action.

Although the record brought here is voluminous, consisting, as it does, of many hundreds of pages of testimony, the case is a very simple one. It is alleged in the complaint that the defendants employed plaintiff "as their attorney to take all proceedings and give all legal advice necessary for the determination of all liens and claims against the said trust property and against the estate of the said Henry Miller, and particularly all claims of the state of California, the state of Nevada, and the United States of America to inheritance tax liens or estate tax liens upon the estate of said Henry Miller, deceased, and to perform all legal services and give all legal advice necessary in connection with the administration of said estate and trust until the final determination of said claims, and promised and agreed to pay plaintiff the reasonable value of such services." The answer denied these allegations, and by way of defense alleged that the services were performed by plaintiff under the terms of the contract with Miller & Lux. Thus the main issue was joined. In his amended bill of particulars plaintiff segregated the services rendered, and placed a value on them aggregating approximately $650,000, but waived his claim for compensation in any amount over $300,000 "for the reason that that amount was agreed upon between the plaintiff and the defendants as the reasonable value of said service." The question as to the reasonable value of the services rendered by the plaintiff was submitted to a number of able and competent attorneys, who testified in the case. Some of them advanced a lower figure than that claimed by him, but others fixed their value at amounts far in excess of that established by the verdict. Consequently the issue as to the value of the services may be considered as having been closed by the finding of the jury.

The important question in the case is whether the services rendered by plaintiff in connection with the estate and trust of Henry Miller were covered by his retainer as general counsel for Miller & Lux, Incorporated, under the contract of May, 1907, and "consisted of business and service which plaintiff was called upon to render and which was placed in plaintiff's hands by defendant J. Leroy Nickel as president and managing officer of said Miller & Lux, Incorporated"; or whether the services were rendered under an entirely separate and distinct contract with the defendants. We feel that no good will be accomplished by attempting a minute review of the long transcript of the evidence submitted in the court below. At the outset of the trial plaintiff sought to introduce evidence of the circumstances surrounding the execution of the contract of May, 1907, by which he became general counsel for Miller & Lux, upon the theory that such evidence was admissible to show that the contract did not include the extraordinary services rendered by him in connection with the estate and trust. The trial court, however, was of the view that the contract "stated in plain and unequivocal terms" what Mr. Treadwell would be required to do, and, unless changed or abandoned, would include the services sued upon in this action; that to allow oral proof to be introduced on the theory contended for by the plaintiff would serve, not to explain any ambiguity appearing on the face of the contract, but to show that a meaning was intended contrary to that which did appear upon the face of the agreement itself. Consequently, the court held that it would not allow any oral testimony to be introduced merely to show the intention of the parties at the time the contract was entered into, but the evidence of an executed oral agreement subsequent to the contract might be received to show that the contract had been changed or partially abandoned; that, although conversations in 1907 were inadmissible under the parol evidence rule to vary the plain meaning of the letters constituting the contract, such conversations, if they had been referred to or repeated after the dates of the letters, might be received in evidence to show that the contract was changed after it was made.

The parties introduced oral testimony, which is sharply conflicting on every material point, and certain documentary evidence. The case of the plaintiff rests largely upon his own testimony and evidence of acts of the parties extending over a period of 15 years. Appellants contend that the evidence does not support the verdict. It requires only a casual inspection of the record to disclose that not only is there a conflict in various material parts of the evidence, but that widely divergent conclusions may be drawn therefrom. On a careful reading of the voluminous record, we are most strongly convinced that the case is one in which the findings of the jury are based upon reasonable inferences drawn from the facts proved with such legal sufficiency that the verdict on the facts cannot be disturbed on this appeal.

From the facts established by the evidence it appears that from the time of his employment in 1907 to August, 1922, the plaintiff attended to all the legal business of Miller & Lux which its officers requested him to perform and which included not only the business of Miller & Lux but that of a number of other corporations, some of which were subsidiary to it, and others in which it held varying amounts of stock. It also appears that after his appointment, and until 1913, under his retainer by Miller & Lux and without extra charge, plaintiff performed legal work for Henry Miller and for Miller's personal corporation, the Las Animas & San Joaquin Land Company; Miller and the Las Animas Company being the predecessors in interest of defendants as sole stockholders of Miller & Lux, Incorporated. In April, 1913, all the stock of Miller & Lux was transferred to the defendants here as trustees under the deed of trust of Henry Miller. From that time plaintiff acted as attorney for the trustees without any extra compensation in the same manner as he had acted for Miller and the Las Animas Company, but, until Mr. Miller's death in 1916, appears to have had but little, if anything, to do for them in that capacity. Mr. Miller personally paid plaintiff $500 for drawing his will. When plaintiff became general counsel for Miller & Lux, Miller was its president. Defendant Nickel was then vice president and general manager and had entire charge of the business. He continued in that position until 1915, at which time he became president and has ever since held that office. He testified that from the time plaintiff became general counsel for Miller & Lux, Mr. Treadwell was his own confidential personal advisor, and without charge rendered legal services for him of a substantial nature. The nature and value of these services appears to be a matter of conflicting opinion. The parties differ very materially as to their nature and extent, but the relation between the plaintiff and Mr. Nickel seems to have been quite close and intimate from 1907 until plaintiff requested payment for his services in connection with the estate and trust of Henry Miller.

The plaintiff testified that some time after his employment by Miller & Lux certain transactions took place which, he asserts, conclusively establish the fact that the parties recognized and construed the contract of employment as not requiring the plaintiff to perform work of an entirely private nature for the stockholders of Miller & Lux, or that if the contract did originally provide for the doing of such private work for the stockholders, these same transactions show that the parties abandoned and rescinded the contract, and that thereafter the plaintiff was employed by the corporation for corporate work, and by the stockholders themselves for any private work done for them. The primary basis for this contention is his testimony of conversations taking place between Mr. Nickel as an officer of Miller & Lux and himself in 1909 or 1910, in which it was agreed that it was not proper that work of an entirely private nature for the stockholders should be put in plaintiff's hands by the corporation or by its officers acting as such, which understanding was thereafter observed and followed, and from which time the plaintiff attended only to the direct interests of the corporation. The effect of plaintiff's evidence and testimony at this point is vigorously assailed by the appellants, and Mr. Nickel denied that any conversations tending to alter the written contract ever took place.

When Henry Miller died, plaintiff at once conferred with Mr. Nickel about the business that would arise in connection with the estate. There is not, and cannot be, any dispute about the fact that the whole matter of attending to the legal business relating to the estate and trust of Henry Miller was confided to plaintiff and placed in his hands by Mr. and Mrs. Nickel. Mr. Nickel testified that while he made no formal request of plaintiff that the latter attend to the probate of Miller's will, he deemed it proper that Mr. Treadwell should attend to the matter, as he had been attending to all the business of various interests, including the Las Animas Company and all other corporations in which the estate was interested; that in his view the business connected with the estate was merely a continuation; that the interests were identical; and that after the stock in the corporations had been transferred to the trustees the business continued along in exactly the same manner as before. The plaintiff testified that he interviewed Mrs. Nickel to get certain data concerning the affairs of the estate, and sought to impress upon her "that she had a very grave responsibility. She brushed it aside and said, 'No, I am going to leave it all to Mr. Nickel.'" Nothing was said at this time by any one about the compensation of plaintiff for the services to be rendered, nor was there any discussion of the fact that the services to the estate and trust were to be regarded as outside the contract of plaintiff's employment with Miller & Lux. The contention of the respondent in this connection is that it was not necessary to discuss those matters as the contract of 1907 had been abandoned and no longer included such extraordinary services. Appellants argue that the reason why the matter of compensation, or the contract of original employment, was not discussed, was because both plaintiff and Mr. Nickel considered such services included in the contract of 1907.

[1] The plaintiff relies upon what he terms a number of significant facts established in the record, and the inferences to be drawn therefrom, which, he argues, tend strongly to corroborate his testimony and to support the finding of the jury that the extraordinary services rendered by him had no connection with the business of Miller & Lux, or its stockholders, but were rendered in pursuance of a separate and independent contract made between the plaintiff and the defendants, and which finding is reflected in the verdict. Whatever may have been the relation of the plaintiff to Henry Miller, while living, or to his personal affairs, such previous relations were severed by Miller's death. Upon that event the defendants entered upon a new relation to the property of the trust and of the estate of the decedent, for they succeeded to such property, both in the trust and in the estate. The states of California and Nevada and the United States were asserting liens against this property for taxes, which liens sprang into life upon Miller's death, when they for the first time became claims or specific liens, not upon any property of Miller & Lux, Incorporated, but upon the property of the trust and estate to which the defendants had succeeded. Defendants were the two persons in existence who were most interested in disputing these tax claims. It would seem only natural and proper, as was suggested in the oral argument in this case, that the plaintiff, who had been adviser of Mr. Miller in legal matters for many years, and fully understood the nature and extent of his property, and who, of all persons, was probably

best informed as to the nature of the trust created by Miller and the testamentary disposition which he had made of the property, should be employed by defendants to defend and protect their interests. Miller & Lux, Incorporated, was in no way directly interested in the tax litigation. The corporation was an entirely separate entity from the defendants, who were the trustees and beneficiaries of the trust and estate. There is a very substantial basis for the contention of the respondent that it was in the capacity of trustees and beneficiaries of Henry Miller, and in that capacity alone, that the defendants employed plaintiff to render the services which are here in dispute; and that in that capacity they contemplated that they would pay plaintiff for such services. There is the testimony of Mr. Nickel to the effect that he did not consider that the salary received by the plaintiff from Miller & Lux was full compensation for the services rendered in connection with the estate and trust. He testified that an increase in the monthly salary was allowed Mr. Treadwell in 1918 as a proper increase to cover all of the services he [Treadwell] was doing for Miller & Lux, Incorporated, and the subsidiary interests at that time. When asked if he included in this increase the services of plaintiff in connection with the inheritance tax matters, Nickel answered:

> "I don't—I didn't include the inheritance tax because it was not under the agreement except he was working under the direction that he was to do anything that he was directed to do by the officers of Miller & Lux."

When the matters relating to the estate and trust were finally settled, and the plaintiff requested the defendants to consider and fix his compensation, Mr. Nickel offered to pay him $50,000 for his services. It was the practice of Miller & Lux, Incorporated, when plaintiff as its general counsel rendered services for any of its subsidiary interests, to make a charge against such subsidiary interest for a proper portion of plaintiff's salary. In the same way, when the corporation was conducting litigation respecting its water rights, in which other persons were interested, a like charge was made against such persons and collected from them by the corporation. That practice was not observed or followed in connection with the services rendered by plaintiff for the defendants in relation to the estate and trust, although all other expenses of the trustees were charged against them. When the plaintiff, in February, 1921, tendered his resignation as general counsel for Miller & Lux, he notified the defendants that, so far as the estate and trust of Henry Miller were concerned, he deemed his employment to require him to see those matters completed until the estate was entirely administered, and he would do so if the trustees desired it. The defendant Nickel replied that it was entirely agreeable that plaintiff should complete the Miller estate matters, and asked him to indicate his idea as to the basis for his charges for such services as he might render in connection with the litigation in inheritance tax matters.

In all of the proceedings relating to inheritance and estate tax matters, the defendants consistently claimed credit for attorney's fees allowable in the matter of the estate of Miller; the amount of such fees to be deducted from the value of the estate before the taxes were computed thereon. In the proceedings in connection with the demand of the state of California the defendants claimed and were allowed a credit in the sum of $161,195 for attorney's fees. They also presented a verified claim before the internal revenue commissioner for an abatement and deduction of attorney's fees before the federal tax should be assessed, computed on the compensation allowed executors and administrators and their attorneys by sections 1618 and 1619 of the Code of Civil Procedure. The federal tax matter was heard before the master in chancery, and a claim was made by the defendants for an allowance of an attorney fee in the sum of $300,000. The respondent points to the magnitude and value of the services rendered by him in connection with the estate and trust of Henry Miller, in support of an argument that to pretend he was to render such services in addition to all the services he was called upon to render to Miller & Lux for an annual salary, which only approached $20,000 during the last years of his connection with the corporation, is to invoke an absurdity. There is much merit in the suggestion.

Appellants' position is that the plaintiff was employed in October, 1916, to render the services in suit in exactly the same manner as he was customarily requested to attend to business admittedly covered by his salary paid by Miller & Lux, Incorporated. They contend that the facts conclusively show that the services were rendered by plaintiff as general counsel of Miller & Lux under his contract of 1907. In consonance with that contention, and their claim that the plaintiff, in order to avoid that contract, is here seeking to recover under the terms of an altered contract of employment by Miller & Lux, Incorporated, appellants argue that there is no evidence that the written contract was altered by an executed oral agreement, or that it was totally or partially abandoned to the extent of excluding the extraordinary services rendered by the plaintiff. On the other hand, the respondent asserts that he has at no time relied upon a modification or alteration of the contract, but upon the fact that the transactions which he claims took place after its execution either conclusively established that the parties recognized and construed the contract as not requiring him to perform work of an entirely private nature for the stockholders of Miller & Lux, or that, if the contract did originally provide for the doing of such work, these same transactions show that the parties abandoned and rescinded the contract, and that thereafter the plaintiff was employed by Miller & Lux, Incorporated, for corporate work alone, and by the stockholders for any private work done by plaintiff for them.

[2] A contract in writing may be altered by an executed oral agreement. (Civ. Code, § 1698.) If there was a subsequent oral agreement modifying the contract between the respondent and Miller & Lux, its object was to exclude from the terms of the employment the requirement, and to set at rest any contention that by virtue of its provisions respondent should also serve the stockholders in addition to attending to the legal business of the corporation. If thereafter the relations of plaintiff and Miller & Lux were governed by such oral agreement, and its object was fully accomplished, the agreement became executed and worked a modification of the original contract of employment. Civ. Code, § 1661. In such event plaintiff was in position, unhampered by any arrangement with Miller & Lux, to enter into an independent contract with the defendants for the performance of such services as they, individually, might require of him in connection with the trust and estate of Henry Miller, and for an agreed or an implied compensation.

[3, 4] Again, a contract is extinguished by its rescission, which may be had by consent of the parties (Civ. Code, §§ 1688, 1689), and a parol agreement to rescind a contract even under seal is good if such parol agreement is executed. (Green v. Wells & Co., 2 Cal. 584). Consequently, whether the contract of employment between plaintiff and Miller & Lux was altered or modified to exclude from the purview of its terms such services as the plaintiff rendered in this case, leaving him free to contract with stockholders of the corporation as he chose, or whether it was rescinded by mutual consent and abandoned and a new arrangement entered into, and thereafter performed by plaintiff and the corporation, as contended for by the plaintiff, he would be free to make a separate and entirely independent contract with these defendants. If the parties were free to, and did, make such an independent contract, and plaintiff has rendered the services he agreed to perform thereunder, upon an express or upon an implied promise of the defendants to pay him therefor, he is entitled to recover in this action. The trial court in its charge to the jury clearly and comprehensively instructed it on the law, both as to alteration and as to abandonment and rescission of contracts.

[5-9] A parol agreement to abandon or rescind a written contract may be inferred from the acts of the parties. Green v. Wells & Co., supra. Whether or not the whole conduct of the respondent in attending to the affairs of Miller & Lux, and in conducting their litigation, and what he did in his relations with certain stockholders of the company, tended to contradict or to support the evidence of plaintiff that there was an abandonment and rescission of his contract of employment by Miller & Lux was an issue of fact for the jury to decide. All of the circumstances under which the employment of respondent by the appellants was arranged were placed before the jury in extenso. It had before it all the antecedent relations of plaintiff and Miller & Lux and these defendants, and what was done by them after the alleged abandonment of the contract. Whether or not, in view of the situation of the parties and their relation to the entire transaction, it was likely or probable that they contracted in the manner claimed by respondent, was the peculiar province of the jury to determine. We are not disposed to attempt a further narration of the evidence, or to engage in a discussion as to its weight or significance. The transcript discloses that "the case was regularly argued by respective counsel to the jury," and from our knowledge of the eminent counsel engaged in this trial we may well assume that the jurors were thoroughly enlightened as to the views of both sides with reference to the weight and character of the evidence, and the consideration to be given to their opposing contentions. By proper instructions the court fully charged the jury as to its duty in weighing and considering the evidence. We apprehend that no good will be accomplished in setting forth any more of the evidence relied on by appellants to overthrow the case of the respondent. When a verdict is attacked for insufficiency of evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. Gjurich v. Fieg, 164 Cal. 429, 431, 129 Pac. 464, Ann. Cas. 1916B, 111. Therefore we have simply epitomized enough of the record to show that the verdict has substantial support if the jurors received the evidence of plaintiff as true and accepted and adopted the construction he placed upon it. Appellants contend that an oral alteration or abandonment of plaintiff's written contract with Miller & Lux, Incorporated, was not proved as the law requires (citing Ross v. Tabor, 53 Cal. App. 605, 615, 200 Pac. 971), by clear, positive, and convincing evidence. The court instructed the jury that evidence of the rescission or abandonment of the written contract in this case must be clear, positive and above suspicion.

That instruction was most favorable to the appellants, for the statutory rule in civil actions is that the case must be decided according to the preponderance of the evidence (Code Civ. Proc. § 2061, subd. 5), and all judicial expressions concerning the necessity of clear and satisfactory proof of an executed oral agreement in a case such as this must be construed in the light of the fundamental declaration that a preponderance of the evidence controls in a civil case (Edmonds v. Wilcox, 178 Cal. 222, 224, 172 Pac. 1101). The sufficiency of the evidence to establish a given fact, even where the law requires proof of the facts to be clear and convincing, is primarily a question for the trial court and the jury, and if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal. Steinberger v. Young, 175 Cal. 81, 84, 165 Pac. 432. We are not called upon to say that the evidence in the record is entirely plain and convincing. To the extent that its determination rests upon a mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding in the lower court is not subject to review in this court. Wadleigh v. Phelps, 149 Cal. 627, 638, 87 Pac. 93; De Kahn v. Chase, 177 Cal. 281, 283, 170 Pac. 608.

It is the contention of the appellants that the trial court committed prejudicial errors in its instructions to the jury concerning the contract of 1907, and concerning the extent and value of plaintiff's services. Primarily, appellants' claim is that the court erred in denying their motion for a directed verdict; in refusing two peremptory instructions requested by them directing the jury to find in their favor; and in giving a number of instructions submitting to the jury the question whether or not the contract of 1907 between plaintiff and Miller & Lux, Incorporated, had been changed or rescinded. In support of this claim appellants rely upon the argument made and the authorities cited to uphold their contention that the evidence does not sustain the verdict. What we have already said, therefore, disposes of these primary objections to the instructions.

[10, 11] Appellants take exception to an instruction (XL) by which the court told the jury that whether or not there was an express agreement by the defendants to pay plaintiff the reasonable value of his services was a question of fact to be determined by it "from all the evidence in the case." The instruction was properly given. There was evidence which would support an inference that the defendants expressly agreed to pay plaintiff. An express contract is one, the terms of which are stated in words (Civ. Code, § 1620), but such a contract need not be in writing. When the contract relied on is oral, its interpretation in the first instance is a question of fact to be determined by the jury. Smyth v. Tennison, 24 Cal. App. 519, 521, 141 Pac. 1059. The question, therefore, was one of evidence, and it was for the jury to determine from the facts and circumstances proved, including, of course, the conversations between the parties, whether or not a contract was proven. Nevills v. Moore Mining Co., 135 Cal. 561, 564, 67 Pac. 1054.

[12, 13] In one of the instructions (XLa), the jury was told that in determining whether there was any other or different contract than that of 1907 it might consider all the circumstances, "including the relative amount of work before and after that contract and before and after the death of Henry Miller, and all acts and declarations of the parties during the performance of said services." In another instruction, concerning the allegation in the answer that the defendants believed that the services in controversy were included by the terms of the contract of 1907, the court instructed the jury that in the determination of that allegation it might consider all of the evidence in the case, "including all of the communications either oral or in writing passing between the parties and all of the acts of the defendants with relation to the fees of said attorney in connection with the estate and trust of Henry Miller." It is contended by the appellants that these instructions are objectionable as singling out and bringing into prominence certain isolated facts and thereby, in effect, intimating to the jury that special consideration should be given to those facts. No reason appears why the court should have singled out portions of the evidence and specially directed that it might be considered. Under the general instructions contained in the full and comprehensive charge, the jury must have known that such evidence with all other evidence of facts and circumstances in the case was to be considered by them. Instructions which are framed solely for the purpose of, and which simply have the effect, of emphasizing some particular portion of the evidence, are not to be commended, and are properly refused. Still v. S. F. Ry. Co., 154 Cal. 559, 572, 98 Pac. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177. Such an instruction was denounced as objectionable in Estate of Martin, 170 Cal. 657, 672, 151 Pac. 138, but it does not appear that the reversal in that case was had because of the improper instruction.

[14-17] By another instruction, the court told the jury that the issues of fact for its determination were presented by the denials made in the answer to the allegations of the complaint and by the affirmative matter pleaded by the defendants. Appellants complain that by this instruction plaintiff's amended bill of particulars was entirely withdrawn from the jury's consideration in determining the issues of fact. There is no merit in the contention. The bill of particulars furnished to the defendants was, of course, to be regarded as an amplification of the complaint, and for the purpose of determining plaintiff's right to recovery or the admissibility of evidence that might be offered in support of his claim, was to be considered as if it had been incorporated in the complaint as originally filed (Millet v. Bradbury, 109 Cal. 170, 172, 41 Pac. 865. In an instruction, proposed by the appellants, explaining at length the issues of the case, and next following the one now criticized by them, the trial court properly told the jury that an amended bill of particulars which plaintiff furnished the defendants, segregated the various services performed, and placed a value upon each of them "aggregating for all the sum of $641, 276.13, which amount in his complaint he reduced to the sum of $300,000." If defendants desired any further or more explicit instruction with reference to the bill of particulars, they should have asked that such be given. Not having done so, they cannot be heard to complain that it was not given. Rice v. Whitmore, 74 Cal. 619, 624, 16 Pac. 501, 5 Am. St. Rep. 479.

[18-20] Plaintiff called a number of experts to testify to the value of his services. It is contended by appellants that the trial court erred in refusing to give an instruction requested by them to the effect that the jury should disregard the testimony of an expert witness unless it believed that all the material facts upon which the hypothetical question propounded to the experts was based, were true. The instruction was properly refused. Expert testimony is to be given the weight to which it appears in each case to be justly entitled. The law makes no distinction between that kind of testimony and evidence of other character. Rolland v. Porterfield, 183 Cal. 466, 469, 191 Pac. 913. The witness to whom the hypothetical question is addressed assumes the facts stated to be true, and bases his answer upon the assumed case. The opinion of the witness must therefore be brought to the test of the facts in order that the jury may judge what weight his opinion is entitled to. Estate of Dolbeer, 149 Cal. 227, 252, 86 Pac. 695, 9 Ann. Cas. 795. When the evidence is sufficient as a basis for a hypothetical question, the truth or falsity of the purported facts is a question for the jury to determine. Coonan v. Loewenthal, 129 Cal. 197, 203, 61 Pac. 940. The opinion can have little, if any, value unless the material facts assumed in such question are substantially true, and the court may properly so instruct the jury whenever there is conflicting evidence as to the truth of the assumed facts. Such opinion evidence does not, however, necessarily become wholly valueless because there is some variance between the facts assumed in the question and the actual facts proven. What weight should be given in such cases to the opinion of the expert witnesses is a question for the jury under proper instructions from the court. Anderson v. Husted, 79 Conn. 535, 538, 66 Atl. 7; Madden v. Saylor Coal Co., 133 Iowa, 699, 704, 111 N. W. 57. An expression in Hallawell v. Union Oil Co., 36 Cal. App. 672, 685, 173 Pac. 177, 183, that "counsel objecting [to a hypothetical question] may have the instruction of the court to the jury to disregard the testimony of the expert unless satisfied that all of the facts upon which the question is based are true," is mere dictum, and does not correctly state the law relating to expert testimony, and is at variance with a later statement by the same court of the correct rule. Graves v. Union Oil Co., 36 Cal. App. 766, 770–771, 173 Pac. 618.

[21, 22] The appraised value of Henry Miller's estate which was actually probated was $36,878.44. The statutory attorney's fees for the usual conduct of the administration of such an estate amount to $1,067.16. Code Civ. Proc. § 1618. In his amended bill of particulars plaintiff claimed $208,776.13 for "ordinary services in the matter of the estate and trust of Henry Miller, appraised at the sum of $41,489,226.64, computed according to section 1618 of the Code of Civil Procedure." Appellants requested the trial court to instruct the jury that plaintiff could not recover fees for ordinary services to the Miller trust, as distinguished from the estate, and if entitled to recover at all could be allowed only the sum of $1,067.16, and that there was "no evidence that the plaintiff performed any service for the trust for which the law would allow compensation computed according to section 1618 of the Code of Civil Procedure." The instruction was clearly misleading, and the trial court properly refused to give it. It will be remembered that by his last will and testament Henry Miller left the residue of his estate, with the exception of certain real property, to these defendants to be held upon the same trusts as provided in the deed of trust. No one contesting either the will or the deed of trust, the residue of the small "estate" was distributed as directed, but the title to the vast bulk of Miller's property passed to the defendants under the deed of trust, and the "estate" was in fact administered as the "trust," the property value of which was $41,489,226.64, the sum mentioned by plaintiff in his amended bill of particulars. Compensation of trustees is confided to the discretion of the trial courts (Code Civ. Proc. § 1700), and an attorney for such trustees is entitled to the reasonable value of his legal services as a proper expense out of the trust fund. (Estate of O'Connor, 2 Cal. App. 470, 478, 84 Pac. 317). It is a matter of common knowledge that, since the Legislature, by statute, fixed the compensation of executors and administrators, and provided that their attorneys shall be allowed as fees for conducting the ordinary proceedings of estates the same amounts as are allowed as compensation for executors and administrators (Code Civ. Proc. § 1619), in the administration of ordinary trust affairs the same ratio of compensation for trustees and their attorneys will frequently be fixed. Under certain circumstances, a trustee is entitled to the same compensation as an executor. Civ. Code, § 2274. There was nothing unusual, therefore, in the plaintiff here seeking compensation for his ordinary services rendered to the "estate" and "trust" of Henry Miller—they were in effect the same in so far as his services were concerned—on the basis of the fees regarded by the Legislature as reasonable in ordinary probate matters. Whether or not the jury would regard such basis of compensation or any basis of remuneration of the attorney as reasonable, provided it found the "ordinary services" were rendered as claimed, was one of the issues of the case which would have been withdrawn from its consideration by the proposed instruction.

The plaintiff called a number of attorneys, who were qualified as experts, to testify to the value of his services. The opinions of these witnesses were expressed in answers to a hypothetical question containing the plaintiff's own statement of what he did in connection with the estate and trust of Henry Miller. All objections interposed to the question by the defendants were overruled, and it is contended that the trial court erred in its ruling. Other than to say in their brief that "the hypothetical question was * * * highly objectionable on the grounds stated in the written objection," appellants argue only the ground of objection that the question assumed facts not in evidence. They say:

> "The question, for example, in several places dogmatically stated that plaintiff's services had in various instances resulted in savings to defendants running into the hundreds of thousands of dollars, while in many of these instances there was no evidence to show that there had been any saving at all."

We do not feel called upon to analyze a long hypothetical question, contained in some 83 pages of typewritten transcript, and an objection involved in 14 pages more of the record, in a critical search for objections not pointed out and argued here. Only four specifications are now presented of the particulars in which it is contended the question assumed facts for which there was no support in the evidence. The first has to do with an item contained in a résumé by plaintiff of the final amount claimed to have been conserved to the Miller estate by the tax litigation conducted by him, from which it would appear that $2,000,000 was saved by the judgment of the Nevada court limiting the Nevada tax to the value of the property in that state. As the basis of this assumed fact the hypothetical question sets forth the history of the Nevada litigation in the light of the circumstance that the Nevada court held that the trust deed from Henry Miller to the defendants, which was dated April 17, 1913, was in its nature testamentary and did not take effect until his death, and that under a construction which plaintiff asserted might be placed upon the Nevada tax statute, passed March 26, 1913, it would have been possible to fix the tax on the value of the corporate stock of Miller & Lux, Incorporated, in California. "If this tax," reads the question, "had been based upon the total value of the stock, as fixed in California, the tax would have amounted to about $2,000,000." The history of this litigation and a narration of all that the plaintiff did in the matter was embodied in the question in support of the claim of the plaintiff that his efforts were the means of saving that sum for the estate. Facts shown by the defendants, and otherwise appearing in the evidence, the appellants argue, tend to practically break down the entire claim of the plaintiff as to this item of his services. Miller & Lux, Incorporated, while a Nevada corporation, possessed nothing in that state other than ownership of the capital stock of the Pacific Live Stock Company, a company incorporated in this state, and which held title to all Miller's property in Nevada. To offset the effect of plaintiff's evidence, that the sum of $2,000,000 was saved to the estate, the defendants introduced testimony which tended to show that the state of Nevada did not claim the right to tax the corporate stock of Miller & Lux, Incorporated, but demanded only a tax on the value of the stock of the Pacific Live Stock Company, which value was stipulated in the litigation; the tax thereon amounting to some $48,000.

[23] The question does assume facts at variance with the evidence introduced by the defendants, and, of course, in disagreement with the construction placed upon plaintiff's evidence by them. It was skillfully drawn, as hypothetical questions usually are, to meet the views of the party propounding it. Considerable latitude must be allowed in the choice of facts as the basis upon which to frame a hypothetical question. Every hypothesis contained in the question should have some evidence to sustain it. But while this is true, it is also the rule that it is not necessary, in framing the question, to include a statement of all the evidence in the case. The question may be framed upon any theory of the questioning party which can be deduced from the evidence, and the statement may assume any facts, within the limits of the evidence, upon which the opinion of the expert is desired. It may omit any facts not deemed by the questioner material to the inquiry. 10 Cal. Jur. p. 966, § 223. It is the privilege of a party in such cases to assume, within the limits of the evidence, any state-

ment of the facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed, subject to the limitation that the question shall not be unfair or misleading. Thompson on Trials, §§ 606–610; People v. Hill, 116 Cal. 562, 567, 48 Pac. 711. Measured by these considerations, the question here was not objectionable.

[24] The second objection urged to the hypothetical question is that it assumes the plaintiff in one instance secured a reduction of taxes amounting to some $83,000, when the evidence discloses that the amount was but $53,000. The statement was an error, which was corrected in the subsequent summary of taxes alleged to have been saved to the estate, and we are satisfied no harm was done by the misstatment.

[25, 26] It is next contended that the hypothetical question did not make it clear that certain services rendered in connection with a bond issue of Miller & Lux, Incorporated, were performed for the corporation and not for the defendants. We have no doubt that the learned lawyers to whom the question was submitted clearly understood that the services were performed for the corporation. Objection is now made that the question included facts the evidence of which had been stricken from the record. Respondent admits such to be the fact, but contends that no objection on that ground was made when the question was asked. The objection was that "there is no evidence" of the fact, which would be a sufficient objection, for if the evidence on the fact was stricken from the record, there certainly would be no evidence on the point. The matter stricken out, however, related only to what another attorney told plaintiff concerning the attitude of the newspapers and the public toward the Miller estate tax litigation, and seems inconsequential in the light of the real issues involved in the case.

The remaining objection pointed out is merely a controversy as to whether plaintiff or another attorney should have credit for the line of conduct of a portion of the tax litigation. No matters have been pointed out to us which amounted to a substantial error in the ruling of the trial court on the hypothetical question.

[27] Appellants complain that the trial court gave contradictory and inconsistent instructions. At the request of the defendants, the court instructed the jury that the contract for legal services, entered into between plaintiff and Miller & Lux in 1907, was plain and unambiguous, and that, unless it had been changed or abandoned, it included the services in suit and prevented a recovery by plaintiff in this action. At the plaintiff's request, it instructed the jury that even though the contract of 1907 was in effect at the time of the alleged employment of plaintiff by the defendants, such contract would not prevent the defendants from entering into an independent contract with plaintiff and agreeing to pay him for his services, and that if they did so, and promised to pay him for his services, such promise was valid and the agreement of the plaintiff to perform such services would be a sufficient consideration for their agreement to pay him therefor. A better understanding of the situation will be had by reading the instructions in full. They are:

"At the request of the defendants:

"XVIII. Taking up first in point of time the alleged contracts concerning which evidence has been offered in this case, you are instructed that the three letters set out in the answer of the defendants written in 1907, and which may be referred to as the so-called contract of 1907, constitute a written contract between plaintiff and Miller & Lux, Incorporated. That contract is plain and unambiguous, and, under it, plaintiff, unless he has proved by a preponderance of the evidence that the contract was modified, changed, or abandoned in this respect, was bound to perform any business or service of any nature for any interests which the officers of Miller & Lux might deem proper to place in his hands, including work for stockholders, and including the services for which he seeks compensation in this case."

"XXV. If you find, in accordance with these instructions, that the written contract of 1907 between the plaintiff and Miller & Lux, Incorporated, was not modified, it makes no difference whether the services in question in this case were anticipated or contemplated by the parties when this contract was made, and it makes no difference whether the plaintiff's services were reasonably worth more than the price fixed in this contract. If this contract was not altered, modified, or abandoned, it controls this case, and the plaintiff is not entitled to recover anything."

At the request of the plaintiff:

"XXXV. Even if the contract of 1907 was still in effect at the time of the alleged employment by [of] plaintiff, such contract would not prevent the defendants from entering into an independent contract with plaintiff and employing plaintiff and agreeing to pay him for his services, and if he agreed to perform said services this would be sufficient consideration for their agreement to pay him therefor."

"XLI. One of the principal issues in this case is whether or not the plaintiff was employed to perform the services in question by the defendants, or whether the particular services were performed under the alleged contract with Miller & Lux, Incorporated, of 1907. Even if under the alleged contract with Miller & Lux, Incorporated, of 1907, that corporation or its officers might have placed these services in the hands of the plaintiff, still there was no particular term of employment under that contract, and the plaintiff therefore could have refused to perform such services under that contract. Therefore the defendants were at liberty to employ the plaintiff to perform such services independent of said contract, and, if they did so employ him and promised to pay him therefor, such promise was entirely valid, and the promise of the plaintiff to perform such services would be a sufficient consideration therefor."

Appellants contend that these instructions are contradictory and conflicting on a most material issue of the case, and that the action of the trial court in giving them constituted prejudicial error calling for a reversal of the judgment. We do not agree with this contention. The situation is clarified when it is remembered that Miller & Lux, Incorporated, is not a party to this action. We are not now considering what, if any, mutual obligations or restrictions rested upon plaintiff and Miller & Lux, Incorporated, by reason of the contract of 1907, at the time it is said plaintiff and these defendants entered into the contract here in question. The defendants were not parties to the contract of 1907. There was nothing in its terms or provisions which erected a bar against, or purported to prohibit them from individually entering into an independent engagement with plaintiff, unaffected by anything in the existing relations between plaintiff and Miller & Lux, and agreeing to pay him for his services. The vital question in the case is, Did they do so? Appellants say they did not, and have attempted to justify their denial by setting up a contract to which they were not parties, but under which they assert plaintiff rendered the services at the instance of, and as chief counsel for Miller & Lux, Incorporated. The trial court of its own motion, and again at the instance of plaintiff as just indicated, instructed the jury that a main issue was: Under which of the contracts set forth in the pleadings in the case were the legal services in question performed? By other instructions (XIX to XXIV, inclusive), the court very properly submitted to the jury the question whether or not the services of plaintiff were covered by the contract of 1907. In these instructions it construed the contract of 1907 to mean that under its terms plaintiff was in any event required to do only such work as the officers of the corporation deemed proper to place in his hands as such officers, acting as such in their official capacity, but that he was not required to perform services which might be placed in his hands by persons who merely happened to be officers of the corporation but who were not acting as such in placing the work in his hands; and also that they should consider whether Mr. Nickel, in placing the legal matters pertaining to the estate and trust of Henry Miller in the hands of plaintiff, was acting as an officer of Miller & Lux, Incorporated, or merely in his capacity as an executor and trustee. The burden of the lengthy charge—there were same 52 instructions—when read as a whole, as it must be (Peters v. S. P. Co., 160 Cal. 48, 69, 116 Pac. 400), was that if the jury found that the services for which plaintiff is here seeking compensation were rendered by him under the contract of 1907, he could not recover without first showing a modification or abandonment of that agreement; but that, if the services were in fact rendered under and in pursuance of a separate and distinct contract for their performance, entered into by the defendants individually with the plaintiff, independent of and aside from the contract between Miller & Lux, Incorporated, and having no relation thereto, plaintiff could recover, for in such event the contract of 1907 would constitute no bar to the separate and independent agreement between the plaintiff and defendants.

[28-30] Thus considered, the charge is a correct statement of the law of the case, and the apparent inconsistency and contradiction arise only by reason of the giving by the trial court of the defendants' instructions that unless the contract of 1907 was altered, modified, or abandoned, it controlled the case and prevented a recovery by plaintiff. The giving of conflicting instructions upon a material point is undoubtedly error, but a party may not be heard to complain that instructions are inconsistent, if it appear that the inconsistency arises through the giving of instructions at his request which are inconsistent with, or contradictory of other instructions given at the request of the other party which are pertinent to the issues of the case, and which are correct statements of the law. Barkhaus v. Producers' Fruit Co. (Cal. Sup.) 219 Pac. 435. Instruction XXV, supra, was prejudicial to the cause of the plaintiff and favorable to appellants', for it took away from the jury the issue of fact, raised by the answer, whether the employment of plaintiff was by Miller & Lux, Incorporated, or by the defendants, and narrowed the case to one of modification or abandonment of the contract. A conflict in instructions which does not operate injuriously to an appellant is not ground of reversal. Dennison v. Chapman, 105 Cal. 447, 458, 39 Pac. 61. Complaint is also made that there is no evidence in the record to warrant the instruction (in XLI, supra) that as there was no particular term of employment of plaintiff under the contract of 1907, plaintiff could have refused to perform the services here in question, if required to do so under that agreement. It is true there is no evidence in the record that the plaintiff ever refused to perform the services in question, but appellants concede that—

> "It may be true as an abstract matter that plaintiff could have terminated his contract with Miller & Lux, and that, if he had done so, he might have made an enforceable contract with defendants to pay him for his services."

No injury to appellants' cause affirmatively appearing by reason of a correct instruction on an abstract matter of law, the error will be disregarded as unimportant and unsubstantial. Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 Pac. 238.

The judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; HOUSER, Justice pro tem.

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FOX et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10923.)

(Supreme Court of California. July 29, 1924. Rehearing Denied August 28, 1924.)

1. Master and servant 🔑388—Injured mother held not legally liable for maintenance of minor children within Compensation Act concerning conclusive presumption of total dependency.

A mother *held* not legally liable for maintenance of minor children within Compensation Act, § 14(a) (2), amended by St. 1919, p. 917, and Civ. Code, § 196, where parents were married and living together and both contributed from their respective earnings to bank account in husband's name, out of which minor children at time of injury to mother were being supported in Japan, and father was not unable to support children and hence conclusive presumption of total dependency, raised by said section 14(a) (2), did not apply.

2. Master and servant 🔑388—Status of minors under Compensation Act, for purpose of applying presumption of total dependency, held not changed because sent to foreign country for education.

That minor children, born here, of deceased employee, were sent to foreign country for their education, was immaterial so far as concerned their status under Compensation Act, § 14(a), amended by St. 1919, p. 917, providing that presumptions of total dependency for support upon deceased employee shall not apply in favor of nonresident aliens, in view of federal Constitution, Fourteenth Amendment, providing that all children born or naturalized in United States are citizens thereof.

In Bank.

Certiorari by C. A. Fox and another, to review an award of compensation by the Industrial Accident Commission for the death of Nobu Wakiya, in favor of Morio Wakiya and others. Award annulled.

Redman & Alexander, of San Francisco, for petitioners.

W. H. Pillsbury, of San Francisco, for respondents.

LAWLOR, J. This is a review of an award made by the Industrial Accident Commission in favor of Morio Wakiya and his three minor children, for the death of the wife and mother, the award amounting to the sum of $4,149.

The deceased, Nobu Wakiya, and her husband, Morio Wakiya, were both employed by petitioner, C. A. Fox, at Fresno. She served as a chambermaid in a hotel conducted by petitioner and received a wage of $3.50 a day, working 7 days a week, plus room, water, ice, and certain other advantages, such items aggregating 50 cents a day, and this remuneration was stipulated to be the basis of any award that may be rendered. The husband received the same wage and customarily deposited the joint earnings of both in a bank account conducted in his own name. The three children were all born in the United States, aged at the time of the death of deceased, 14, 15, and 16 years, respectively. When two years of age each child had been sent to Japan to boarding school. They were all in Japan at the time of the death of deceased. Thirty-five dollars monthly was forwarded to these children in Japan from the common earnings of husband and wife. During the course of the employment the wife was electrocuted as a result of her hand coming in contact with a nest of uncovered electric wires, and upon her death proceedings were instituted by the husband and father, as guardian ad litem and trustee of the children, and by the father-in-law of the deceased (a resident of Japan), for the collection of the death benefit.

The Commission filed the following findings of fact:

"A. Nobu Wakiya, while employed as a chambermaid on December 14, 1922, at Fresno, Cal., by defendant C. A. Fox, doing business as Fox Hotel, sustained an injury occurring in the course of and arising out of her employment, as follows: Her hand came in contact with an open electric switch, causing her immediate death. At said time said defendant's insurance carrier was Ætna Life Insurance Co., and the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917.

"B. The employer had notice of said injury and death within the terms of the aforesaid act.

"C. Employee left surviving her Wataru Wakiya, Masako Wakiya, and Seishi Wakiya, her minor children, each of whom was at said time under the age of 18 years. Said deceased and her husband at all times herein mentioned and since the year 1911, were residents of the state of California, and said minors and each of them were born in said state and subject to the jurisdiction thereof. Said minors were sent by their parents to boarding schools in Japan for more economical education and support.

"D. The surviving parent of said minors was not dependent for support upon said deceased.

"E. Said minors were therefore at the time of said injury citizens of the state of California (section 1, Amendment 14, United States Constitution; 11 C. J. 777, 778), constructively residents therein (section 52, Political Code of California), and conclusively presumed to be totally dependent for support upon said deceased (section 14, Workmen's Compensation, Insurance and Safety Act of 1917, as amended July 22, 1919; sections 196 and 197, Civil Code of California).

"F. Said minors are therefore, entitled to a death benefit of $4,049.60, payable at the rate of $17.29 a week, together with an award for

> $100 burial expense, payable direct to Morio Wakiya. Said payments are based upon daily earnings of $4 for employment 7 days a week. Payments accrued to August 16, 1923 (35 weeks) are $605.15, no part of which has been paid.
>
> "G. Deceased also left surviving her applicant Tadakichi Wakiya, her father-in-law, who was at said time partially dependent upon her support; the annual amount contributed to such support by deceased being the sum of $92.80.
>
> "H. It is the judgment of this Commission that the whole of said benefit should be awarded to said minor children."

Section 14 of the Workmen's Compensation Act (St. 1917, p. 844), as amended in 1919 (St. 1919, p. 917), is as follows:

> "(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee; provided, that these presumptions shall not apply in favor of aliens who are nonresidents of the United States at the time of the injury.
>
> "(1) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury.
>
> "(2) A child or children under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he or they are living at the time of the injury of such parent or for whose maintenance such parent was legally liable at the time of injury, there being no surviving dependent parent.
>
> "(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

Petitioners contend that the Commission erred in holding that the children were conclusively presumed to be totally dependent for support upon their mother under section 14(a)(2) of the Compensation Act, and that the award should have been made under section 14(b) and section 9(c)(2) instead of section 14(a)(2). It is first argued that under the law the presumption of total dependency would be upon the father of the children and not upon the mother. It is urged that:

> "The children were not totally dependent upon their mother for support, as they received at least one-half of their support from their father. * * * If the children were totally dependent upon their deceased mother for support, the award is a correct one, but if they were only partially dependent it should be reduced to $630, pursuant to section 9(c) (2) of the Compensation Act, which allows partial dependents to recover only three times the annual contributions of their deceased relative for support. * * * Assuming that the money sent abroad was furnished half by the wife and the other half by the husband, the actual amount received by the children from each parent approximated $210 per year. * * * The children at best were only partially dependent upon their mother, in view of the fact that they received at least one-half of their support from the father. * * * We contend that if the children were presumptively totally dependent upon any one it was upon their father and not their mother. If the father had died instead of the mother, the Commission would have applied the presumption of total dependency; but we contend that the act does not authorize it upon the death of the mother, when the father is still alive and has been contributing to the support of his children."

Upon this contention petitioners claim that the provision does not contemplate "a total dependency upon both parents"; that it might be either but not both, citing the statutes and the common law to the effect that the primary duty of support is on the father. The brief continues:

> "We call particular attention to the words 'the,' 'such,' and 'was.' * * * These are restrictive terms and indicate a single person only. They show that it was not the intention of the Legislature to make the children presumptively totally dependent upon both parents but rather upon one only. If it had been intended to make the presumption apply to both parents the words 'the' and 'such' and 'was' would not have been used; and the term 'parent' would not have been in the singular but rather in the plural. The act would have read 'upon the parents with whom he or they are living * * * or for whose maintenance such parents were legally liable.' But, as one of the parents is singled out in the act, it becomes a question of construction to determine which was intended. We submit that in a case of this kind the father was intended and not the mother, and our contention for that construction finds support in the Compensation Act, the Codes of the state, and the general law."

Sections 156, 196, and 198 of the Civil Code, and section 52 of the Political Code, are cited in support of this contention, as are also the following authorities: 29 Cyc. 1606; Ex parte Gordan, 95 Cal. 374, 377, 30 Pac. 561; In re Campbell, 130 Cal. 380, 62 Pac. 613; Henly v. Wilson, 137 Cal. 273, 70 Pac. 2158, L. R. A. 941, 92 Am. St. Rep. 160. And Shebley v. Peters, 53 Cal. App. 288-293, 200 Pac. 364; Sinnerton v. Robert Addie, 13 Butterworths' Workmen's Compensation Cases, 500, and Spreckels v. Industrial Accident Commission, 186 Cal. 256, 199 Pac. 8, are cited to the effect that, where several wage earners contribute to a common fund, those supported by it are only partially dependent upon each contributor. Sections 156, 196, and 198 of the Civil Code provide that the primary duty of the father is to support his minor children, that he is the head of the family, that if the support of the father is inadequate the mother must assist him to the extent of her ability. The authorities hold that at common law the father had a right to the services of his minor children, which right is coupled with the obligation to support and educate them, that he is entitled to the custody, control, and benefits of minor children as against the wife, unless during separation, that it makes no difference if such minor children have ample means of their own for support, the duty continues upon the father, and that section 376, Code of Civil Procedure, authorizes the father to sue for injuries to, or death of, the minor children.

Respondents, on the other hand, contend that the award should be affirmed on two grounds:

The first, which is based upon a construction of the language of section 14(a)(2), that—

> "The conclusive presumption contained in section 14(a) (2) creates a total dependency upon the parent who happens to be the employee killed in the course of employment * * * without regard to the sex of the deceased employee. * * * Preliminarily it is to be noted that section 14(a) (2) does not say that the minor child is dependent upon the father, but instead upon the parent. The term includes either father or mother. * * * Obviously, the term includes both a mother and a father, without other limitation than that stated herein. The section does not refer to the male parent or to the female parent but to the injured parent, whichever it may be. * * *"

And second, upon the ground that—

> "The limitations contained in the section are all complied with. (a) There was no surviving dependent parent, since the father was not dependent upon his wife's earnings. (b) The mother was legally liable for maintenance. (c) The children were 'living with' her."

Point (a) is based upon finding D of the Commission. There is no evidence to contradict this finding that the husband of deceased was not dependent upon his wife for support and was not entitled to any death benefit under the act. Point (b) is based upon section 196, Civil Code, and the Code sections which declare that the rights of custody in the minor children are equal in the husband and wife when they are living separate and apart (section 198). Respondents argue that—

> "Section 196, Civil Code, provides that the parent entitled to the custody of the child must support it, and that the mother must assist where the father's means are inadequate. * * * The Code sections quoted establish the proposition that, while the father is expected primarily to support the minor children, the mother is not exempted from this obligation. Where a father cannot fulfill the duty, the mother must. * * * The existence of a legal duty resting upon the father does not free the mother from her legal obligation; it is only performance of the duty by him that excuses her. * * * There is reasonable ground for deducing that the father needed assistance from the mother in paying for the maintenance of the three children in a boarding school in Japan."

The brief then assumes to show by computations what the earnings of the husband were as a basis for the argument "that assistance from the mother was absolutely necessary in order to give the children the support actually sent them," but we do not find any evidence in the record justifying the contention, and there is no finding on the point.

Point (c) is based upon a construction of the words "living with" in section 14(a)(2). It is argued that—

> "Where the child is living with both parents, and both parents are employed, both would seem to be within the presumption, depending upon which was injured. In the present case, the children were not physically living with either, although constructively domiciled with both (Pol. Code, § 52), as both the children and wife take the domicile of the father during his lifetime, and hence all are domiciled together. The term 'living with,' in the case of husband and wife, has been interpreted to mean a relation where there is physical separation but no separation in the nature of an estrangement. Belle City, etc., Co. v. Rowland, 170 Wis. 293, 174 N. W. 899, 7 A. L. R. 1071; N. W. Iron Co. v. Ind. Comm., 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877. Whether in the case of minors a constructive domicile is tantamount to 'living with' the parents seems to be a novel point without published precedent; but we submit that this court is amply justified in holding that such a meaning is in accord with the intent of the Legislature to find parents liable if there is no legal separation from their minor children."

It will not be necessary to discuss the first ground upon which the affirmance of the award is based, for the reason, as will presently be seen, the award must be annulled on other grounds. Suffice it to say that we cannot accept respondents' contention that section 14(a)(2) refers to the injured parent, whichever it may be, in a situation where there is no legal or actual separation between husband and wife, and they are both contributing to the support of the minor children.

[1] The second ground upon which it is sought to uphold the award is that the conditions contained in section 14(a)(2) are present. There is no dispute, as we have said, touching the finding that there was no surviving dependent parent. The precise question is whether the mother can be said to be legally liable for the maintenance of the minor children within the meaning of the words of section 14(a)(2), quoted above, where the parents are married and living together and both contributing from their respective earnings to a bank account in the husband's name out of which the minor children at the time of the injury of the mother were being supported in Japan. No finding was made by the Commission that the deceased parent in this case otherwise contributed to the support of the children, and, from the evidence in the record before us, we are unable to see how

an implied finding that the mother was legally liable for the maintenance of the minor children can be supported. The legal liability of the father for the support of his minor children had not been altered; the voluntary contributions made by the deceased parent did not shift his legal responsibility. Section 196 of the Civil Code provides that the mother must support the minor children if the father is unable to do so. There was no finding made by the Commission that the father was unable to support the minor children, and no other finding that it was therefore necessary for the mother to contribute to such support, nor were any facts adduced at the hearings before the Commission which would warrant such findings. A situation is conceivable in which the husband and wife might be living together, both contributing to the support of the minor children in the manner described above, where by some judicial proceeding and decree, or by a contract between the parties, the mother has made herself legally liable for the support of the minor children, and the father has, at least as far as the other parent is concerned, been divested of such legal responsibility. But there is nothing here which in any manner detracts from the legal liability of the father. It will serve no purpose to further discuss this point, since neither by the statute law of this state nor by voluntary contribution to the support of the minor children did the deceased parent become legally liable for their maintenance, and, such being the fact, the conclusive presumption of total dependency does not apply as to her.

[2] The second ground upon which this review is based is that "There is no place for a presumpton of total dependency in this case," since section 14(a) provides that "these presumptions shall not apply in favor of aliens who are nonresidents of the United States at the time of the injury." It is urged that, while the minor children were born here and therefore citizens of the United States, they were residing in Japan, and "no proof was offered to show their present status." And, further, "there was nothing indicating any intention on the part of the deceased or the father to bring these children back during their period of minority, and it is a fair presumption that these children were actively engaged in productive labor in Japan." Moran's Case, 234 Mass. 152, 125 N. E. 157, is cited as authority for the proposition that the Compensation Act "is dealing with the fact of actual not constructive residence."

If the contention of petitioners is valid—that is, if the minor children are nonresident aliens—they are not entitled to the benefit of the conclusive presumption of total dependency, and their actual dependency should be determined in accordance with the provisions of section 14(b).

The Fourteenth Amendment of the Constitution of the United States reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

The fact that the minor children were sent to a foreign country for the purposes of education is immaterial as far as their status is concerned (In re Look Tin Sing [C. C.] 21 Fed. 905; 11 Corpus Juris, 777–8; U. S. v. Wong Kin Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890). It cannot be doubted that the minor children here concerned do not come within the proviso of section 14(a), and, such being the case, the presumption of section 14(a)(2) would be applicable if all the conditions of that section were found to be present.

It having been held that the deceased parent was not legally liable for the maintenance of the minors, within the meaning of section 14(a)(2), it is clear that the conclusive presumption of total dependency does not apply. Section 14(b) provides that, in all cases where this conclusive presumption does not apply—

> "Questions of entire or partial dependency * * * and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

There is neither evidence nor findings as to what, if any, portion of the money contributed to the support of the minors came from the earnings of the deceased parent. It is found that her earnings were $28 per week, but it is not found whether the whole or any part thereof went into the bank account, although it appears from the evidence that the father customarily deposited the joint earnings. On the going down of this decision, the Commission will find the fact and make an award accordingly under section 14(b) and section 9(c)(2), which provides that in case of partial dependency the amount of the death benefit shall be three times the annual amount contributed.

The award of the Commission approved, ratified, confirmed, and ordered filed on September 4, 1923, is annulled, and the proceeding remanded for further action by the Commission in accordance with this decision.

We concur: MYERS, C. J.; RICHARDS, J.; HOUSER, Justice pro tem.; SEAWELL, J.; WASTE, J.; LENNON, J.

67 Cal. App. 654

WATTON v. COLONIAL AMUSEMENT SYNDICATE et al. (two cases.)
(Civ. 2726, 2727.)

(District Court of Appeal, Third District, California. June 11, 1924.)

1. Corporations 🔑513(1)—Administratrix's complaint for money had and received held not to authorize accounting.

Complaint by administratrix against corporation for money had and received, failing to allege fraud or deceit, or that deceased was a stockholder, *held* not to authorize plaintiff to accounting and recovery of any money wrongly credited or wrongfully paid out.

2. Corporations 🔑182—Administratrix of stockholder leasing building for corporation could not contend that it was not corporation lease, so as to recover rents from subletting.

Where two stockholders leased a building intended for and used solely by the corporation, administratrix of one stockholder could not contend lease was individual property, in order to recover part of rents from subletting.

Appeals from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Separate actions for accounting by Alice G. Watton, as administratrix of the estate of Norval L. Watton, deceased, against the Colonial Amusement Syndicate and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Case & Forslund, of Stockton, for respondents.

WEYAND, Justice pro tem. By stipulation of the parties in open court, the above cases were tried together. Separate records of the cases are made, but the briefs filed are the same in both cases.

[1] Both actions were begun on January 25, 1922. In substantially the same words, except as hereinafter disclosed, both complaints alleged that the Colonial Amusement Syndicate was a Nevada corporation, licensed to do business within California; that Norval L. Watton died on May 24, 1921, and that Alice G. Watton, his widow, was, after due proceedings, appointed the administratrix of his estate; that on divers times between the 24th day of May, 1921, and the 8th day of October, 1921, defendants received moneys, aggregating $20,000, for the use of Norval L. Watton, "in his lifetime," and since his death for the use and benefit of his estate. These moneys are alleged to have received by defendants from the following sources, to wit: "For and on account of moneys had and received as the proceeds of the operation of the Colonial Theater in the city of Stockton, and the lease of the property thereof, and, for moneys deposited in bank belonging to said corporation, and deceased." Then follows a further allegation of a promise on the part of defendants to pay said Norval L. Watton, "in his lifetime," and a like promise to pay the administratrix, said sum. Further the complaint avers demands made for payment and refusal of payment by defendants.

In the second case above named the complaint makes the same charges, except that an additional defendant, one E. G. Vollman, is added, and the sum of moneys charged to have been had and received was stated as being $6,000, and the time covered was from October 8, 1921, until the filing of the complaint. Specific denial was made in each case that any such sums, or any moneys whatsoever, were received by defendants for the use of Watton or his estate.

The evidence disclosed that the Colonial Amusement Syndicate was a Nevada corporation, entitled to do business in the state of California, and which was doing business at Stockton in the state of California, as a moving picture and vaudeville theater. The deceased, Watton, and the defendant Yori each owned substantially one-half the stock of the said company; the defendant Burritt owning just sufficient stock of the company to qualify him as an officer of the corporation. Watton, up to the time of his death, was a director of the corporation, and was manager of the theater at Stockton, and which business was the only business of the said company. Watton, Yori, and Burritt were the directors.

The line of questions asked by plaintiff's attorney at the trial indicated that it was plaintiff's claim that by false entries in the books of the corporation, and by sundry fraudulent acts of the defendants, Watton had been defrauded in his lifetime, and his estate had been prevented, since his death, from receiving moneys due the estate. These questions indicated that it was claimed moneys were, by fraudulent acts of the defendants, taken from Watton's estate, and for the uses and purposes of the defendants. In the second case, which has been called the "Vollman Case," and which designation we will adopt, to more briefly name this case, the testimony sought to be elicited by plaintiff indicates that the contention of plaintiff is to the same effect that the defendants Yori, Burritt, and Vollman, by fraud, and for their own advantage, after the death of Watton, procured a lease of the Colonial Theater to be made by the company to Vollman. The questions indicate that the plaintiff claims part of the rentals paid by Vollman.

There was not even the semblance of an attempt to allege fraud or deceit in either of the above actions. There was not as much as an allegation in the complaint that Watton, the deceased, was a stockholder in the

Colonial Amusement Syndicate, and yet plaintiff claimed the right to go into an accounting of the affairs of the corporation, and claimed the right to attack each and every act and thing done by the corporation, all upon the theory that, if perchance moneys were wrongfully credited by the corporation, or wrongfully paid out, all such matters could be litigated in an action for money had and received for the use of the said Watton or for the benefit of his estate. Under her complaints she had no such right.

The court did render judgment in favor of the plaintiff for $622.50 on account of a dividend declared by the Amusement Syndicate. The dividend referred to was in the sum of $2,171.48. Of this sum $1,082.98 was by resolution of the board of directors declared to be deceased's share thereof. This was the proper proportion of the whole dividend declared. According to the testimony of the company's secretary this dividend was just sufficient to "square" the account of Watton on the books. Two of the items charged against Watton were properly stricken from the list charged to Watton. These two items amounted to the sum allowed as a judgment in favor of plaintiff. It is beyond our comprehension how plaintiff could expect to recover herein for money had and received under the circumstances of this case. No fraud or deceit was alleged; not even an allegation that Watton was a stockholder. No dividend except the one above mentioned was declared to the stockholders.

[2] As to the allegation of the receipt of moneys from a lease of the properties of the company, the facts were clearly shown to be as follows: The lease of the theater building in Stockton, and wherein, during the lifetime of Watton, the sole business of the Colonial Amusement Syndicate was conducted was made by one Wolf to Yori and Watton. This lease contained a clause against subletting. The evidence disclosed that Yori and Watton as individuals never did use the property leased. The evidence disclosed that it was leased for, and at all times was used for, the business of the Colonial Amusement Company. It clearly appears that Yori and Watton at all times intended the leased premises to be used for no other purpose. The evidence attempted to be introduced by the plaintiff in the Vollman Case seemed to be directed to a claim on the part of plaintiff that, as this lease was made to Yori and Watton, as individuals, it remained their property, and, as it contained a clause against subletting, the attempt to sublease by the Amusement Syndicate to Vollman created an obligation to Watton or his estate for one-half of the rentals. The trial judge rightly held that, as the lease was taken for the company, and was always considered as being property of the company by the deceased, Watton, during his lifetime, his estate could not now contend otherwise.

Our conclusions are that no error was committed by the trial court in the case. We feel that no authorities need be cited to sustain our conclusions.

The judgments in both actions are affirmed.

I concur: FINCH, P. J.

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67 Cal. App. 625

WURL v. WATSON et al. (Civ. 4241.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

1. Negligence 🔑56(1)—"Proximate cause" defined.

"Proximate cause" is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury and without which injury would not have occurred.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

2. Highways 🔑175(1)—Negligence in driving left of center of highway held proximate cause of collision.

Defendant's negligence in driving truck with left wheels about one foot to left of center of highway was proximate cause of a resulting collision with plaintiff's automobile, where left front wheel of automobile passed very closely inside of left front wheel of truck.

3. Highways 🔑177 — Statute limiting speed around curves held inapplicable, where highway visible for 100 yards ahead.

Motor Vehicle Act (St. 1915, p. 409, § 22, subd. [a]), as amended by St. 1919, p. 220, § 13, subd. (a), limiting speed of automobiles to 15 miles per hour around curves when view is obstructed, has no application, where curve is so slight that highway is visible for a distance of 100 yards ahead of an automobile.

4. Highways 🔑177—Statute limiting speed of automobile around curve should be reasonably construed.

Motor Vehicle Act (St. 1915, p. 409, § 22, subd. [a]), as amended by St. 1919, p. 220, § 13, subd. (a), limiting speed of automobiles to 15 miles an hour in going around curves when driver's view of the road is obstructed, should be given a reasonable construction.

5. Highways 🔑175(1)—Motor vehicle driver may assume that approaching vehicle will be lighted in accordance with the law.

Motor vehicle driver has right to assume that a motor vehicle approaching from opposite direction at night will have two lighted lamps visible 200 feet ahead, as required by St. 1919, p. 206, § 13, subd. (a).

6. Highways 🔑177—Plaintiff held not contributorily negligent in driving around curve at more than 15 miles per hour.

Plaintiff, who was familiar with road, was not contributorily negligent in driving his car in nighttime around curve so slight that in daytime highway was visible for 100 yards ahead at more than 15 miles per hour, where his own lamps lighted one-half of highway for a distance of 75 feet ahead of him, in reliance on duty imposed upon motor trucks approaching from other direction to have two lighted lamps visible at least 200 feet ahead.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Paul A. Wurl against Fred Watson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

B. P. Gibbs and W. I. Gilbert, both of Los Angeles, for appellants.

Allen G. Mitchell, of Pomona, for respondent.

HOUSER, J. This is an action for damages arising out of a collision which occurred between an automobile driven by plaintiff and a motor truck being operated by defendants. The collision occurred on a long curve in a highway at about 11 o'clock at night. The findings show that just prior to the happening of the accident plaintiff was driving his automobile easterly over a highway with which he was very familiar at a rate of 25 miles per hour; that defendants' truck with a trailer attached thereto was being driven westwardly at from 8 to 12 miles per hour, with the left wheels of the truck about 1 foot south of the center of the highway, and with no lights either on the truck or on the trailer; that the lights were burning on plaintiff's automobile both immediately prior to and at the time the accident occurred. The evidence showed that on the northerly side of the highway an embankment cut off the view so that neither of the parties saw the other as each of them was rounding the curve until they were separated by a distance of approximately 50 feet, although in the daytime from the point of the accident the highway is visible in a westerly direction for a distance of about 100 to 120 yards. Judgment went for plaintiff, and defendants appeal.

While it is admitted by appellants that the findings show negligence on the part of defendants, it is contended, first, that as a matter of law such negligence was not the proximate cause of the accident; and, secondly, that the evidence established the contributory negligence of the plaintiff, and hence that the judgment should be reversed.

[1, 2] Proximate cause has been variously defined, but the definition thereof which appears to meet with general approval is that it is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred. The actual contact of the two machines was only as to the left front wheel of the automobile driven by plaintiff, passing very closely to the inside of the left front wheel of the truck, and then colliding with the front of the truck, which of necessity resulted in the left front wheel of the truck pursuing a similar course, with the same result with reference to the automobile—from which it follows, without consideration of the fact that the truck was being driven without lights, that, had the truck been "on its own side of the road," the collision would not have occurred. The position of the truck as it was driven over the highway was at least one of the direct causes which continued unbroken by any other efficient intervening cause up to and including the very instant that the accident occurred, and without which cause there would have been no collision between the two motor vehicles.

Plaintiff was driving his car where he had a legal right to drive it. The only question with reference to his operation of his automobile arises from the manner in which the automobile was driven around the curve. The substance of the law, as set out in subdivision a of section 22 of the Motor Vehicle Act (Stats. 1915, p. 397, as amended by Stats. 1919, p. 220), § 13, subd. (a), is that no person shall operate or drive a motor vehicle on any public highway at a greater rate of speed than 15 miles an hour in "going around corners or curves in the highway, when * * * the operator's or driver's view of the road * * * is obstructed."

[3-5] The first matter entitled to consideration is whether or not that part of the statute which limits the speed of automobiles to 15 miles per hour "in going around corners or curves in the highway" when the view is obstructed was violated. Notwithstanding the fact that the embankment shut off the view on the side of the curve on which the accident occurred, the road was visible in the daytime to a person situated as was plaintiff for a distance of at least 100 yards ahead of him. The degree of the curve, therefore, must have been so slight that to a driver of an automobile, in the absence of the embankment, the road would appear to be nearly straight. However, although the highway could be seen for a distance of 100 yards ahead, the embankment, beyond a distance of 100 yards, constituted somewhat of an obstruction. The words of the statute should be given a reasonable construction. The purpose of the statute was that one driving an automobile might see sufficiently far so that in case another automobile was approaching from the opposite direction a clear opportunity for avoiding a collision would be afforded. One hundred yards is a considerable distance. If an accident could not be averted within such a space, it would seem unlikely that the question of distance would be a factor in preventing a collision. To hold that anything which prevented the driver of an automobile from seeing the road ahead of him for only a greater distance than 100 yards con-

stituted such an obstruction within the meaning of the statute as would limit the legal rate of speed on such a curve to 15 miles per hour, would be placing a construction upon the statute which, in the light of experience and observation in the management and operation of automobiles, would be unreasonable and not within the contemplation of the Legislature in its enactment of the statute.

The suggestion is also made that darkness constitutes an obstruction. Plaintiff testified that as he rounded the curve the lights of his automobile showed one-half the road for a distance of 75 feet in front of him, and that, traveling as he was at the time of the accident, his automobile could have been stopped in a distance of 50 feet. Assuming, then, that at the very instant defendants' truck could possibly have been seen by plaintiff, he had exerted every effort to stop his automobile, there would have been a space of 25 feet between the automobile and the truck by the time plaintiff's automobile could have been stopped had the truck, instead of moving, been a stationary object. Defendants' truck however, according to the evidence, was moving toward plaintiff's automobile at a rate of between 8 and 12 miles per hour. Of course, in such emergencies both distances and rates of speed can only be estimated. Any testimony which would pretend accuracy in such matters on occasions of that nature would ordinarily be regarded as questionable. Plaintiff's view of the road may have been a few feet more or a few feet less than 75 feet, and, in addition thereto, a further inaccuracy may have existed in the width of the road which was visible to him for the distance of 75 feet; likewise regarding the distance which in the prevailing conditions the automobile might have been stopped.

On the date of the accident the statute to which reference has been made provided that (except under certain conditions therein specified) "it shall be unlawful to operate or drive at a rate of speed in excess of thirty miles an hour." Therefore, if neither the embankment nor darkness constituted an "obstruction," each of the parties to this action had the legal right (without considering other provisions of the statute) to operate his car around the curve in question at the rate of 30 miles per hour. Taking plaintiff's statement as correct, that to him one-half the highway was visible for a distance of 75 feet as he rounded the curve, and that traveling thereon at the rate of 25 miles per hour he could stop his automobile in a distance of 50 feet, it may be assumed also that, if another automobile traveling at the rate of 25 miles per hour in a direction opposite to that in which plaintiff was traveling had been similarly equipped with lights and brakes, the driver thereof would also have been able to see one-half the highway for a distance of 75 feet ahead of his automobile, and likewise could have stopped his automobile in a distance of 50 feet. The lights on plaintiff's automobile and the lights on defendants' truck, assuming them to have been burning, would have made the highway visible for at least 150 feet. Of course, the lights on the one automobile would be visible to the driver of the other automobile for a much greater distance than 150 feet—probably under normal atmospheric conditions for at least as great a distance as the curve of the road would permit vision in the daytime, which, as above stated, was about 100 yards; and as plaintiff rounded the curve he had a right to assume that, in accordance with the law (section 13 [a], Stats. 1919, p. 206), defendants would have two lighted lamps which would be visible at least "two hundred feet in the direction in which the truck was traveling." Judd v. Webster, 50 Cal. App. 743, 195 Pac. 929; Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 Pac. 677. Under such conditions plaintiff would have been able to see defendants' truck when it was at least 100 yards ahead of plaintiff, and in all probability, because of the light on defendants' truck, would have been apprised of the fact that some motor vehicle was approaching long before it actually came within the range of plaintiff's actual vision of it.

The case of Ham v. County of Los Angeles, 46 Cal. App. 148, 189 Pac. 799, is authority for the rule to the effect that, as to an inanimate object not required to be lighted (as is a motor vehicle), and with which inanimate object the automobile may collide, darkness may be considered as an obstruction within the meaning of subdivision b of section 22 of the Motor Vehicle Act; but, as is laid down in the case of Haynes v. Doxie, 52 Cal. App. 133, 198 Pac. 39, where the condition of the road is known to the driver of an automobile, he is entitled to proceed at a rate of speed reasonable under such conditions and within the limits of the law, and negligence cannot be imputed to him simply because he may be driving in the dark and unable to stop his automobile and avoid collision with objects after they come within the range of the lights on his automobile.

[6] If the conclusion be correct that in the daytime the statute which forbids driving at a greater rate of speed than 15 miles per hour around a curve where the view is obstructed has no application where the curve is so slight that the highway is visible for a distance of 100 yards ahead of an automobile, it would also follow that negligence may not be ascribed to the operator of an automobile who, being familiar with the road (as was plaintiff here), drives his car in the nighttime around the same curve at a greater rate of speed than 15 miles per hour, relying not only upon his own lamps to light one-half of the highway for a distance of 75 feet ahead

of him, but as well upon the duty imposed by law upon motor trucks approaching from the opposite direction requiring them to have two lighted lamps visible at least 200 feet in the direction in which the motor truck is proceeding.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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67 Cal. App. 704

WOLCOTT v. HUDNER, Superior Court Judge. (Civ. 4747.)

(District Court of Appeal, Second District, Division 2, California. June 17, 1924.)

1. Appeal and error 🔑460(2)—Appeal from order granting relief from failure to give timely notice for transcript held to stay proceedings.

Since court's order relieving defendant from the effect of his failure to file notice within ten-day period prescribed by Code Civ. Proc. § 953a, to entitle him to a certified reporter's transcript, is not mentioned in sections 942–945, an appeal by the plaintiff from such order stayed all proceedings upon the order in view of section 949.

2. Appeal and error 🔑485(1)—Certification by trial judge of transcript held stayed by appeal from order.

Pending appeal from order under Code Civ. Proc. § 473, relieving defendant from his noncompliance with section 953a with respect to notice to clerk of intention to appeal, trial judge was precluded under section 949 from certifying the transcript.

Application by N. A. Wolcott for writ of mandate against John L. Hudner, as Judge of the Superior Court in and for the County of San Benito, sitting as a Judge pro tem. in the Superior Court of Los Angeles County. Alternative writ discharged and peremptory writ denied.

Stutsman & Stutsman, of Los Angeles, for petitioner.

J. M. Fursee and Dan V. Noland, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is a petition for a writ of mandate directing Hon. John L. Hudner, judge of the superior court in and for the county of San Benito, to certify to the truth and correctness of a reporter's transcript in accordance with the provisions of section 953a of the Code of Civil Procedure.

[1] Petitioner is one of the defendants in the case of Callaway et al. v. Wolcott et al., a case brought in the superior court in and for the county of Los Angeles and which was there tried before respondent, who was sitting in one of the extra sessions of that court. The plaintiffs in that action recovered judgment. From that judgment the petitioner in this proceeding took an appeal to the Supreme Court. It was his intention to bring up a record on appeal prepared under the alternative method, so called, i. e., under the method provided for by section 953a of the Code of Civil Procedure. Petitioner neglected, however, to file the necessary notice with the clerk within the ten-day period prescribed by that section to entitle him to a certified transcript of the reporter's phonographic report of the trial. Because of this remissness on his part petitioner presented a motion under section 473 of the Code of Civil Procedure to be relieved from the effect of his failure to give the clerk timely notice of his intention to appeal and of his request for a reporter's transcript. The motion was heard by Hon. Victor R. McLucas, one of the judges of the superior court for Los Angeles county, who granted the motion and made an order relieving petitioner from the effect of his default. Thereupon petitioner filed with the clerk the notice required by section 953a. Within a few days after the entry of Judge McLucas' order an appeal therefrom to the Supreme Court was taken by the plaintiffs in the action. Thereafter petitioner presented a reporter's transcript to respondent with the request that he, as the judge before whom the case was tried, certify to the truth and correctness of the transcript. Respondent refuses to certify to the transcript pending the appeal from the order made by Judge McLucas.

Petitioner contends that since the order made by Judge McLucas relieved him from the effect of his default in failing to give the clerk timely notice of his intention to appeal and of his request for a transcript, it is now respondent's duty to certify to the truth and correctness of the reporter's transcript. Respondent, on the other hand, contends that the appeal from the order of Judge McLucas stays all further proceedings thereon in the superior court, and that therefore it is not his duty to certify to the reporter's transcript until final disposition shall have been made of that appeal.

In their presentation of the question as to respondent's duty in the premises counsel on both sides have assumed that the order made by Judge McLucas is appealable, and we therefore shall follow their lead by indulging in the same assumption.

Sections 942–945 of the Code of Civil Procedure provide a mode by which the "execution" of the judgment or order appealed from may in certain cases be stayed until the determination of the appeal, and section 949 provides that "in cases not provided for" in those sections the perfecting of an appeal "stays proceedings in the court below upon the judgment or order appealed from," except as to certain designated matters not necessary to be enumerated here. As the order of Judge McLucas granting relief to petitioner under section 473 is not one of the orders mentioned in sections 942–945, it follows that the appeal from that order had the effect of staying all proceedings in the court below "upon the * * * order appealed from."

[2] It only remains to consider whether the act of respondent, if he were to certify to the truth and correctness of the reporter's transcript, would be a "proceeding" upon the order appealed from within the meaning of section 949. That section, in so far as it is germane to the question here under consideration, has so frequently been construed by our Supreme Court that we are not left in doubt as to its general scope and effect. Thus in Dewey v. Superior Court, 81 Cal. 68, 22 Pac. 333, it is said:

> "During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered."

"The effect of the appeal," says the court in Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473, "is to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined." See, also, In re Dupes, 31 Cal. App. 698, 161 Pac. 276. In Ruggles v. Superior Court, 103 Cal. 128, 37 Pac. 211, the court says:

> "By the appeal the order or decree is set at large, and the subject matter removed from the jurisdiction of the lower court, until the appeal has been determined, and the matter remitted back from the appellate court."

In State I. & I. Co. v. San Francisco, 101 Cal. 150, 35 Pac. 549, the court expresses itself as follows:

> "The effect of an appeal from a judgment when the proceedings thereon are stayed is to preserve the rights of the parties to the controversy in the same condition as they were prior to the entry of the judgment."

Under the principles as thus announced we think it clear that not only is it not respondent's duty to certify to the transcript pending the appeal from Judge McLucas' order, but that he is without authority to do so until final disposition shall have been made of that appeal. Because the appeal from Judge McLucas' order operated to stay all proceedings thereon in the superior court, respondent's authority to certify to the truth and correctness of the reporter's transcript subsequent to the appeal from the order is precisely what it was prior to the making of the order. The effect of the appeal was to preserve the rights of the parties in the same condition they were before the order was made. Before he was relieved from the effect of his default by Judge McLucas' order, petitioner had lost his right to proceed with the preparation of a record under the alternative method (Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13); and, contrariwise, the plaintiffs in the action had gained the right to object to any certification of the record by respondent. It is clear, therefore, that if we were to direct respondent to certify to the reporter's transcript while the appeal from Judge McLucas' order is pending, the rights possessed immediately prior to the making of that order by the parties who appealed therefrom would not be preserved the same as they were before the order. Our mandate would operate to carry the order into effect notwithstanding the appeal, and might render a reversal of the order entirely ineffectual. The case is not distinguishable in principle from Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563; State I. & I. Co. v. San Francisco, supra, and Estate of Loyd, 175 Cal. 699, 167 Pac. 157. It results inevitably from these considerations that the writ should be denied.

The alternative writ of mandate heretofore issued is discharged, and the application for the peremptory writ is denied.

We concur: WORKS, J.; CRAIG, J.

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67 Cal. App. 606

PEOPLE v. PRATT. (Cr. 1169.)

(District Court of Appeal, First District, Division 1, California. June 6, 1924.)

1. Criminal law 🔑798½—Forms of verdict submitted should cover every phase of the law and any kind of verdict warranted.

Forms of verdict submitted to jury should cover every phase of the law under the evidence and include any kind of verdict which the jury would be warranted in returning, especially where a statute requires that a verdict of guilty shall assess the degree of the crime and the place of imprisonment.

2. Criminal law 🔑14—Amendment of statute did not affect prosecution for offense previously committed.

Under Pol. Code, § 329, saving prosecutions for offenses previously committed from operation of repeal of criminal laws, in a prosecution for rape, with consent, on a prosecutrix 15 years old, under Pen. Code, § 261, subd. 1, where section 264, making such an offense a felony, was amended after the offense and before the trial, so as to make it a felony or a misdemeanor at the option of the jury, the amendment had no application.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Thomas Pratt was convicted of rape, and he appeals. Affirmed.

Jos. P. Lacey, of Oakland, and Ben F. Jones, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was accused, tried, and convicted of the crime of rape. A motion for a new trial was made and denied. The accusation was based upon section 261, subd. 1, of the Penal Code, condemning acts of sexual intercourse with females under the age of 18 years. The prosecutrix was of the age of 15 years, and the act was accomplished upon her with her consent on January 6, 1923. Trial was had in October of the same year, and judgment was pronounced the November following. At the time the offense was charged section 264 of the Penal Code read as follows:

> "Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision 1 of section 261 of the Penal Code, and the female is over the age of sixteen years and under the age of eighteen years in which case the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall determine by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison."

It will be observed that under this section a minimum sentence may be imposed by the jury, in their discretion, when the female is over the age of 16 and under the age of 18 years, where the prosecution is had under subdivision 1 of section 261. In the exercise of this discretion, therefore, an offense committed under this subdivision could have been made a felony or a misdemeanor by the jury provided the female was over the age of 16 and under the age of 18 years.

After the alleged commission of the offense and prior to the trial, verdict, and sentence the Legislature in 1923 (St. 1923, p. 271) amended this section in two particulars. It emasculated therefrom the age of the female, leaving it discretionary with the jury to determine by their verdict whether in any case and irrespective of the age of the female an offense charged under subdivision 1 of section 261 was a misdemeanor or a felony. The amendment also provided that the trial court in the event of a plea of guilty might, in imposing sentence, also exercise a like discretion. This section as amended in 1923 became effective 90 days after May 18, 1923, which was, as above stated, prior to the trial.

Under these facts appellant claims that the trial court should have instructed the jury on the law as applicable at the time of the trial, and should have submitted for their consideration with the necessary instructions an additional and appropriate form of verdict in conformity with section 264 of the Penal Code as amended and effective at the time of the trial; in other words, the claim is made that defendant was entitled to have a form of verdict setting forth a recommendation as to the place of imprisonment included with the forms submitted to the jury, as the trial should have been conducted under the statute as amended. It is conceded that the forms of verdict submitted would have been proper prior to the amendment because of the fact that the prosecutrix was only 15 years old, and the jury at that time had no discretion to fix the punishment except where the female was over the age of 16 years.

[1] When forms of verdict are submitted to the jury they should be comprehensive enough to cover every phase of the law under the evidence, and should include any kind of verdict that the jury would be warranted in returning after its deliberation, and this is especially so where a statute requires that a verdict of "guilty" shall assess the degree of the crime and the place of imprisonment. If, therefore, the defendant was entitled to the benefit of the amendment it is clearly apparent that his substantial rights have been affected.

[2] The question is thus presented whether the amendment referred to affects the prosecution and punishment of offenses committed prior to its becoming operative. The situation is analogous to that arising upon the repeal of a statute and the effect of such repeal upon violations of the statute theretofore committed but for which prosecutions have not yet been had. To meet this situation we have in this state a general provision saving from the effect of the repeal such violations, namely, section 329 of the Political Code, which reads as follows:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

In construing this section the Supreme Court, in the case of People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61, held that a permanent saving clause in the general body of the law, if couched in apt language to express the purpose, is as efficient as a special clause expressly inserted in the particular statute saving the operation of the repealed statute in its applicability to past offenses. It is there further held that an amendment to a statute as to the penalty does not apply to offenses committed prior to the amendment. To the same effect is People v. Vincent, 95 Cal. 425, 30 Pac. 581, where it is held that such amendments do not apply to convictions for offenses committed prior to their enactment; in other words, the amendment must be given a prospective operation only.

In harmony with the views expressed in these cases the District Court of Appeal of the Third District, in the case of People v. Davis, 227 Pac. 494, decided May 10, 1924, a case which in its facts is on all fours with the one at bar, held that the amendment to the statute now under consideration was to be given a prospective operation only, and that the defendant could not have the benefit of its provisions. These authorities are determinative of this case.

The judgment and order denying a new trial are affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

68 Cal. App. 1

FALVEY v. ROBERTS. (Civ. 4881.)

(District Court of Appeal, First District, Division 2, California. June 25, 1924.)

1. Evidence 🔑588—Improbability of single isolated portion of testimony does not bind court to disregard other testimony.

Improbability of single isolated portion of testimony does not bind court to disregard witness' testimony in its entirety, where it is otherwise consistent and not improbable.

2. Municipal corporations 🔑706(5)—Evidence held to sustain finding of defendant's negligence in causing automobile collision.

In action for death of automobilist in collision of cars at street intersection, evidence as to which car had right of way and as to speed of respective cars *held* sufficient to warrant finding of negligence of defendant.

3. Appeal and error 🔑1011(1)—Function of trial court to weigh conflicting evidence.

It is function of trial court to weigh conflicting evidence, and its decision cannot be disturbed on appeal.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Mary L. Falvey, as administratrix of the estate of Jeremiah Baldwin Falvey, deceased, against Elmer A. Roberts. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas, Beedy & Lanagan, George J. Presley, and Ernest T. Hall, all of San Francisco, for appellant.

Gilbert D. Ferrell and Daniel A. Ryan, both of San Francisco, for respondent.

NOURSE, J. Action by the administrator of the estate of Jeremiah Baldwin Falvey, deceased, for damages resulting from the latter's death in an automobile collision July 12, 1922.

The collision occurred between a Ford sedan owned and operated by the deceased's son, in which the deceased was a passenger at the time, and an Oakland touring car owned and operated by defendant herein. The cause was tried before the court without a jury, and the court found, in accordance with the allegations of the complaint, that defendant so carelessly, negligently, and unskillfully managed, drove, and operated his automobile that it ran into and collided with the automobile in which decedent was riding, overturning the same and killing decedent, and rendered judgment for plaintiff in the sum of $5,000. Defendant appealed.

The appeal is on the sole ground that the evidence fails to disclose any negligence on the part of defendant which either proximately or at all caused or contributed to the injuries suffered by respondent's intestate.

The collision occurred at the intersection of San Mateo drive and Peninsula avenue, in San Mateo county. San Mateo drive runs in a northerly and southerly direction, and Peninsula avenue runs easterly and westerly. Double car tracks run along San Mateo drive. The Ford sedan in which respondent's intestate was a passenger was proceeding south on San Mateo drive, about 2 feet from the westerly curb line, while appellant was proceeding west on Peninsula avenue, traveling about the middle of the street. The Ford sedan was on appellant's right, and had the right of way, unless it was further from the point of intersection of their paths than appellant's automobile. Failure of the driver of either car to yield the right of way resulted in their collision, overturning both cars and killing respondent's intestate. On the question of which party had the right of way, as well as the speed of the respective cars, the evidence was sharply conflicting. Appellant's position is that the only evidence that the Ford had the right of way was the testimony of the driver Falvey, the son of respondent's intestate; that his testimony upon this point "is so improbable and fantastic in the light of what admittedly happened that it should be disregarded entirely"; and that the physical facts support this contention. He refers particularly to that portion of Falvey's testimony where, on cross-examination, he says he started to swerve to the right when he had gone about 10 feet past the northerly curb of Peninsula avenue, and that at that time appellant's car had gone about a couple of feet past the easterly curb of San Mateo drive. Appellant then says it would have been physically impossible for him to have reached the point of collision by the time Falvey did. We agree with appellant that these figures are undoubtedly wrong. The space occupied by the crossing of the two streets formed a square 70 feet across from property line to property line. The sidewalk was 12 feet wide on each side, leaving the square between the curbs 46 feet across. It was 16½ feet in a diagonal line from the point where Falvey testified he turned to the point designated as the point of collision, and, according to this evidence, appellant was distant 52 feet from the point of collision. A rate of speed more than three times that of Falvey's would be required to have enabled appellant to reach the point of collision at the same time as Falvey. Falvey attributed to

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🔑 For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes appellant a rate but two and a half times his own, and his was the highest estimate.

[1, 2] However, we do not agree with appellant that the improbability of a single isolated portion of the testimony binds the court to disregard the witness' testimony in its entirety where it is otherwise consistent and not improbable. It is to be expected that there will be some variance in the evidence in a case of this kind on such questions as distance and speed. The evidence fixed the place of the collision as slightly south of the middle of Peninsula avenue and between the western curb and property line, if extended, of San Mateo drive—about 8 feet past the curb line. On direct examination intestate's son testified that he was traveling at about 14 miles an hour; that when the front wheels of his car were about on a line with the northerly curb of Peninsula avenue he saw appellant's car just approaching the easterly curb of San Mateo drive—"I would say he was in the vicinity of this property line, possibly between the property line and the outside curb, but he had not reached the outside curb in the vicinity of the easterly property line of San Mateo drive; very close to it"; that he saw appellant look over in his direction, and appellant being on his left-hand side and further away, he (Falvey) proceeded to cross the street at a rate of about 14 miles an hour until he saw appellant crossing the car tracks on San Mateo drive and knew he was coming across, when he (Falvey) swerved to his right and turned up Peninsula avenue in an effort to avoid a collision; that appellant had been traveling about 30 miles an hour on approaching the intersection and increased his speed to about 35 miles an hour as he crossed the intersection in order to clear another automobile which approached on his left, traveling north on San Mateo drive. The driver of this third automobile testified that appellant was traveling "better than 20 miles an hour" as he entered the intersection and increased his speed as he crossed.

Mathematically tested, this testimony of Falvey is not at all improbable. Falvey's car was traveling about 2 feet from the westerly curb of San Mateo drive. The distance from the northerly curb line of Peninsula avenue to the center of the avenue and then at a right angle to the point of collision was 33 feet. The distance, traveling diagonally from a point ten feet south of the northerly curb of Peninsula avenue, was over 26 feet. Taking for the moment the evidence which put Falvey's rate of speed at 14 miles an hour and appellant's at 35 miles an hour, the latter was traveling two and a half times as fast as the former and would have traveled 65 feet while Falvey was traveling 26. The distance from the easterly curb of San Mateo drive to the designated point of collision was 54 feet. A variance in another witness' testimony from that of the witness Falvey did not oblige the trial court to accept the former and reject the latter. Neither do we think the position of the automobiles after the collision precludes the credibility of Falvey's testimony.

[3] The record then simply presents a conflict in the evidence, which it was the function of the trial court to weigh, and which cannot be disturbed on appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

67 Cal. App. 445

PEOPLE v. UPTON. (Cr. 745.)

(District Court of Appeal, Third District, California. May 23, 1924.)

1. Escape 🔑1—Statute making escape from prison offense held valid.

Pen. Code, § 106, which makes escape from state prison under certain circumstances an offense, is valid.

2. Criminal law 🔑240—Formal written order holding defendant to answer prevails over oral order of committing magistrate.

A regular order made by justice of peace as committing magistrate at the close of the preliminary hearing, holding accused for the offense of escaping while at work in a prison camp, prevailed over an oral order made by the same justice and which might have been at variance with the facts adduced at the hearing.

3. Statutes 🔑205—All sections of statute referring to same general matter to be read together.

All sections of a statute referring to the same general matter must be read and considered together.

4. Criminal law 🔑96—Escape 🔑9—Jurisdiction of offense of escaping from state prison lies in any county so that variance is immaterial.

Under Pen. Code, § 777, providing that, "except as herein otherwise provided," jurisdiction is in the county of the commission of the crime, construed with section 787, jurisdiction of the offense of escaping from prison, as defined in section 106, lies in any county, and a variance as to the county is immaterial; the quoted words referring to the Penal Code as a whole or to the same title and chapter.

5. Escape 🔑1—Statute making it crime to escape from state prison construed; "while at work"; "while being conveyed" to prison.

Under Pen. Code, § 106, making it a felony for one committed to state prison to escape "while being conveyed to or from or while confined within such prison," or "while at work" outside such prison, the words "while at work" refer to the general mission upon which the prisoner is engaged at the time, and the words, "while being conveyed to" a prison, apply to the original conveyance or delivery of a prisoner to the prison for confinement or a transfer from one prison to another.

6. Escape ⟹9—No variance between information and proof.

Where an information charging escape, in violation of Pen. Code, § 106, alleged the escape was made while accused was at work, but the proof showed the escape occurred while accused was being taken from a prison camp to the prison there was no variance.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Howard Upton was convicted of escaping from a prison camp, and he appeals. Affirmed.

Howard Upton, in pro per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WEYAND, Justice pro tem. Defendant was accused of the crime of escaping from a prison camp, in Trinity county; he being a prisoner of the state of California under the jurisdiction and control of the state prison at Folsom, Cal.

[1] He appeared at the trial without an attorney, and he appears upon this appeal in his own behalf, and by lengthy brief presents his claims for a reversal of the judgment of the lower court.

Three of the points presented by appellant herein are identical with the claims made in People v. Vanderburg (Cal. App.) 227 Pac. 621. These relate to the following alleged errors of the trial court, or objections advanced: That section 106 of the Penal Code is unconstitutional; that Sacramento county superior court had no jurisdiction; and that the evidence failed to prove that the guard on duty was a "prison guard."

These points were, in the Vanderburg Case, decided against the defendant, and a like ruling will be made in this case.

[2] In addition to these claims for reversal defendant in the instant case makes the additional claims: (1) That he is prosecuted for an offense other than the one for which he was held to answer; (2) that he was denied process for witnesses to his injury, and (3) that there was a material variance between the allegations of the information and the proof adduced, in that in the information it was alleged that defendant escaped "in said county of Trinity," and "while at work outside such prison," while the proof clearly showed an escape within the county of Shasta, and that the escape occurred while returning from work outside such prison.

1. The defendant was held to answer in the regular manner, and while it is disclosed that the justice of the peace who acted as committing magistrate did make an oral order at the close of the preliminary hearing, which might have been at variance with the facts adduced at said hearing, yet it is in the record that upon making the oral order the justice made the usual written order holding defendant to answer, and it was to the effect that defendant be held for the offense "in the within depositions mentioned." The record does not disclose a formal motion to set aside the information. After arraignment and plea was taken, defendant, on his own motion, was permitted to withdraw his plea of not guilty "for the purpose of entering the demurrer." The defendant presented his demurrer orally in the trial court, and this oral demurrer contains the only pretended assignment, allegation, or statement that raises this particular objection before the trial was had. Even conceding to a defendant appearing in his own behalf that this objection was properly presented to the lower court for decision, the trial court must be sustained. The record discloses a regular order holding to answer for the offense in the "within depositions mentioned," and the complaint upon which that indorsement was made did set forth the crime of escaping while at work in a convict camp. What the committing magistrate may have said cannot be taken as against the formal written order holding the defendant to answer.

[3] 2. As to the contention that defendant was denied proper process to secure the attendance of his witnesses, it appeared that at the trial of the case the defendant made a definite request for the attendance of one Major, a convict at Folsom prison. This witness was brought before the court by order, and testified upon behalf of defendant. Later, during the trial, the defendant did make the suggestion that other witnesses were desired by him to properly make his defense, but there is nothing that can be construed into a demand for any particular witnesses. In view of the statements of defendant as to witnesses desired by him, we can see no merit in this point.

[4, 5] 3. The original complaint before the magistrate was for an escape "in said county of Shasta," and "while at work outside such prison (Folsom)." For that charge defendant was held to answer. The information, whether carelessly drawn or for some other reason not apparent, charged an escape "in said county of Trinity." The proof disclosed an escape in Shasta, and at a time when the defendant was being transferred from the work at the camp back to the state prison at Folsom. Section 777 of the Penal Code, as it existed prior to 1919, in so far as now concerned, was as follows:

> "Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, * * * and except as herein otherwise provided, the jurisdiction of every public offense is in the county wherein it is committed."

In 1919 (St. 1919, p. 81) the Legislature added to said section a proviso relating only to the venue in prosecutions under section 270 of the Penal Code. In all other respects section 777 aforesaid was allowed to stand as it had been for many years. Appellant seems to contend that the words, "except as herein otherwise provided," in this section, as it has been since the year 1919, means as provided in said section 777. Ever since 1905 the words, "except as herein otherwise provided," were a part of section 777 and it is apparent that these words as then used meant as otherwise provided in the Penal Code, or in the same title and chapter thereof. To have said "as herein otherwise provided" in a section that had no provisos whatsoever therein would have been futile and meaningless. It is also apparent that by amending section 777, Penal Code, the Legislature did not intend to restrict its operation, but intended to make definite the question of jurisdiction in another particular kind of action. The Penal Code, since the year 1880, and in the same title and chapter, had therein and still contains another section, to wit, section 787, which reads as follows:

> "The jurisdiction of a criminal action for escaping from prison is in any county of the state."

Section 777 aforesaid and section 787 of the same chapter must be read together. It is an elementary principle governing the interpretation of laws that all sections referring to the same general matter must be read and considered together. It must be held that the words, "herein otherwise provided," used in section 777 since the amendment of 1919, have no different meaning in said section than they had before the amendment of that year, and it then follows that to give these words meaning they must refer to the Penal Code as a whole or to the title and chapter thereof dealing with jurisdiction. Construing these two sections together jurisdiction for this offense will be in any county of the state. In Bradford v. Glenn, Superior Judge, 188 Cal. 350, 205 Pac. 449, it was held that jurisdiction was in Sacramento county for a like escape in the county of Trinity. It then follows that the only necessary material allegation as to the place of escape would be an allegation of its occurrence within the confines of the state of California. It would then appear to be quite immaterial as affecting jurisdiction or venue whether either allegation or proof fixed Trinity county or Shasta county as the county within which the acts complained of occurred, if the information disclosed an escape in California, which fact was clearly set forth. If a variance, it is upon an immaterial matter.

[6, 7] The charge in the information was that the escape was made while defendant "was at work," etc., but the proof disclosed that the defendant had been taken to this camp in Trinity county from Folsom prison to work upon the state roads, and that the actual escape occurred while the defendant was being taken back from the highway camp to the prison. The words, "while at work," as used in section 106 of the Penal Code as it now stands, must be given the usual and ordinary meaning. Strictly speaking, there can never be an escape while at work. The "work" would of necessity have to cease and the "escape" begin. It then becomes a question as to whether, as used in this section, the words, "while at work," may be given their ordinary and usual meaning. The section does begin with a statement of an offense of escaping "while being conveyed to" a prison, but it is apparent that as there used these words are meant to apply to the original conveyance or delivery of a prisoner to the prison for confinement, or a transferring from one prison to another, and by its use shows that it is there intended in a quite different sense from conveying prisoners to a work camp. The words, "while at work," as used in the section, will be held to refer to the general mission upon which defendant was engaged at that time.

The only other phase of the matter that could be urged is this: Was the defendant sufficiently apprised of the charge against him, and was he enabled to make a proper defense? There can be no question but that the defendant was sufficiently advised of what the exact charge was. He made a full and complete defense in so far as he could. He was at no time "in the dark" as to the exact nature of the charge against him; indeed, his own testimony discloses that he did escape from the guards.

No reversible error appears, and the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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66 Cal. App. 707

DOLLEY et ux. v. RAGON et al. (Civ. 4367.)

(District Court of Appeal, Second District, Division 1, California. April 24, 1924. Rehearing Denied May 21, 1924. Hearing Denied by Supreme Court June 23, 1924.)

1. Pleading 🔑379—Admission of evidence affecting allegations of supplemental complaint held proper.

In action to terminate an oil lease, where a supplemental pleading was authorized by Code Civ. Proc. § 464, evidence affecting its allegations was properly admitted, the sufficiency of the original pleading being unquestioned.

2. Pleading 🔑279(3)—Supplemental pleading may be filed to show material facts occurring after commencement of action.

Under Code Civ. Proc. § 464, where a complaint is unobjectionable, a supplemental pleading may be filed in aid thereof which, leaving the original complaint intact, sets forth material facts occurring after commencement of the action.

3. Mines and minerals 🔑78(7)—Instruction that in determining whether development was prosecuted diligently before suit not to consider what came afterward held correct.

In an action to terminate an oil lease for failure to develop diligently, where supplemental complaint set up such failure after action was brought, instruction that the jury in determining whether the work was so prosecuted before the action was commenced, should not consider what was done afterwards, was not error.

4. Appeal and error 🔑1050(1)—Admission of stipulation in other case which was merely cumulative not reversible error.

In an action to terminate an oil lease for failure to develop diligently, continuously, and in good faith, where there was evidence that the work had not been so prosecuted, admitting a stipulation by attorneys in another suit to show materials used in developing the lease were not purchased until after the commencement of the action *held* not reversible error, being merely cumulative.

5. Mines and minerals 🔑78(5)—Lessors not estopped from suing for failure to develop oil lease by permitting lessees to erect derrick.

That lessors under oil lease permitted lessees to erect derrick which was completed one month before suit did not estop them from suing to terminate lease for failure to develop continuously, diligently, and in good faith, as required by lease.

6. Mines and minerals 🔑78(7)—Exclusion of evidence that if lessor had permitted lessee to assign lease money would have been available for developing not error.

In action by a lessor to terminate oil lease for failure to develop diligently, continuously, and in good faith, exclusion of evidence that if consent to assignment of lease had been given by plaintiffs and if the suit had not been brought defendants could have obtained money to develop the lease *held* proper, it being uncertain and problematical.

7. Mines and minerals 🔑78(7)—Evidence of offer of bonus for lease, and agreement to finance suit for cancellation of existing lease, properly excluded.

In action by lessor against lessee to terminate an oil lease for failure to develop according to contract, testimony that plaintiff had been offered a bonus for a lease of the land in question by another oil company, which had agreed to finance an action for cancellation of the lease, was properly excluded.

8. Mines and minerals 🔑78(7)—Instruction that failure to develop oil lease diligently would be excused in event of unavoidable delays properly refused.

In an action by a lessor to terminate an oil lease for failure to develop diligently, continuously, and in good faith as required by the lease, requested instruction that a compliance by the lessees with the lease would be excused by unavoidable delays and accidents *held* properly refused as inapplicable.

9. Mines and minerals 🔑78(7)—Instructions defining diligence required in development of oil lease properly refused.

In an action to terminate an oil lease for failure to develop diligently and continuously and in good faith as required by the lease, which prescribed that nothing but substantial work and continuous operations under terms of the lease should be considered as a compliance, instructions defining diligence *held* properly refused.

10. Appeal and error 🔑1078(1)—Errors not argued nor seriously presented entitled to no consideration.

Where points suggested by appellants are neither argued nor seriously presented they are entitled to no consideration.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by L. F. Dolley and wife against Edward D. Ragon and others. From judgment for plaintiffs, defendants appeal. Affirmed.

See, also, 228 Pac. 665.

Everett L. Ball, of Los Angeles, for appellants.

Frederick W. Smith and G. Randolph Miller, both of Whittier, for respondents.

HOUSER, J. The purpose of this action was to terminate an oil lease entered into between plaintiffs and the individual defendants. By the terms of the lease the said defendants bound themselves to commence active work developing the land for oil on or before April 1, 1921, and thereafter "to prosecute said work diligently and continuously and in good faith." The lease contained the further provision that "nothing but substantial work and continuous operations under the terms of this lease shall be considered a compliance with the terms hereof." The action was tried before a jury to which certain special issues were submitted, and the jury specifically found in substance that the defendants had violated the terms of the lease in that the defendants had failed to prosecute the work diligently and continuously and in good faith.

[1, 2] The first objection to the judgment which is presented by appellants' brief is that the trial court erred in permitting evidence to be introduced in support of the allegations contained in a supplemental complaint which was filed by plaintiffs. Authorities are cited by appellants which go to the point that where the original complaint fails to state a cause of action no relief can be granted on a supplemental complaint, and of course, in such circumstances, evidence affecting the allegations contained in the supplemental complaint would be improperly received. But no such condition is presented by the pleadings herein; indeed, the sufficiency of the original pleading is unquestioned. The rule

appears to be that, where a complaint is unobjectionable, a supplemental pleading may be filed in aid thereof, which, leaving the original complaint intact, brings to notice material facts relating to the case alleged to have occurred after the commencement of the action, but which may materially affect the rights of the plaintiff. Section 464, Code Civ Proc.; Giddings v. Seventy-Six Land & W. Co., 109 Cal. 116, 41 Pac. 788; California Farm, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593.

The supplemental pleading here being authorized by statute as well as by judicial interpretation, evidence affecting its allegations was properly admitted.

[3] Appellants complain of error in that the jury was instructed that in determining whether or not the defendants prosecuted the work of developing plaintiffs' land for oil, gas, or other materials diligently and continuously and in good faith prior to the commencement of the action, the jury should not consider what was done by the defendants in connection therewith after the action was commenced. The criticized instruction contains the further statement that—

> "Now, that does not mean that you are not to consider at all whether there was a failure to prosecute the work diligently and continuously after the suit was brought, but it simply means that, in determining whether it was so prosecuted before the suit was brought, you are not to consider what came afterwards."

The instruction directed the attention of the jury to an alleged breach of the covenant of the lease said to have occurred before the action was commenced, and informed the jury that in determining that particular fact it should not take into consideration evidence of what, if anything, occurred thereafter; but for an alleged breach occurring after the action was commenced, under the allegations contained in the supplemental pleading it could properly consider such evidence. In view of what has heretofore been said with reference to the allegations contained in the supplemental complaint and which related to the failure of defendants to prosecute the work diligently after the action was commenced, we are unable to agree with counsel for appellants in his contention as to the impropriety of the instruction of which complaint is made.

[4] This action was commenced on July 13, 1921. The burden of the complaint was that up to that time the defendants had breached the covenant contained in the lease calling for diligent and continuous work. The answer of the defendants, besides specifically denying the allegations of the complaint, set up certain affirmative allegations, among which was the averment that certain boilers, feed pumps, fittings, and hand tools had been purchased by the defendants prior to the date of the commencement of the action, looking to the performance by them in good faith of the conditions imposed upon them by the terms of said lease. It appears that only a partial payment had been made by the defendant Signal Hill Oil Company on the purchase price of the articles to which reference has been made, and that an action in claim and delivery had been brought by the vendors to recover possession of the same. On the trial of the instant case, plaintiffs offered in evidence a stipulation which had been entered into between the parties in the claim and delivery action, to the effect that the plaintiff therein was the owner of the property referred to in the action; that, in consideration of such plaintiff abstaining from further proceedings for a period of about three weeks, he might resume possession of the said personal property, provided that, in the meantime the defendants had not paid to said plaintiff the sum of $4,089, with costs of court; and that, upon the failure of the defendants to make such payment, plaintiff should have judgment. Objection was made to the introduction of the stipulation—the basis of the objection being that, inasmuch as the stipulation was signed by the attorneys representing the respective parties in that action and that it provided for a confession of judgment to be taken against the defendants which was unauthorized by the defendants personally, the stipulation was of no validity. In ruling upon the objection the judge of the trial court made the following statement:

> "I don't believe that the fact that a lawyer is employed to contest a case gives him authority to stipulate his client's rights away; objection sustained."

And the court limited the effect of the stipulation by the further statement that "I am only admitting it for the purpose of showing that those things were not purchased until about the 23d of July," which was a date 10 days after the commencement of the action in the instant case. The evidence merely tended to disprove the averments contained in the answer, to the effect that those articles had been purchased before the action was commenced. The final objection of defendants' attorney to the introduction of the stipulation in evidence, that it was not proper under the supplemental complaint, was overruled by the court. But, as heretofore shown, it was not a stipulation for judgment in the claim and delivery action, but only the implied fact arising out of the stipulation (which was annexed as an exhibit in another case) that the articles had not been purchased at the time when it was alleged in the instant case that they had been purchased, which was permitted to go to the jury. Limited as was the stipulation to its tendency to prove that particular fact, its effect was only cumulative to the mass of other evidence going to the main issue in the original complaint, namely, that up to the time the action was commenced the work had not been prosecuted diligently and continuously and in good faith, as defined by the provision of the lease that "nothing but substantial work and continuous operations" should be considered as a compliance with the terms thereof. Under such conditions, even assuming the correctness of appellants' contention (which point becomes unnecessary of decision), the admission of the stipulation for the purpose stated by the trial judge is not of that consequence which would justify an order of reversal of the judgment.

[5] Error is predicated upon the refusal by the court to give to the jury, at the defendants' request, an instruction to the effect that plaintiffs were estopped by virtue of their conduct to object to any noncompliance with the terms of the lease by the said defendants prior to the commencement of the construction of the derrick on said property.

The answers of the jury to the several special interrogatories submitted to it show that, although the lease was executed on December 22, 1920, the defendants were not obliged to commence actual work to develop the land in controversy for oil or gas before April 1, 1921; that after work was commenced it was not prosecuted diligently and continuously and in good faith until the suit was brought on July 13, 1921; but that there was "continuous substantial work done on the property from the time the construction of the derrick was begun until it was completed." The evidence tends to show that the derrick occupied about three weeks in building, and that it was completed on or before the 15th day of June, 1921; that 28 days elapsed between the date of the completion of the derrick and the date when the action was commenced; and that plaintiffs were frequently on the premises and at all times observed what progress was being made by the defendants in carrying out the covenants of the lease. Appellants urge that in such circumstances, plaintiffs being cognizant of all the facts, could not permit the defendants to proceed with the erection of the derrick and afterward object to delays in the development prior to the time the work was actually started in the construction of the derrick. But the lease itself contains no provision which requires plaintiffs to give notice to the defendants of any claim on the part of plaintiffs that the defendants either were violating or had violated the terms of the lease. Whatever were the difficulties or the problems which beset the defendants in connection with the work were of their own making. The evidence clearly shows that none of the defendants possessed any capital; or at least that if any of them had any assets, he was either unwilling or unable to put any considerable part thereof into this enterprise. The necessities of the defendants were merely the result of their own rashness in undertaking a large project when there appeared to be no certainty of financing the proposition. By admitting appellants' suggestion as being a correct statement of the law, it would follow that any act, however slight and inconsequential, performed by the defendants with the knowledge of plaintiffs in furtherance of the terms of the lease, even at the very last moment before action was commenced, would preclude plaintiffs from asserting their rights and from proving on the trial of the case whatever may have been the facts with reference to the inactivities of the defendants theretofore in connection with the development of the property. For example, let it be assumed that up to one week preceding the date when action was commenced nothing whatsoever had been done by the defendants with reference to carrying out the covenants of the lease requiring diligence and continuous work in the matter of the development of the land; let it further be assumed that on that day, to the knowledge of plaintiffs, the defendants delivered a load of lumber on the premises and actually commenced the erection of a derrick thereon: Could it then rightfully be assumed that plaintiffs, because of their knowledge of the facts, should be estopped to prove on the trial the delays and the inactivities of the defendants preceding the delivery of the lumber on the premises? It should be remembered that the claim of plaintiffs is not that no work was done by the defendants, but rather that the defendants failed "to prosecute said work diligently and continuously and in good faith." In such circumstances the fact that some work was done, however important, is not an answer to plaintiffs' contention that the provision of the lease requiring diligent and continuous work in good faith was violated. Estoppel is based upon principles of equity; but it would be most inequitable and unjust to preclude plaintiffs here from showing just what were the facts relating to the acts of the defendants in connection with their attempted compliance with the requirements of the lease from its inception until the date when the action was commenced.

[6] Appellants next contend that the trial court erred in refusing to permit the defendants to introduce testimony offered to the effect that had plaintiffs consented to an assignment of the lease, and had this action not been commenced, money would have been available for diligent operation under the lease.

By the terms of an instrument signed by plaintiffs, it was agreed that under certain conditions therein expressed plaintiffs would consent to an assignment of the lease by the defendants to a corporation to be organized by the lessees, to be known as the Signal Hill Oil Company (one of the defendants herein); also:

> "This consent to an assignment shall not be effective until the form of said assignment is submitted to the undersigned and approved in writing by them, nor unless the said Signal Hill Oil Company is organized and empowered to do business by the corporation commissioner of the state of California within thirty days from the date hereof."

The date of the instrument referred to was uncertain in that the date appeared as "this —— day of February, 1921." No attempt was made to show that the corporation was ever "empowered to do business by the corporation commissioner of the state of California"; nor was it shown that any form of assignment was ever submitted to plaintiffs, nor that they refused to approve any form of assignment. On the other hand, it clearly appears from the record herein that the defendants were afforded every reasonable opportunity to show that plaintiffs refused to consent to an assignment of the lease. The only instrument submitted by the defendants to plaintiffs for their approval was a drilling contract entered into between the individual defendants as parties of the first part, and Signal Hill Oil & Gas Company, as party of the second part, and the evidence is to the effect that plaintiffs orally assented to its terms, and the evidence is very uncertain that plaintiffs ever refused to approve in writing even the drilling contract. Of course, it is manifest that the bringing of the suit could in no way have affected the defendants in any efforts which they might have seen fit to exert in the way of raising money before the suit was brought. The proposition that if such consent had been given by plaintiffs, and if said suit had not been brought, the defendants could have shown that money would have been available for the diligent operation of the lease, is so uncertain, so problematical, and so incapable of ascertainment that no reasonable basis is afforded for the admission of evidence tending to establish the suggested conclusion. At most, evidence of such a nature would necessarily have consisted of opinions of witnesses of what might have occurred in a given contingency. It would have been in the nature of a prophecy, and in this day and generation such matters are neither given, nor are they entitled to, very great consideration.

[7] Appellants complain that the trial court was in error in refusing permission to the defendants to show that the leased land was undeveloped territory at the time the lease was executed; that thereafter, and before plaintiffs refused to consent to the "assignment" to which reference has heretofore been made, the leased property had become a proven oil field; that prior to the filing of the complaint plaintiffs had been approached by another oil company which had offered plaintiffs a large bonus for a lease on the land in question and that said oil company had agreed "to finance the bringing of an action for the cancellation" of the lease between plaintiffs and the defendants.

Assuming that each of the foregoing facts might have been established, just what bearing either or all of them would have had upon the main issue as to whether or not the work had progressed with diligence is not pointed out; neither is it apparent to this court; nor does the record entirely comport with appellants' contention that evidence of each of those facts was not permitted by the court to be introduced. As to the first point, the evidence is clear that the territory was as is claimed by appellants. As to the second point, this court has been unable to locate in the record any attempt on the part of either counsel, other than certain photographs which were offered and received in evidence, which would have even tended to show that the land ever became proven oil territory. Regarding the third point, as heretofore indicated, we are unable to perceive that the court committed any error in rejecting defendants' offer to prove same.

[8] Appellants further contend that the court erred in that the instructions to the jury did not contain any admonition to the effect that a compliance by the defendants with the terms of the lease would be excused in the event of unavoidable delays and accidents preventing such compliance. Counsel for appellants fails to show that any such instruction was requested by him on the trial of the case. Nor is it claimed that there was any evidence of any accidents, nor of any unavoidable delays, other than such as may have been occasioned possibly by scarcity of materials, condition of the roads, or of the soil, making difficult the delivery of materials on the leased premises. By the great preponderance of the evidence it was shown that such claimed conditions were not genuine, but that all such delays were wholly attributable to defendants' lack of money with which to carry on the work. Besides, the finding by the jury that continuous substantial work was not done on the property between April 1st and July 13th negatives appellants' contention that any real endeavor was made by the defendants to overcome such obstacles. No authorities are cited by appellants to sustain their position that delays of the sort mentioned by them constituted "unavoidable delays," within the legal meaning of the words, and we know of none which would make the principle for which appellants contend applicable to even the facts as presented by defendants' witnesses.

[9] The last contention on the part of appellants is that the trial court erred in refusing to give to the jury at the defendants' request an instruction defining the word "diligence" as a "steady application, a constant effort to accomplish the undertaking"; and in addition to such definition, refusing to

instruct the jury that "the law does not require unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable." On this point the jury was instructed that, unless the jury found from the evidence that substantial work was done on the premises and that continuous operation was carried on as provided by the terms of the lease, the verdict should be for plaintiffs. It will be remembered that by the terms of the lease the defendants were required to "prosecute said work diligently and continuously and in good faith." The lease also undertakes to define what is meant thereby in the following language:

> "Nothing but substantial work and continuous operations under the terms of this lease shall be considered as a compliance with the terms hereof."

Any other definition of what was meant by the language of the contract would be to place an interpretation upon the contract which was never contemplated by the parties to it. They said exactly what was meant when they said that substantial work and continuous operation was the meaning of the terms employed. For a trial court, or for any other court, to say that something greater or something less than "substantial work and continuous operation" was what the parties intended would be in effect to make a different contract for the parties. The jury found that the defendants did do "substantial work" in the matter of the construction of the derrick, only, and that what other work was performed by them was not done continuously nor in good faith. Such a finding negatives any effect which possibly might have resulted from an instruction that all that was required was the "usual, ordinary and reasonable" effort on the part of the defendants as outlined by the refused instruction.

[10] Other points suggested by appellants are neither argued nor seriously presented in any way. In such circumstances, under the rule frequently announced by the Supreme Court of this state, such alleged errors are entitled to no consideration. Brown v. Tolles, 7 Cal. 398; People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Chutnacut, 141 Cal. 682, 75 Pac. 340; Bell v. S. P. R. R. Co., 144 Cal. 560, 77 Pac. 1124; Pigeon v. Fuller, 156 Cal. 691, 105 Pac. 976; Born v. Castle, 175 Cal. 680, 167 Pac. 138; People v. Clark, 183 Cal. 677, 192 Pac. 521; Frazier v. David, 187 Cal. 724, 204 Pac. 17.

The judgment is affirmed.

I concur: CONREY, P. J.

CURTIS, J., deeming himself disqualified, does not participate in the foregoing opinion.

(67 Cal. App. 650)

VALENTINE et al. v. HAYES. (Civ. 4660.)

(District Court of Appeal, First District, Division 2, California. June 10, 1924. Rehearing Denied July 10, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

1. Master and servant 🔑278(12)—Evidence held insufficient to establish negligence in maintenance of ladders in light well.

Evidence *held* insufficient to establish negligence in construction and maintenance of ladders in a light well, for use of deceased workman, who fell while going down.

On Petition for Rehearing.

2. Master and servant 🔑278(12)—That custom was departed from does not show place unsafe.

The mere fact that usual custom of maintaining ladder in light well of building under construction has been departed from does not in itself, prove that place of employment was unsafe, if facts are without dispute that system used was in fact reasonably safe.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Flora A. Valentine and others, minors, by Flora A. Valentine, their guardian ad litem, against W. W. Hayes. Judgment for plaintiffs, and defendant appeals. Reversed.

Miller, Thornton & Miller, of San Francisco, for appellant.

Stanley Moore and George K. Ford, both of San Francisco, for respondents.

NOURSE, J. This action was instituted by the widow and minor children of Clarence A. Valentine to recover damages for his death, resulting from a fall from a ladder while in the course of his employment as a carpenter under the defendant Hayes during the construction of a building in the city of San Francisco. The case was tried before a jury, and a verdict rendered for $7,500 in favor of the plaintiffs. Thereafter the defendant moved for and was granted a new trial upon the sole ground that the trial court had erred in giving a certain instruction to the jury. From this order granting a new trial, the plaintiffs appealed to the District Court of Appeal, First Appellate District, Division 1. That court held that, though the ground upon which the new trial was granted was insufficient, as the instruction complained of was a proper one, nevertheless, a new trial was properly granted because the evidence was insufficient to support the verdict. Thereafter the case came on for a second trial, at which time an amended complaint was filed setting forth in some greater detail the manner in which it was claimed that the place of work was unsafe. The trial was had, which resulted in a verdict for the plaintiffs in the sum of $7,500, and from the judgment following the defendant has prosecuted this appeal.

The facts of the case are clearly stated in the former opinion (Valentine v. Hayes, 37 Cal. App. 42, 45, 173 Pac. 410, 411), from which we quote:

> "In the construction of the building the defendant provided a system of ladders in a light well for his employees, to be used in ascending to and descending from their work. At each floor planks were run across the light well resting on the window sills. From these platforms ladders were run, each ladder being one floor in height, running from alternating sides of the light well. The platforms so constructed were about 2 feet 6 inches in width, filling up the entire space in the windows between which they extended, and the boards thereof were 2 inches thick. The ladders resting upon these platforms were about 22 inches wide at the bottom and 18 inches wide at the top. The platforms were secured by nails, and there is no evidence to show that the system adopted was not strong and substantial, and reasonably safe for the purpose for which it was used. At the time deceased received the injuries resulting in his death, nothing gave way or broke about the ladders or platforms. The evidence further shows that when the accident happened deceased was going down one of the ladders carrying a lot of tools, with his face outward from the ladder and his back turned thereto, and that he lost his balance and fell, receiving the injuries from which he died."

Upon the second trial the respondent depended to a great extent upon the testimony of the witnesses given at the former trial, and a great part of this testimony was read into the record. In addition to this, evidence was offered tending to show that the place of work was unsafe because the ladder from which the deceased fell was not constructed and maintained in the ordinary and usual manner. It was also shown that it was not customary to maintain these temporary ladders in a light well, but that they were ordinarily constructed from floor to floor, where the beams and girders were covered with flooring to protect the workmen, in accordance with a state statute and city ordinance.

[1] All the evidence which was adduced at the second trial proved exactly the same facts which were before the appellate court on the former appeal. Taking all this evidence and all the inferences to be drawn therefrom as most favorable to the respondent, there is a complete failure of proof, as on the former appeal, that the accident was caused by any improper or faulty or defective construction or dangerous place of work. The case, therefore, stands as it did before —there is no evidence to prove negligence on the part of the appellant. The evidence is insufficient to support the assumption of the respondent that it was necessary for the deceased to come down the ladder in the manner in which he did. It is clear from the testimony of those present that he could have descended with his face toward the ladder, which would have enabled him to have held to the rungs of the ladder with his free hand. He was not required by reason of the construction of the latter or by any demands of the appellant to descend in the careless manner in which he did.

From a review of the entire evidence it follows, unmistakably, that the accident was caused by the carelessness and negligence of the deceased, rather than by any negligence on the part of the appellant. For this reason the judgment must be reversed, and it is therefore unnecessary to consider other points raised by the appellant.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing is denied. In their petition the respondents direct their criticism to the statement in the opinion that "there is no evidence to prove negligence on the part of the appellant." This is said to be in conflict with the former statement in the opinion that:

> "Evidence was offered tending to show that the place of work was unsafe because the ladder from which the deceased fell was not constructed and maintained in the ordinary and usual manner. It was also shown that it was not customary to maintain these temporary ladders in a light well, but they were ordinarily constructed from floor to floor where the beams and girders were covered. * * *"

[2] Taking these statements alone, and without reading the entire opinion, they do appear to be in conflict. What we were endeavoring to show was that the case, so far as proof of negligence was concerned, was the same as that before the court on the former appeal. The evidence that the ladder was maintained in a light well was not new, but was considered on the former appeal. The new or additional evidence offered was to the effect that this was not the usual or customary method of maintaining such ladders. The testimony of a witness that a week after the accident he visited the place and discovered that one of the ladders was not securely nailed was considered in the former opinion and held to be insufficient.

In this case another court has reviewed a former judgment, and the Supreme Court denied a transfer. The evidence was reviewed at length and held insufficient. The only essential addition to the evidence then considered is that the ladder was not maintained in the usual and customary manner and place. But this does not necessarily mean that the appellant was negligent, or that the place of employment was unsafe, in view of the fact that it was shown without conflict that the system used was the usual one in buildings such as that under construction when the injury occurred. In other words, the mere fact that the usual custom has been departed from does not, in itself, prove that the place of employment was unsafe, if the facts are without dispute that the system actually used was in fact reasonably safe, and this we understand to be the law of the former decision.

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67 Cal. App. 716

COLLOPY et al. v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 4721.)

(District Court of Appeal, First District, Division 1. California. June 19, 1924. Hearing Denied by Supreme Court Aug. 18, 1924.)

1. Eminent domain ⚷300—Evidence held to show that county's purpose in acquiring land was to change grade and relocate tracks of interurban.

Where plaintiffs executed and delivered to county a deed conveying a right of way and incidents thereto for a public highway, evidence *held* to show that county's only purpose in acquiring the land was to change grade and relocate tracks of an interurban railroad thereon, and that this fact was known to plaintiffs.

2. Eminent domain ⚷280—Consideration received by landowner for right of way covers all damages.

Where a landowner agrees to convey a right of way for a highway across his land, consideration received by him covers all damages to which he would have been entitled in a regular condemnation proceeding; he being presumed to have contemplated all such damages in fixing consideration for contract.

3. Eminent domain ⚷119(1)—Abutting owner not entitled to be compensated anew for every improvement in street or vehicle.

An abutting owner is not entitled to be compensated anew for every improvement in street or vehicle, or with every change made imperative with such improvement, especially where he has made a conveyance in full contemplation and knowledge of such change.

4. Highways ⚷88—Conveyance of land for public highway implies that it will be used as public welfare and convenience demands.

Conveyance of land for a public highway implies that it will be used as convenience and welfare of public may demand, although that demand may be augmented by increase of population.

5. Eminent domain ⚷79, 80—Abutting landowner held estopped to claim damages for location of interurban on highway.

Where abutting owners had been fully compensated for the location of a highway on their land, and by express terms of their deed had signified their approval of the location, and waived all claims for damages on account of its establishment, they were estopped by their agreement from claiming damages for the location of an interurban railway thereon.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Ella W. Collopy and husband against the United Railroads of San Francisco. Judgment for defendant, and plaintiffs appeal. Affirmed.

Thomas M. Stuart, of Fresno, for appellants.

Wm. M. Abbott and K. W. Cannon, both of San Francisco, and Ross & Ross, of Redwood City, for respondent.

TYLER, P. J. Action for damages to real property, and for abatement of an alleged nuisance. The complaint recites the corporate existence of defendant railway company, and the operation and management by it of street railroads and suburban and interurban lines of electric roads in the counties of San Francisco and San Mateo. The facts upon which the complaint is based, chronologically stated, show that for a long period of time prior to October 6, 1890, plaintiffs were the owners of the parcel of land described in the complaint. On the date last mentioned the county of San Mateo, by ordinance, granted to the predecessors in interest of defendant company a franchise for the construction, maintenance, and operation of a street railroad, with all necessary side tracks, over the main county road. This road passed through the town of Colma and along and adjacent to plaintiffs' property. The ordinance required that the grade of the railroad should conform to the grade to be established or re-established by the board of supervisors of the county or their successors, and that the particular portion of the highway upon which the railroad was to be located or relocated should be designated by the county surveyor under the direction of the board. It also expressly provided that the rights and privileges granted were to be held by the grantees and their successors subject to the general laws of the state, and also subject to such requirements and restrictions, which might thereafter be imposed by the board.

The street railroad was thereafter constructed and operated under the ordinance, and some nine years later appellants deeded to the railroad company a small portion of their property for county road purposes, which was thereafter graded off so that it might be used for said purposes, the grading leaving an embankment some two feet high. The railroad, as originally constructed, was located in the center of the highway, and was some 25 or 30 feet distant from appellants' property line. Some 23 years later, on March 24, 1913, and while the defendant company was thus maintaining and operating its railway, viewers were appointed by the board of supervisors of San Mateo county to survey and lay out a proposed new road from the San Francisco-San Mateo county line. The proposed route paralleled the county road upon which the tracks of defendant company were situated, but upon approaching one of the streets at Colma the route curved to the left and crossed a small portion of plaintiffs' lands. The property being thus affected by the proposed improvement, the California highway commission, which had through its engineering department inaugurated the change in the highway, addressed a letter to Mr. Collopy, advising him of the filing of the petition for the changed route, and also of the appointment of certain viewers, and requested that he meet them on the property to discuss the matter of acquiring that portion of plaintiffs' property which was affected by the survey. The parties accordingly met, and the parcel which was required was staked off, and the question of the new grade and how it would affect plaintiffs' other land was discussed, and an agreement between the parties was reached as to the amount of money plaintiffs should receive as damages by reason of the change. This agreement was in writing, and it recited, among other things, that "in consideration of the location of a public highway across said land and of the benefits to accrue to G. M. Collopy thereby, and the payment by county warrant of twelve hundred ($1,200) dollars, hereby agrees to grant by a proper deed of easement to the county of San Mateo, state of California, or to the state of California, as hereinafter provided, for the purpose of said highway, a strip of land across the above described land whereon to build said highway, as located by the department of engineering of the state of California. * * * And G. M. Collopy hereby waives all claim and damages whatsoever for and on account of said location and construction of said highway as aforesaid."

Pursuant to and in conformity with this agreement, plaintiffs on May 5, 1913, executed and delivered to the county their deed of a right of way with incidents thereto for a public highway over and across the portion of the lands of plaintiffs so selected. After the execution of the deed, the fence line of the property was moved back to the new line, and the land between the old fence line and the new fence is the land described in the deed executed by plaintiffs to the county. It consists of a strip some 40 feet at its widest point, and it tapers off to a point at either end. At this time the tracks of the company ran in a curve around and in front of plaintiffs' property, and bordered upon, and ran parallel to and along its entire frontage on the highway, a distance of some 450 feet. The deed of conveyance contained certain recitals, which had been incorporated in the agreement to the effect that, in consideration of the benefits to accrue to plaintiffs by reason of the location of the highway and other considerations, they consented to the location and waived all claim for damages or compensation on account of its re-establishment. It further expressly provided that the state of California should have the right to adopt and approve as a state highway the whole or any part of the right of way granted.

On November 7, 1913, the California highway commission notified the president of defendant corporation to relocate and reconstruct its tracks so as to place the center line thereof in a position 12 feet westerly from the established easterly curb line, and 13 feet easterly from the established center of the state highway. Two weeks later the commission also wrote a letter to the board of supervisors of San Mateo county concerning the removal of the defendant company's tracks, and inclosed a draft of an ordinance with reference thereto, which the commission suggested the supervisors adopt. A like communication was sent to the supervisor for the district where plaintiffs' land was situated, asking that the board confirm the center line location, and requested that he assist in the passage of the proposed ordinance covering the matter. Pursuant to these various communications the board adopted an ordinance in conformity with the suggestions. The ordinance required that the defendant company relocate and reconstruct its tracks to conform to the change as outlined in the communication sent to its president by the state highway commission. In April, 1914, the company proceeded to make the directed change. In doing so it excavated the property conveyed by plaintiffs to the county to the established grade, and removed its tracks thereto from the center of the highway, and it ever since has and is now maintaining and using them on the public highway. Some two years later and in 1916, just prior to the bar of the statute of limitations, appellants filed this action.

The complaint alleged the removal of the tracks from the center of the road without the consent of the plaintiffs. Damages were claimed in the sum of $10,000 for the alleged wrongful taking of plaintiffs' lands and the use thereof by defendant company. An additional sum of $5,000 was prayed for on account of the destruction of plaintiffs' right of egress and ingress to the county road. By way of a second cause of action, plaintiffs alleged that the operation of the heavy interurban cars over the tracks as relocated caused the dwelling house of plaintiffs and the earth on which it rested to vibrate, thus rendering the use of the premises less comfortable and inhabitable, and diminishing its value, for which reason an additional sum of $5,000 was claimed as damages, and the complaint also prayed that this nuisance be abated.

The case was tried by the court sitting without a jury. With the exception of proof of the alleged jarring of the house caused by the change of location of the tracks, plaintiffs made no effort to segregate the different elements of damages, and they confined their proof in support of their action to the testimony of two witnesses, who stated that in their opinion the removal of the tracks affected the value of the property in the sum of $15,000.

Upon the conclusion of the evidence the case was submitted on briefs September 30, 1919. Plaintiffs failed to present their opening brief until some two and a half years later. Upon the filing of defendant's brief shortly thereafter the court in August, 1922, rendered judgment in favor of defendant, and plaintiffs appeal.

The substance of their contention is that neither the Legislature nor a municipality can permit a street or highway to be taken, used or incumbered in such a manner as will interfere with the rights of abutting owners, or permit any use of it, which will amount to an additional burden, unless some provision for compensation is made, as such owners have special easements therein, such as the right to ingress and egress, which cannot be taken away, materially impaired, or interfered with, even under legislative authority, without just compensation being made.

The principle, that an ordinance affecting an easement must be taken in subordination to the paramount rights of an owner, presents varied and very interesting questions, included in which are the subjects relating to the loss suffered and benefits acquired by abutting owners by reason of a change of grade in highways made imperative by the increase in traffic and the ever changing modes and means of travel, and the effect upon the owners of the original acquisition of lands for highway purposes where additional burdens are imposed thereon. These and other questions, while highly interesting, do not require extended discussion, for the principles announced in the cases upon the subject have in our opinion little bearing on the case.

[1] As above set forth it appears in evidence that the plaintiffs executed and delivered to the county a deed conveying a right of way and incidents thereto for a public highway. By the express terms thereof they signified their approval of the location, and they likewise waived all claims for damages or compensation for or on account of its establishment. The deed contains a provision that the state of California shall have the right to adopt and improve as a state highway the whole or any part of the right of way granted. There is also evidence in the record to show that plaintiffs knew that defendant's tracks were to be moved. The right of way agent for the highway commission testified that he discussed this subject with both plaintiffs. He further testified that, before acquiring the property, he advised them that it would be necessary to make a cut that would create an embankment on practically the entire distance of the frontage of plaintiffs' land which abutted the highway, starting with a small cut at a point where their barn is situated, which would be increased gradually to form seven to eight feet at the highest point. The testimony of one of the viewers is practically to the same effect. It is therefore manifest from the evidence that the only purpose of acquisition of the land by the county was to change the grade and relocate the tracks, and that this fact was known to plaintiffs. As intimated by the trial court, it is not conceivable that the county would pay the sum of $1,200 for the property for road purposes and its incidentals without intending to use it for such purpose, as the evidence shows that it was an inclined elevation and could not be used for any purpose unless it was graded. Under the evidence presented the trial court found, and, we think, correctly so, that plaintiffs are concluded by their deed.

[2, 3] The findings in substance show that the evidence was insufficient to warrant a recovery upon the second cause of action relating to the alleged injury caused by the vibration resulting from the cars, and that plaintiffs had abandoned the same. They further show that the damages, if any, claimed by plaintiffs, by reason of the grading of the property for road purposes, had been fully settled by the consideration paid to plaintiffs for the land for road purposes and incidentals thereto, and that plaintiffs by their deed, having expressly waived any claim for damages which they might suffer on account of the establishment and use of the highway, were estopped from claiming the same. We fail to see how the court could have reached any other conclusion. The deed itself covered, in contemplation of law and by implication, all claims for damages. Where a landowner agrees to convey a right of way across his land, the consideration received by him covers all damages to which the landowner would have been entitled in a regular condemnation proceeding. In such a case he is presumed to have contemplated and arranged for all such damage, in fixing the consideration for the contract, and he is therefore remitted to it. Hord v. Holston Ry. Co., 122 Tenn. 399, 123 S. W. 637, 19 Ann. Cas. 333, 135 Am. St. Rep. 878; 2 Lewis, Eminent Domain, p. 845. Nor is one acquiring such an easement limited in the use thereof to the particular methods in vogue when the easement was granted. As civilization advances and new and improved methods of transportation are developed, these are in aid of and within the general purposes for which highways are designed. Cater v. Northwestern, etc., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543. An abutting owner, therefore, is not entitled to be compensated anew for every improvement

in street or vehicle, or with every change made imperative by such improvement, and especially so where he has made a conveyance in full contemplation and knowledge of such change. Such in effect is the principle established in Montgomery v. Railway Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89, and Hayes v. Handley, 182 Cal. 273, 187 Pac. 952. See, also, Albany v. United States, etc., 38 Cal. App. 466, 176 Pac. 705.

[4] Where land is conveyed for a public highway the implication must be that it will be used as the convenience and welfare of the public may demand, although that demand may be augmented by the increase of population. The benefits which an owner of the servient estate receives from the increase in population and consequent building up of the community usually far more than compensate him for the increased burden he may claim to have suffered. Huddleston v. City of Eugene, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444. True, in some instances a landowner may suffer a loss; but he often obtains the benefit for nothing through the increase of the value of his land, and he must bear the burden in the less common case of the depreciation in value in consequence of the work. Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A, 73.

[5] Aside from these considerations, plaintiffs having, as the evidence and findings show, been fully compensated for their alleged injury, and having expressly waived any claims for damages by reason of the improvement, they are estopped by their agreement from claiming the same.

Appellants complain of certain alleged errors in the rulings of the trial court. We do not deem a discussion of the same necessary. We have examined them, and in our opinion they are without merit.

Other questions raised are controlled by the views herein expressed.

The judgment is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

(67 Cal. App. 575)

TARPEY v. CURRAN et al. (Civ. 4715.)

(District Court of Appeal, First District, Division 1, California. June 4, 1924. Hearing Denied by Supreme Court July 31, 1924.)

1. New trial 🔑155—Motion deemed denied by failure to act thereon within statutory period.

Motion for new trial for insufficiency of evidence to support findings and illegality of decision is deemed denied by failure of action thereon within statutory period.

2. Corporations 🔑447—Liability on contract assigned to de facto corporation attaches on creation of de jure corporation.

Liability of corporation on contract as signed to it while mere de facto corporation attaches as soon as de jure corporation comes into existence, whether or not it subsequently accepts assignment.

3. Appeal and error 🔑1009(3)—Rule as to trial court's findings on conflicting evidence applies in equity cases.

Rule that appellate court will consider merely whether there is substantial evidence supporting trial court's findings of fact on conflicting evidence applies in equity cases.

4. Vendor and purchaser 🔑214(6)—Vendor cannot recover deficiency judgment for purchase money against vendee's assignees not assuming contract obligations.

Original vendor in executory contract cannot recover deficiency judgment for unpaid purchase money, from vendee's assignee, under Civ. Code, § 1589, or otherwise, unless the latter assumed the contract obligations, either in action for specific performance or for foreclosure of vendor's lien, notwithstanding assignee made payments under contract and took possession of and wasted property.

5. Corporations 🔑448(2)—Good faith presumed and defective formalities disregarded in determining whether obligations of contract were assumed by corporate assignee.

Trial court, in determining whether corporation accepted assignment of contract by organizers to purchase mining claims and assumed obligations thereof, could presume good faith in proceedings attending transactions and incorporation, with subsequent actions of corporation and organizers, and look beyond defective and lacking formalities to real purpose and meaning of whole plan.

6. Appeal and error 🔑1009(3)—Findings on conflicting evidence in equity case conclusive so far as supported by substantial evidence with reasonable inferences.

Trial court's fact findings on conflicting evidence in equity case are conclusive on appeal, so far as supported by substantial evidence with reasonable inferences therefrom.

7. Judgment 🔑256(5)—Against party not signing contract sued on erroneous.

Judgment against defendant, whom evidence showed and court found did not sign contract sued on and was not obligated thereunder, *held* erroneous.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by M. F. Tarpey against Belle M. Curran, executrix, etc., and others, in which certain defendants cross-complained against the remaining defendants. From judgment for plaintiff which denied any relief to cross-complainants plaintiff and cross-complainants appeal. Modified and affirmed.

Hearing Denied by Supreme Court; Tyler Justice pro tem., not participating.

James Gallagher, of Fresno, for appellant Tarpey.

L. L. Cory, of Fresno, for other appellants.

Frank D. Stringham, of San Francisco, for respondent Piedra Magnesite Co.

Beverly L. Hodghead, of San Francisco, for respondent American Refractories Co.

ST. SURE, J. This is an action to recover $33,617.20, balance due on a last installment of $37,500 under agreement to purchase certain magnesite mining claims, to which plaintiff as vendor and defendants Curran and Phillips as vendees were the original parties, and for the foreclosure of a vendor's lien on said mining claims.

Defendants Thomas, Winter, Piedra Magnesite Company, and American Refractories Company are joined as claimants of interests in the mining property and a calcining plant, as purchasers, grantees, assignees, mortgagees, and judgment creditors.

The third amended complaint alleges that defendants Winter, refractories company, and Thomas, with full knowledge of the mutual rights and obligations of the original parties to the contract, and while the same was wholly executory, promoted and incorporated the defendant Piedra Magnesite Company for the purpose of assuming said contract and performing its terms, and became stockholders of said company; that said company, with knowledge of the rights and obligations of the parties to the contract, took and accepted an assignment of said contract, and agreeably to plaintiff assumed its obligations, entered upon the property, and proceeded to the keeping and performance of the conditions and covenants of the contract; that it erected the plant mentioned, and otherwise performed under the terms of the contract and made installment payments thereunder with the exception of the payment sued on.

Defendants Phillips, Thomas, and Belle M. Curran, as executrix of her husband testator, denied generally the allegations of the complaint with respect to themselves, and cross-complained against the remaining defendants, alleging the execution of the original agreement; also execution of an agreement between themselves and Winter and the refractories company to form a corporation for the purpose of assuming, as assignee, the burdens of the original agreement, and holding them harmless thereunder, for the consideration of 50 per cent. of the stock of said corporation and the assignment of said contract. The third amended complaint of the plaintiff is made part of the cross-complaint, and the prayer is that as to any deficiency judgment that may be entered, the remaining defendants be adjudged primarily liable and these defendants (Thomas, Curran, and Phillips) sureties.

Defendants Winter, the refractories company, and the Piedra Magnesite company answered separately the third amended complaint and the cross-complaint, after demurrers interposed thereto had been overruled. Trial was had, resulting in judgment for plaintiff, foreclosing any rights of all the defendants in the real property the subject of the original contract; and against defendants Curran, Phillips, and Thomas for the amount sued for; for a sale of the property mentioned in the contract, and for a deficiency judgment; denying judgment against defendants Piedra Magnesite Company, American Refractories Company, and Emil Winter, both for a deficiency judgment as to them on the original action, and a declaration of their status as principal debtors with Curran, Thomas, and Phillips as sureties, on the cross-complaint of the latter.

[1] Motion for new trial by plaintiff and cross-complainants on the grounds of the insufficiency of the evidence to support the findings, and that the decision was against law, is deemed denied by failure of action thereon within the statutory period. This is a joint appeal by plaintiff and cross-complainants from that part of the judgment adjudging that no deficiency judgment be entered or docketed against defendants Piedra Magnesite Company, American Refractories Company, and Emil Winter; and that cross-complainants take nothing by their cross-complaint against said defendants. Defendant and cross-complainant Thomas appeals from the whole of the judgment against himself.

The record shows that on June 1, 1917, a contract of sale was entered into between plaintiff Tarpey as vendor and defendants Curran and Phillips as vendees for certain magnesite mining claims in Fresno county, Cal., for the purchase price of $75,000, of which amount $2,500 was to be paid in cash and the balance in installments. A further consideration expressed in the contract was that within 120 days from its date the vendees, at their own cost and expense, should erect a calcining plant, crusher, works, machinery, and appliances on the right of way of the Atchison, Topeka & Sante Fé Railway Company's railroad, or otherwise in the vicinity of the said claims, and expend thereon a sum not less than $35,000 within said period, which plant was to be appurtenant to said mining claims and stand as additional security for the performance of the contract. A proviso that the vendees should, on demand, execute a mortgage on this plant to the vendor, was included in the contract. The cash payment was made, and for the balance of the purchase price the vendees gave their promissory notes, due at the respective due dates of the payments to be made under the contract. Default in the payment of the last installment under the contract is the basis of this action. Defendant Thomas, though not a party to the contract, became jointly interested with the vendees by advancing one-third of the initial payment of $2,500 and entering into a separate agreement whereby they were to share equally under whatever arrangement was made for financing and operating the property. Thomas then was, and since April 25, 1916, had been, the representative in Tulare county, Cal., of the American Refractories Company to buy magnesite.

Shortly after the making of the Tarpey contract, the vendees, together with Thomas, went east for the purpose of interviewing officers of the American Refractories Company with a view to the financing of the Tarpey property by the latter company. Mr. Curran took with him maps, photographs, and a report prepared by engineer Coghlan on the property, together with a copy of the Tarpey contract. At Chicago and Joliet they met Messrs. Mossman and Allen, respectively manager and vice president of the American Refractories Company, and had conversations with them respecting the business in hand. From Chicago the vendees, Thomas, and Mossman, at the suggestion and on the arrangement made by the last named, proceeded to Pittsburg to confer with Mr. Winter, the president of the refractories company. At Pittsburg a meeting was held at which Curran, Phillips, Thomas, Mossman, and Winter were present, and after discussion an agreement drawn which was then signed by all those named there present, and a few days later by Mr. Allen at Joliet or Chicago. This instrument, called the Pittsburg agreement, was dated June 9, 1917, and dealt with the formation of a California corporation "for the purpose of mining, calcining and shipping magnesite," to have five directors, three of whom (Allen, Mossman and Winter) "will represent the American Refractories Company," and Curran and Thomas "are to represent the California stockholders." The stock of the corporation, of the value of $10,000, was to be divided equally between Curran, Thomas, and Phillips as one party and the American Refractories Company. This agreement recited that—

> "Messrs. Curran, Thomas and Phillips have secured an option to purchase a cerain magnesite property located at Piedra, Fresno county, Cal., * * * and they have made a payment of $2,500 on the purchase price of the property. In consideration of receiving fifty per cent. of the corporation stock they are to assign this contract to purchase to the new corporation with all its rights, titles and privileges. * * * The $2,500 cash they have paid and the contract to purchase shall be in full payment of their subscription of $5,000. The American Refractories Company, by its three stockholders named above agree to pay $5,000 in cash for the $5,000 stock they are to receive."

Provisions were made for advances of cash as a loan to the corporation by Allen, Mossman, and Winter on behalf of the American Refractories Company to the extent of $50,000 for building purposes and machinery; the name of the company agreed upon, that the entire production of the new company was to be sold to the American Refractories Company, Curran named as vice-president and general manager, with his salary for the first year; and Phillips as general superintendent and his salary for the first year; counsel to be retained specified; the amount to which contracts might legally be made by the California representatives without the consent of a majority of the directors, limited; and, finally, a statement made that the corporation was to be organized on the strength of representations made by Messrs. Curran, Thomas, and Phillips as to deposit and quantity and quality of same, and as to their ability to have the plant built and in operation within sixty days. This last condition was stated to be satisfied if the plant was built and in operation within three months, on account of recognized abnormal conditions prevailing. There is a conflict in the evidence as to whether or not there was a copy of the Tarpey contract at the Pittsburg meeting.

Returning from Pittsburg to California, defendant Thomas caused the incorporation of the Piedra Magnesite Company, as provided in the Pittsburg agreement, retaining Attorney Powers of Visalia for the legal work. After the incorporation of the company, Mr. Thomas requested the same attorney to prepare an assignment by Messrs. Curran and Phillips of the Tarpey contract to the new company. This assignment, referred to as the "first" assignment, was executed by Messrs. Phillips and Curran some time in July, 1917, and was delivered to defendant Thomas, who was secretary and treasurer of the new company. It presumably remained in his possession with the other records of the company until they were sent to Mr. Mossman at Joliet, Ill., some time in August or September. There is a dispute as to whether or not the assignment was actually sent with the other records or remained in Thomas' possession until produced November 22, 1917. One provision of this assignment read:

> "This instrument is made and delivered by said undersigned upon the condition that said Piedra Magnesite Company shall keep and perform all the conditions of said contract to be kept and performed by said undersigned."

And a copy of the Tarpey contract was annexed to and made a part of it. The assignment was at the directors' meeting of the Piedra Company on organization, but there is no evidence of any resolution of the board of directors, as such, accepting it. Plaintiff testified also that there was no notice of any assignment of the contract ever given him by the original vendees.

The company was organized under instructions from Attorney Powers, and the necessary organization meetings held. The original directors were Curran, Phillips, Thomas, Mitchell, and Stevenson, the two last mentioned being merely accommodation resident signers to make up the necessary quota of five. A second meeting was held on July 23, 1917, but the minutes of the meeting were unsigned. Until November 22, 1917, these appear to be all the directors' meetings held. At the first stockholders' meeting Phillips was elected temporary president and Thomas temporary secretary, the articles and certificate of incorporation were read, and a draft of the by-laws presented, read, and adopted. At the first meeting of directors, officers of the corporation were elected as follows: Phillips, president; Curran, vice president; Thomas, secretary; Thomas, treasurer. The business ensuing consisted in following out the Pittsburg agreement by the employment of Curran as general manager at the agreed salary and of Phillips as superintendent, at the agreed salary; the method of signing checks specified and the general manager authorized to contract obligations not to exceed $5,000. These minutes were signed by the president and secretary. By the unsigned minutes of the directors' meeting of July 23d the following appears to have taken place: Joe L. Mitchell resigned as director, and Emil Winter was elected director in his place; R. D. Stevenson resigned as director, and P. B. Mossman was elected director in his stead; Phillips resigned as president, and Emil Winter was elected to that position; Thomas resigned as secretary, and Mossman was elected as such. The new lineup of directors and officers then stood: Winter, president; Mossman, secretary; Thomas, treasurer; Curran, vice president; Phillips, director; which, excepting that Allen was not on the directorate, for which purpose an additional meeting was deemed necessary, was the program outlined for the corporate representation in the Pittsburg agreement.

On November 22, 1917, at the instance of Mossman and under direction of Attorney Hodghead, another meeting was held. "There were present Directors Thomas J. Curran, J. W. Thomas, and W. B. Phillips. There were also present former directors Joe L. Mitchell and R. D. Stevenson, two of the original incorporators of said Piedra Magnesite Company, and directors thereof until the 23d day of July, 1917." Then follows a recital of the proceedings of substituting Winter and Mossman by election as directors and president and secretary, respectively, at the meeting of July 23d, and their refusal to accept such election. A resolution is then set forth rescinding the proceedings of the meeting of July 23d in toto. Mitchell and Stevenson were again elected directors, Phillips was again elected president and Thomas secretary, and after qualifying shares had been issued, the meeting continued with this personnel. A resolution was then passed reciting the advance by the American Refractories Company to Piedra Company of an aggregate of $69,000, or some $19,000 in excess of that agreed to be advanced in the Pittsburg agreement, and in consideration of assurance of the American Refractories Company, through Mossman, that it would refrain from instituting action to recover this money, or attach the property of the company therefor, the Piedra Company acknowledged its indebtedness to the American Refractories Company in the sum of $69,000, less the actual payments on account as shown by the books of account of the Piedra Company, and authorized the execution of promissory notes of the company to the American Refractories Company for the various amounts which had been advanced from time to time, to bear interest at 6 per cent. from the respective dates of advancement. The place of business of the corporation was then moved from Porterville to San Francisco, and the notes executed and delivered to Mossman as treasurer for the American Refractories Company. Mitchell and Stevenson then resigned as directors, Phillips as president and director; Curran, as vice president, was called to preside. Mossman and S. H. Dolbear were elected directors to replace Mitchell and Stevenson, and F. D. Stringham to fill the vacancy as director, of Phillips. Dolbear was then elected president. The minutes were signed by Thomas as secretary, and a note, also signed by him, was added, to the effect that Mossman and Winter, though declining to admit that they were directors or officers of the company, were willing, and Mossman authorized for Winter, in the latter's absence, to consent to the holding of the meeting if such consent were deemed necessary to the validity of the proceedings.

At this last meeting an assignment of the Tarpey contract, called the "second" assignment, was signed by Curran and Phillips, antedated July 30, 1917, which recited the making of the Pittsburg agreement and the formation of the Piedra Company in accordance therewith; and also in stated accordance therewith, for the expressed consideration of one dollar, assigned the Tarpey contract to the Piedra Company. The clause for assumption of liability by the company, contained in the first assignment, was omitted from this instrument. Phillips testified that he protested executing this second assignment, saying that he had already signed the necessary instrument following the incorporation of the company, but that it was represented to him that the first assignment was lost and this was merely to replace it and complete the records. Mossman testified that they never consented to such an assignment as the "first," and that he had no knowledge of such an instrument until the meeting of November 22d. Winter testified he had no personal knowledge of the "first" assignment. There was also executed at this time by Curran and Phillips a release of the Piedra Company, the American Refractories Company, and the stockholders of the latter, of all liability incurred or to be incurred by reason of the assignment of the Tarpey contract to the Piedra Company. The expressed consideration for this release is the advancement to Phillips and Curran of the sum $17,000, or thereabouts, "being such sum as is necessary to make the payment due under said Tarpey contract on the 30th of November, 1917, if the same be paid."

The Piedra Company continued to operate the claims until May, 1918, but abandoned them before the final payment under the Tarpey contract matured on May 31, 1918, and with the exception of the application of a small royalty of $2 per ton for what had been mined during this period, the last payment was never met.

The findings of the court pertinent to this appeal are substantially as follows:

III. That on June 1, 1917, the Tarpey contract was fairly entered into for an adequate consideration, between Tarpey, Curran, and Phillips.

IV. That Thomas did not sign the contract and was not obligated to plaintiff thereunder.

V. That while the Tarpey contract was executory and nothing done thereunder save the initial payment of $2,500 by the original vendees, the Pittsburg agreement was made by the American Refractories Company by and through its representatives, Emil Winter, P. B. Mossman, and E. M. Allen, with defendants Curran, Phillips, and Thomas.

VI. That the magnesite company was incorporated "pursuant to the terms of" the Pittsburg agreement; that Curran and Phillips assigned to said corporation all their right, title, and interest in and to the Tarpey contract; and, further, that the "first" assignment was executed in July, 1917, by Curran and Phillips, and delivered to Thomas, but never accepted by Piedra Magnesite Company nor any other defendant; that no officer of the Magnesite company was authorized to assume the indebtedness under said Tarpey contract for the Piedra Company, and the Piedra Company never assumed said indebtedness. Further, that the "second" assignment was executed November 22, 1917, by Curran and Phillips, delivered to the board of directors of the Piedra Company on the same day, and accepted by the Piedra Magnesite Company.

VII. That in July, 1917, while the Tarpey contract was wholly executory, the Piedra Company entered into and took possession of the Tarpey contract property, and mined and extracted ore therefrom. That thereafter they advanced to Curran and Phillips and caused to be made on the Tarpey contract the following payments: $15,000 on or before June 30, 1917; $20,000 on or before November 30, 1917; and an aggregate of $6,062.63 as royalty on ore extracted payable to plaintiff under the terms of the Tarpey contract.

VIII. That on November 22, 1917, for the consideration named therein, Curran and Phillips executed the "release" of that date (the consideration expressed being the advancement of the amount necessary to meet the payment of November 30th), and that on November 30th the Piedra Company advanced to Curran and Phillips the sum of $17,000 to meet the November 30th payment, and the payment was made by the latter to the plaintiff Tarpey.

XI. That the amount sued for, with interest, is due and owing plaintiff by Curran, Phillips, and Thomas; that the Piedra Magnesite Company, American Refractories Company, and Emil Winter did not assume any of the obligations of Curran or Phillips under the Tarpey contract or the payment of the purchase price thereunder; and that the Piedra Company, American Refractories Company, and Winter are not liable to plaintiff nor to the cross-complainants in any amount whatever.

XII. That within three months from the Pittsburg agreement the Piedra Company constructed a calcining plant on the property of the Atchison, Topeka & Sante Fé Railway Company at Piedra; that it was not constructed as appurtenant to or as part of the Tarpey contract property, but for the purpose of reducing magnesite ore received from the property of plaintiff or from any other source.

The appeal, as was the motion for a new trial, is grounded on the insufficiency of the evidence to justify the findings, and that the decision is against law.

It is also urged that the entire judgment against Thomas has no support in the evidence or findings; that the decision in favor of Piedra Magnesite Company, American Refractories Company, and Winter is wholly unsupported by the evidence, as is also the decision that cross-complainants are entitled to no relief against their codefendants.

In appellants' closing brief the points on which the correctness of the decision is questioned are thus set forth:

(1) In denying a deficiency judgment to plaintiff against the Piedra Company with a consequent stockholder's liability against the Refractories Company and its stockholder Winter.

(2) In denying cross-complainants relief against respondents.

(3) In finding that the calcining plant erected was not so erected as appurtenant

to the Tarpey claims, and additional security for the Tarpey contract.

(4) In awarding judgment against defendant Thomas.

[2, 3] Appellants and respondents agree that the Pittsburg agreement constitutes the measure by which the rights and liabilities of the various parties are to be established. Introductory to their main contention appellants argue that the Piedra Magnesite Company was created a de facto corporation, and an equitable assignment of the Tarpey contract with all its rights, titles, and privileges, presently made to it by the original vendees, in accordance with the terms of the Pittsburg agreement; and that the determination of the character of that assignment as imposing or withholding the assumption of the burden of the Tarpey contract, is a matter of law to be determined by the court from the agreement itself; and that what the Piedra Company did or failed to do in formally accepting such assignment when it became a de jure corporation, cannot affect its liability under the Tarpey contract, nor that of the parties to the Pittsburg agreement. If this were so, the finding of the court on a conflict of evidence that the Piedra Company did not accept the "first" assignment would become of no consequence in determining the actual liability of that company under the Tarpey contract, for the burden of liability would attach as soon as the de jure corporation came into existence. But it is not a question of law; it is a question of fact with which we are confronted. In this connection appellants refer to the "compelling equities" in the case, but the rule as to conflict applies in cases formerly denominated cases in equity, as in cases of law. 2 Cal. Jur. § 546.

Appellants' main attack is directed against findings VI, VII, and VIII. Upon the sustention or reversal of these findings depends appellants' case. These findings and the allegations contained in the third amended complaint, as to the acceptance of the "first" assignment and the assumption of the obligations of the Tarpey contract, are correlative. The main question thus presented for our decision is whether or not, in case of a conflict, there is substantial evidence supporting the finding negativing assumption. With the fact of assumption or non-assumption, and depending upon it, are inextricably interwoven the secondary propositions of the construction of finding VII (relative to advances or loans to the Piedra Company or Curran or Phillips, used in paying installments upon the Tarpey contract); and, likewise, of the effect to be given finding VIII (concerning consideration for the release).

[4] The law is settled that as to the original vendor in an executory contract for the sale of real estate there can be no recovery of deficiency judgment or personal judgment for the purchase money, for default in the payment of the purchase price, against the assignees of the vendee without an assumption of the obligations of the contract, in either an action for specific performance or for foreclosure of the so-called vendor's lien. The utmost relief to which the vendor is entitled is a strict foreclosure of his vendor's lien on the property. Personal judgment for deficiency must be against the original vendee. This is based on the ground of lack of privity of contract between the assignee and the vendor without an assumption of the obligations of the contract, and also on the ground that the assignment is in the nature of a covenant in gross personal to the vendee and not running with his estate in the property. Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, and cases cited. And this is true where the assignee has acted under the contract of sale to the extent of making payments thereunder (Lisenby v. Newton, supra), and even where, after assignment, he has taken possession of the property and wasted it (Wilson v. Beazley, 186 Cal. 437, 199 Pac. 772; Beazley v. Embree, 41 Cal. App. 706, 183 Pac. 298). The seeming exceptions to the rule are exemplified in the cases of Jones v. Allert, 161 Cal. 234, 118 Pac. 794, and Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979, holding in the latter case (page 541 [165 Pac. 982]):

> "Of course, * * * the mere assignment of the rights under an executory contract would not make the assignee liable to the other contracting party. Such was the case of Lisenby v. Newton, 120 Cal. 571. * * * But where, after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor. Such is this case, as was Jones v. Allert, 161 Cal. 234."

Jones v. Allert was a case where land was purchased especially for a corporation to be formed. The corporation was later formed, recognized the contract as binding on itself, and performed affirmative acts looking toward further benefit, in securing the vendor to deal directly with it.

The contract here was not expressly entered into in the first instance on behalf of a corporation to be formed, as was the case of Jones v. Allert, supra, and the trial court evidently did not believe that the acts of those interested in financing the corporation, both prior to its formation and afterwards, were consistent with the idea that they expressly, either in equity or otherwise, assumed the obligations of the Tarpey contract already entered into by Curran and Phillips. Only on such an assumption could the Piedra Company be held at suit of the vendor under the theory of Jones v. Allert or Robinson v. Rispin, or under section 1589 of the Civil Code, which has almost uniformly been restricted to parties to the contract under which relief is sought. Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Stone v. Owens, 105 Cal. 292, 38 Pac. 726; Beazley v. Embree, 41 Cal. App. 706, 709, 710, 183 Pac. 298; Wilson v. Beazley, 186 Cal. 437, 199 Pac. 772.

[5, 6] The trial court had all the evidence, documentary and oral, before it, on which to judge the intent of those planning the Piedra Company, and their and its acts, formal and informal, following incorporation. Entering into and a necessary part of the evidence on which its decision was based was the presumption of good faith in the proceedings attending the transactions preceding and providing for the incorporation of the Piedra Company, with the subsequent actions of it and its organizers, and the power to look through and beyond defective or lacking formalities to the real purpose and meaning of the whole plan. In a case in equity, with full power to act, the trial court found on a conflict of evidence adduced before it that the "first" assignment, with its clause of express imposition of liability, was never accepted by the Piedra Company. It also found that the Piedra Company did not assume the obligations of the Tarpey contract. As to findings VI, VII, and VIII the evidence presents a conflict. "The decision of the trial court * * * is conclusive upon us, in so far as there is any substantial evidence tending fairly, with such inferences as may reasonably be drawn therefrom, to support such decision, even though we may think that a different conclusion should have been reached." Clopton v. Clopton, 162 Cal. 27, 31, 121 Pac. 720, 721.

What we have heretofore said concerning findings VI, VII, and VIII, and the reasons given for refusing to interfere with them, applies with equal force to finding XI.

Finding XII excludes the calcining plant from the decree of foreclosure and sale. It is contended by appellant Tarpey that he is entitled to have that property included in the decree of sale. The Pittsburg agreement provides:

> "This corporation is to be formed for the purpose of mining, calcining and shipping magnesite and the manufacturing and sale of the same into the various products, if found necessary. * * * That Curran, Thomas, and Phillips have secured an option to purchase certain magnesite property from M. F. Tarpey," which they agree to assign and "also agree to assign any other property they may now have, control or can get, etc."

The agreement further recites that large sums of money will be necessary for buildings and machinery to operate the plant, and provides for an advance for this purpose of $50,000. The Tarpey contract with Curran and Phillips provides for a plant to cost not less than $35,000. Appellant's argument is based upon the contention that it appears uncontradicted that the plant was constructed with full knowledge of the Tarpey contract and pursuant thereto. Respondents contend that this calcining plant was erected by the Piedra Company, as agreed by the parties at Pittsburg, to do a general calcining business in the Fresno district, including the ore from the Tarpey mines and from "any other property" they could secure. The finding of the court is in accord with respondents' contention. It was made upon conflicting evidence and for reasons heretofore stated will not be disturbed.

[7] The trial court found (IV) that appellant Thomas did not sign the Tarpey contract and was not obligated thereunder. And yet the trial court gave judgment against Thomas. Neither the evidence nor the findings support such judgment. Appellants ask that the judgment against Thomas be set aside, and respondents say they are not concerned about the matter. Under such circumstances we deem it advisable to direct the court below to modify the judgment. Fox v. Hale & Norcross S. M. Co., 122 Cal. 219, 54 Pac. 731. The cause is therefore remanded to the superior court, and that court is directed to modify its judgment herein by striking out those portions thereof which authorize any judgment against J. W. Thomas.

As so modified, the judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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67 Cal. App. 674

PEOPLE v. MILLER. (Cr. 754.)

(District Court of Appeal, Third District, California. June 13, 1924.)

1. Sodomy 🔑6—Evidence held to sustain conviction of assault.

Evidence *held* to sustain conviction of assault with intent to commit the crime against nature.

2. Criminal law 🔑511(1)—Sodomy 🔑6—Testimony held to sufficiently corroborate assaulted man whether victim or accomplice.

In prosecution for assault, with intent to commit crime against nature, testimony of an officer as to what he saw over hotel transom *held* to sufficiently corroborate testimony of assaulted man whether accomplice or victim.

3. Criminal law 🔑507½—Evidence held to show assaulted man was victim, not accomplice.

Evidence *held* to show assaulted man was victim, rather than accomplice, in assault with intent to commit crime against nature.

4. Criminal law 🔑1086(14)—Transcript held not to show request for instruction.

Transcript on appeal *held* at most to show that defendant suggested that the court frame instructions covering particular points not a request for instructions.

5. Criminal law 🔑830—Rule as to giving requested instructions stated.

Court must give any instructions asked by either party, correctly expounding the law upon any evidence before the jury, but may refuse an erroneous instruction, and is not bound to modify or give another in its place.

6. Criminal law 🔑815(9)—Instruction that conviction might be for simple assault should present question of intent.

In prosecution for assault with intent to commit crime against nature, requested instruction that defendant might be convicted of simple assault should present question of reasonable doubt as to whether defendant entertained the intent charged.

7. Criminal law 🔑1186(4)—Omission to charge that defendant might be convicted of simple assault held not prejudicial.

Where the evidence clearly warranted conviction of assault with intent to commit crime against nature, and instructions were given requiring prosecution to prove beyond reasonable doubt assault with intent and purpose charged, omission to charge that conviction might be of simple assault was not prejudicial, in view of Const. art. 6, § 4½.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Bud Miller was convicted of assault with intent to commit the crime against nature, and he appeals. Affirmed.

J. T. McMenamin, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 26th day of November, 1923, the defendant and appellant was found guilty of the infamous crime against nature, as charged in the information, and from the sentence and judgment pronounced thereupon the defendant appeals.

The information charges the defendant as follows:

"That on the ——— day of September, 1923, and within the limits of the city of Sacramento, in the state of California, the said defendant, Bud Miller, did then and there, before the filing of this complaint, and within one year prior thereto, willfully and unlawfully and feloniously and carnally, upon the person of one Parley Sheya then and there being, make an assault with the intent then and there feloniously and carnally upon the person of said Parley Sheya to commit the infamous crime against nature; the said Parley Sheya being then and there a male person, contrary to the form, force, and effect of the statute of said state in such case made and provided," etc.

The defendant asks a reversal of said judgment upon two grounds, first, insufficiency of the testimony to warrant the verdict; secondly, that the court erred in refusing to instruct the jury as requested by the defendant.

[1] The testimony in the case is so utterly revolting that we shall not attempt to state it in detail. Suffice to say that it shows every element of the crime charged in the information. It shows that the defendant and one Sheya, upon whom the assault was made, and a witness by the name of Stenzel, were in a room at the Pacific Hotel in the city of Sacramento; that all of the persons in the room had been drinking more or less; that Sheya and Stenzel appear to have been very good friends; that Stenzel took Sheya to the room in the hotel mentioned and put Sheya to bed; that Sheya, at the time of being put to bed, was more or less under the influence of liquor, and more or less helpless; that after Sheya had been put to bed the defendant Bud Miller began acting in such a manner as to alarm Stenzel; that Stenzel became so impressed with the idea that Miller was about to attempt the act with which he is charged that he (Stenzel) left the room and went for an officer; that upon the return of the officer the door of the room was found closed, and the officer looked over the transom, and his version of what he saw is as follows:

"I stood up on the table; then I was enabled to look over the transom, a glass transom over the top of the door, and this young gentleman here, Sheya, and the defendant were both absolutely naked; both on the bed, Miller was sitting on his knees, with his back to the transom, and Sheya was resting with his head and shoulders on the bed, and his feet almost straight in the air—Miller had his arms underneath his back, the small of Sheya's back, pulling him up close; Sheya originally had been on his back, but pulled so close his feet were standing right up, and Sheya was crying, kind of whining and crying and pleading with Miller to leave him alone, and Miller kept repeating, 'Come on, put it up, put it up,' and Sheya kept pleading, 'No, leave me go,' and whining and crying, and Miller kept repeating, 'Put it up.' * * * Suddenly Miller became furious evidently, and jumped out of bed and went to the window where his pants were hanging, and took a pocket knife out of his pants, then turned, I think, and faced the door, and, opening the knife, he said, it was partly to himself and partly to Sheya I presume, 'I am going to cut your G—— d—— heart out right now,' and Sheya says, 'I want you to go away.' Sheya was still on the bed sort of crying, and Miller on the floor trying to open the knife; Miller approached the bed with the knife open, then Sheya said, 'All right, I will give it to you,' and Miller says, 'No, you won't give it to me, it is too late now, G—— d—— you, I'll cut your heart out right now,' and he grabbed Sheya with his left hand by the throat and raised the knife—

just then I kicked on the door, * * * and Miller opened the door."

This witness further testified that—

"Sheya was exhausted and appeared to be coming out of a drunk; he had the appearance of a man who had been drinking; he seemed more exhausted than intoxicated; Miller was the much more powerful of the two; he seemed to me a pretty powerful man; he is a muscular fellow."

The testimony of Sheya, the victim, is to the same effect that the defendant was attempting to have sexual intercourse with him, and that he refused and resisted, and then the defendant, as stated by the officer, grabbed a knife and threatened to cut his heart out. This testimony, and more along the same line, abundantly justified the jury in finding a verdict of guilty as charged.

On page 25 of the transcript in this case appears the following:

"*(1. Cloud the issue by introducing Stenzel case.)*
"(2. *'Lay over on your face.'*)
"(2) Testimony of an accomplice is to be weighed very carefully.
"(3) Def. cannot be convicted upon the uncorroborated testimony of an accomplice.
"(4) The corroboration must in and of itself tend to connect with the commission of the offense.
"(5) That Def. might be convicted of a simple assault.
"Refused. Pullen, J."

[2, 3] Upon what has been set forth it is urged by counsel for defendant that the judgment herein should be reversed. In so far as the question of an accomplice is concerned, the testimony of the officer is sufficient, in and of itself, to justify the verdict of the jury, whether Sheya be or be not regarded as an accomplice, but a thorough reading of the testimony leads us to the conclusion that Sheya was not an accomplice, and that he was, in every sense of the word, an unwilling victim. However, as just stated, this is immaterial, because the officer's testimony alone is sufficient to sustain the verdict. We may state, however, that in the case of People v. Dong Pok Yip, 164 Cal. 143, 127 Pac. 1031, in cases of this kind, it has been held that, where the victim appears to be other than a free agent, the rule relating to accomplices does not apply. Everything in the testimony, as set out in the transcript, tends to show that Sheya was not consenting to any act of the defendant.

The court did, however, instruct the jury on the subject of accomplices by quoting section 1111 of the Penal Code. It is strongly urged by counsel for defendant that the court erred in refusing to give what has been hereinbefore set out as No. 5 of defendant's proposed instructions, which reads as follows: That Def. might be convicted of a simple assault."

[4-6] The transcript does not clearly show that the court was requested to give any such instruction. At most, what we have set forth amounts only to a suggestion to the court to frame instructions covering particular points. But, assuming that the words quoted were intended as proposed instruction, it is manifest that the court did not err in refusing to give the same. It would have been a direct instruction to the jury concerning their privilege of finding the defendant guilty irrespective of the testimony. As stated in 14 R. C. L. 800:

"A court is bound to give any instructions asked for by either party which correctly expound the law upon any evidence before the jury, but may refuse to give an instruction which is erroneous and is not bound to modify it or give any other in its place, for a party cannot, by asking an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. It follows, therefore, that a reversal will not be directed because of the refusal to give an instruction, unless it is strictly and entirely accurate."

A large number of authorities are there cited to support the text just quoted. That an assault is necessarily included in the charge contained in the information in this case may be admitted, but, in order to justify the giving of an instruction to the jury, it would be necessary to so frame the instruction as to present to the jury the question of reasonable doubt in their minds as to whether the defendant entertained the intent charged in the information, and that, if they were satisfied beyond a reasonable doubt from the testimony that the defendand committed the assault but were not satisfied beyond a reasonable doubt and to a moral certainty that the defendant committed the assault with the intent charged in the information, then, and in that case, they might find the defendant guilty only of an assault.

[7] If the defendant desired an instruction to the jury to such effect, it should have been so requested. Again, we do not think the defendant has been prejudiced in the matter of instructions. because the court instructed the jury that, in order to find a verdict of guilty, the burden rested upon the prosecution to establish beyond a reasonable doubt every element of the offense charged in the information, which included, of course, establishing beyond a reasonable doubt that the defendant made the assault with the intent and purpose charged against him. The evidence which we have quoted shows that the defendant was clearly guilty of the offense with which he was charged. In a number of cases it has been held that, where the evidence shows the defendant clearly guilty of the offense charged, it is not error for the court to refuse an instruction referring to a lower offense included in the offense charged in the information. People

v. Turley, 50 Cal. 469; People v. Barney, 114 Cal. 554, 47 Pac. 41; People v. Franklin, 70 Cal. 641, 11 Pac. 797; State v. Kapelino, 20 S. D. 591, 108 N. W. 335; Brantley v. State, 9 Wyo. 102, 61 Pac. 139. A number of other cases might be cited to the same effect.

The appellant calls attention to the case of People v. Hickey, 109 Cal. 275,[1] where the offense was the same as in this case. However, it appears by a reading of that case that the testimony concerning one of the occurrences merely disclosed a simple assault, and the court held that it was error to refuse the giving of an instruction on the subject of simple assault. That case we do not think controlling in this instance, because of the dissimilarity of the circumstances. From what we have quoted of the testimony it is scarcely perceivable how the jury could come to any other conclusion than that the defendant was guilty of the offense just as set forth in the information. Under such circumstances, although we may admit that the instruction involving the subject of simple assault might have been given, if the proper request had been made therefor, yet, in view of section 4½ of article 6 of the Constitution, it would be a manifest miscarriage of justice to set aside the verdict finding the defendant guilty as charged, where the testimony abundantly sustains such verdict, simply because the court did not call the attention of the jury to the fact that they might find him guilty of a lesser crime.

The judgment is affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

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[1] 41 Pac. 1027.

67 Cal. App. 643

FIDELITY & CASUALTY CO. OF NEW YORK v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 4796.)

(District Court of Appeal, First District, Division 1, California. June 10, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

1. Master and servant 🔑417(7)—Findings on evidence in compensation case final.

In certiorari proceedings the appellate court will not weigh the evidence and decide whether in its opinion the finding of the Industrial Accident Commission accords with the preponderance thereof, and if there is evidence to sustain such finding the action of the commission will not be reviewed.

2. Master and servant 🔑385(1)—Pain caused by disease factor in estimating amount of compensation.

Where kidney or Bright's disease, which is usually not painful, is accompanied by pain of such severity or frequent occurrence as to interfere with claimant's ability to pursue his calling, it becomes a factor in estimating amount of award of compensation.

3. Master and servant 🔑417(7)—Province of Industrial Accident Commission to determine existence of pain.

Though repeated examinations of claimant's back did not disclose any particular cause for pain in the back, it was the province of the Industrial Accident Commission to determine its existence from the evidence.

4. Master and servant 🔑405(6) — Evidence held to sustain finding of compensable injury to back and kidney.

Evidence *held* to sustain finding of Industrial Accident Commission of injury to claimant's kidneys from electric shock and of injury to his back.

5. Master and servant 🔑387—Award of compensation held not double award.

An award of compensation, based on claimant's kidney condition and the pain caused in his back, *held* not a double award, where the allowance for the kidney condition was for a condition of the kidneys unaccompanied by pain.

Certiorari to Industrial Accident Commission.

Proceedings for compensation under the Workmen's Compensation Act by James F. Fulmer, claimant, opposed by H. W. Jacobs, employer, and the Fidelity & Casualty Company of New York, insurance carrier. The Industrial Accident Commission awarded compensation, and the insurance carrier brings certiorari. Award affirmed.

Chickering & Gregory, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari for the purpose of reviewing the proceedings of respondent Industrial Accident Commission and its order therein by which on June 29, 1923, it made an award against petitioner and in favor of respondent James F. Fulmer of compensation in the sum of $5,436.63 for a partial permanent disability suffered by said Fulmer as the result of an injury received in the course of his employment.

It appears from the record that the respondent Fulmer on or about the 8th day of March, 1920, was employed by H. W. Jacobs as an electrical lineman, and the Fidelity & Casualty Company of New York was the insurance carrier of the employer. Fulmer was at that time 32 years of age and received weekly wages of $38.50. On said date he was working upon a certain power pole engaged in painting it. He was near the top of the pole supported by his lineman's belt. As he was about to descend the pole, his right hand came in contact with the wet surface thereof, and he received an electric shock. He did not fall from the pole, being supported by his belt. He remained supported in this manner for approximately one hour, when he was lowered from the pole still unconscious. As the result of the shock he sustained burns on his left hand and right foot. He was removed to a hospital and was under the care and treatment of Dr. Jackson Temple. While in the hospital some kidney trouble developed accompanied by pain in the lower region of the back. The burn on the hand necessitated the amputation of the middle minor finger at the proximal joint. The petitioner, as the insurance carrier of Fulmer's employer, paid the medical and hospital expenses and certain compensation to Fulmer, who, on December 27, 1920, not being in accord with petitioner as to the total amount to be paid him, filed an application with the Industrial Accident Commission requesting that it fix such amount.

Thereafter hearings were had, and on March 30, 1921, the Commission made and filed an award in favor of the applicant, in which it found that he had "sustained a permanent disability consisting of the loss of the minor (left) middle finger at the proximal joint, and limited flexion of the index, ring and little fingers, which for applicant's occupation and age, 32 years, is equal to 16½ per cent. of total disability, entitling him to a weekly payment of $20.83 for 66 weeks, and amounting to the total sum of $1,374.78." The Commission further found that the injury suffered by the applicant "also caused a certain disability to the back which is only partially disabling and which it is not possible to fix as permanent at this time."

On January 16, 1923, respondent Fulmer filed with the Commission an application for a further award based upon permanent disability arising from injury to his back. Hearings were duly had upon said application, and reports of physicians who had examined the applicant filed, and on June 29, 1923, the Commission made and filed an order amending its previous findings and award, and by which it found that in addition to the injuries upon which its first award was based the applicant had sustained in said accident additional injuries consisting of spasm of lombar muscles causing a painful condition, and permanent disease of the kidneys; and it increased the rating for permanent disability to 65¼ per cent., thereby entitling the applicant to weekly payments of $20.83 aggregating the sum of $5,436.63.

Thereafter the petitioner applied to the Commission for a rehearing upon the grounds (1) that the evidence did not justify the findings of fact and award, and (2) newly discovered evidence, such evidence consisting of reports of three physicians after a new examination of the applicant, together with laboratory and pathological reports. This petition for rehearing was by the Commission denied on September 6, 1923.

On November 14, 1923, the petitioner made application to the Commission for an alteration of its award of June 29, 1923, based upon an alleged improvement in the applicant's condition in that there was no longer any ascertainable or discernable injury to the back of the applicant, and filed in support of its application certain medical reports, one of Dr. Nolan based upon an examination made by him on October 17, 1923, and one by Dr. Harbaugh, assistant medical director of the Commission, based upon an examination of the applicant subsequent to the making of the Commission's award and a review of the history of the case. On December 27, 1923, the Commission denied this application, holding that the evidence tendered was not sufficient to establish that there had been any change in the applicant's condition from and after September 6, 1923, the date of the order denying the petitioner's petition for a rehearing. On January 9, 1924, the petitioner applied to the Commission for a rehearing of this last-mentioned application upon the ground that the evidence was not sufficient to justify the Commission's order in that behalf, and this application was also denied.

In support of its petition for a writ of review the petitioner contends that there is no evidence in the record of the proceedings before the Commission to sustain the finding of that body that Fulmer suffered any injury to his kidneys by reason of the electric shock, that the evidence does not show any actual injury to his back, and that in any event the applicant should not have been granted a permanent disability rating for both his back and the condition of his kidneys, since, if the subjective symptoms of pain in the applicant's back are actually existent, it is probable that they arose from the kidneys and not from any anatomical or muscular impairment in the back itself.

[1-4] It is, of course, not the province of this court to weigh the evidence and decide whether in its opinion the finding of the Commission accords with the preponderance thereof. If there is evidence to sustain such finding the action of the Commission will not be reviewed. Dr. Jackson Temple, who attended the applicant immediately after his injury, testifies to an injury to the applicant's kidneys which he attributed to the effects of the accident; and Dr. Gibbons, medical director of the Commission, in his report upon the case, and referring to the fact that three hours after the accident the symptom of hematuria was observed in the patient, declares that that circumstance is good presumptive evidence that damage to the kidney occurred. With this evidence in the record we cannot say that the Commission was not justified in considering the kidney condition as an important element in fixing the amount of the award, and its rating department did in fact base a certain percentage of permanent disability upon this condition. But the evidence also shows that kidney or Bright's disease is not usually painful, and we think it apparent that where it is accompanied by pain of sufficient severity or frequent occurrence as to interfere with the applicant's ability to pursue his calling it becomes a factor in estimating the amount of the award.

In this connection the applicant testified that before the injury he never had pains in his back, but commencing immediately thereafter he had suffered and now suffers from them; that he cannot lean over; that he can stoop but little, and that he cannot lift anything; that this pain is right where he wears the lineman's belt, and that since his accident he has not been able to retain employment as a lineman, and has had to give it up and go into the store as a floor man; and that he cannot work on his knees. While repeated examinations of the skeletal and muscular structure of the applicant's back do not disclose any particular cause for this pain, it was the province of the Commission to determine its existence from the evidence, and we cannot say that there is not a sufficient base for that portion of its award which is referable to the condition of pain in the back of applicant.

[5] It is also suggested by the petitioner that the proportion of the award based upon the painful condition of applicant's back is a double award since if it exists at all it arises from the kidneys, the diseased condition of which has already furnished the basis for the compensation allowed. But it appears sufficiently from the record that the allowance for the kidney condition was for a condition of the kidneys unaccompanied by pain. There has not, therefore, been a

double allowance for this phase of applicant's disability.

It follows from what we have said that the award of the Commission must stand; and it is so ordered.

We concur: KNIGHT, J.; ST. SURE, J.

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67 Cal. App. 648

FIDELITY & CASUALTY CO. OF NEW YORK v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 4894.)

(District Court of Appeal, First District, Division 1, California. June 10, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

Master and servant 🔑419—Order denying application for alteration of compensation award held within commission's jurisdiction and not reviewable.

Where the evidence offered by insurance carrier, in support of its application for alteration of an award, consisted of medical reports of a similar tenor to prior reports already before the Commission and considered in making the award, and was cumulative, order denying the application *held* within its jurisdiction, and not reviewable in certiorari proceedings.

Certiorari to Industrial Accident Commission.

Proceedings for compensation under the Workmen's Compensation Act by James F. Fulmer, claimant, opposed by H. W. Jacobs, employer, and the Fidelity & Casualty Company of New York, as insurance carrier. The Industrial Accident Commission made an award and denied insurance carrier's application for alteration of the award, and insurance carrier brings certiorari. Writ discharged.

Chickering & Gregory, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari for the purpose of reviewing the proceedings before the Industrial Accident Commission upon the application of the petitioner for the alteration of an award and its order dated December 27, 1923, denying said application.

The facts giving rise to and upon which said award was based are stated in the opinion filed this day by this court in a proceeding bearing the same title as the present and numbered 4796, and the order to which the present proceeding is addressed is one made by the Commission denying an application made by the petitioner herein for an alteration of said award. Said application set forth as the ground thereof that an improvement had taken place in the condition of the beneficiary of said award. In its order denying the application the Commission found that the evidence was insufficient to establish that there had been any change in such condition. The evidence offered by petitioner in proof of such change in condition consisted of medical reports made after new examinations, but such reports were of similar tenor to prior reports already before the Commission and considered by it in making said award, and introduced matter which was cumulative rather than new, and were not therefore sufficient to satisfy the Commission that the alleged change had occurred. Its order denying said application was thus within its jurisdiction.

We will not therefore review this order, and the writ heretofore issued in this behalf is discharged.

We concur: KNIGHT, J.; ST. SURE, J.

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67 Cal. App. 708

RICHEY v. CORRALITOS UNION SCHOOL DIST. OF SANTA CRUZ COUNTY. (Civ. 4866.)

(District Court of Appeal, First District, Division 2, California. June 17, 1924.)

1. Schools and school districts 🔑120—Pleadings alleging existence of defendant district held not ambiguous.

A complaint alleging that "since July, 1919, Corralitos union school district of Santa Cruz county has been, and now is, a union school district of the county of Santa Cruz," *held* good against a special demurrer assigning ambiguity in the manner of pleading defendant's existence.

2. Ejectment 🔑63—Complaint for recovery of land held to state cause of action.

A complaint which alleged plaintiff's right to possession of land, definitely describing it, and the unlawful withholding of the possession thereof by defendant, *held* good against general demurrer.

3. Schools and school districts 🔑65—Land deeded for school purposes held not so used, and to revert to grantor.

Where land was deeded to a school district, for school purposes, on condition for forfeiture and reverter, if not used for school purposes, grantor *held* entitled to possession, though building was still used to store furniture and books, and intermittently by teacher of another school.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Harold E. Richey, as administrator of the estate of Charles M. James, deceased, against the Corralitos Union School District of Santa Cruz County. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanford G. Smith, Dist. Atty., of Santa Cruz, for appellant.

Charles B. Younger, of Santa Cruz, for respondent.

NOURSE, J. [1] The plaintiff sued to recover the possession of certain property held by the defendant school district. The complaint alleged the appointment of the plaintiff as administrator of the estate of Charles M. James, deceased, the right of plaintiff to the possession of the property, the unlawful holding of possession by the defendant, and the corporate existence of the defendant as the successor in interest to the Brown's Valley school district. A demurrer was interposed, both general and special. The special demurrer assigned ambiguity in the manner of pleading the existence of the defendant corporation; the argument being that the complaint should have named the officers or trustees of the district, its boundaries, and the laws under which it was incorporated. The complaint alleges that "since July, 1919, Corralitos union school district of Santa Cruz county has been, and now is, a union school district of the county of Santa Cruz, in the state of California." We do not find any ambiguity in these allegations.

[2] As to the general demurrer, the complaint alleges plaintiff's right to possession of the property, which is definitely described, and the unlawful withholding of the possession thereof on the part of the defendant. The complaint thus states facts sufficient to constitute a cause of action.

[3] The issue framed by the pleadings and tried by the court, sitting without a jury, was that in the year 1885 plaintiff's predecessors had deeded to the Brown's Valley school district the land in question to be "used for school purposes only, and if at any time not so used, the estate hereby granted shall be forfeited and revert to said grantors." The trial court found, in accordance with the allegations of the complaint, that the plaintiff was entitled to the possession of the property which the defendant was unlawfully holding, and that said property had not been used for school purposes since July 1, 1919. There was ample evidence to support these findings. It appeared that when the property was deeded to the Brown's Valley school district a school building was erected thereon, and this had been used for school purposes by the trustees of that district until July 1, 1919. It then appeared that on the latter date the Corralitos school district was organized, and that it thereupon succeeded to all the interest of the Brown's Valley school district, the grantee under the deed. It was shown that from that date the property had not been used for school purposes, but that the trustees of the union school district had allowed certain school furniture, which was unfit and unsuitable for school purposes, to remain in the building, that they had allowed some books belonging to the Santa Cruz public library to be stored there, and that they had permitted a teacher of an adjoining Oriental school to use the building intermittently for the purpose of exhibiting pictures and drawings, made by herself, to some of her pupils. This teacher, as well as the pupils, however, came from another school district and there was no attempt to show that their use of the building pertained to the school purposes of the defendant school district.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

67 Cal. App. 724

PEOPLE v. MENDEZ. (Cr. 1100.)

(District Court of Appeal, Second District, Division 1, California. June 19, 1924.)

1. **Criminal law ⚷1173(3) — Refusal to instruct on crime of which jury acquitted accused held not prejudicial.**

Where jury acquitted accused of crime of assault with intent to commit murder and found him guilty of assault with deadly weapon, refusal to give instruction relating to assault to commit murder *held* not prejudicial to accused.

2. **Criminal law ⚷829(1) — Refusal to give proposed instruction covered by instruction given held not error.**

The refusal to give a proposed instruction covered by instruction given *held* not error.

3. **Homicide ⚷310(1) — Instruction predicating guilt of assault on element of criminal negligence held not error.**

In a prosecution for assault with a deadly weapon with intent to commit murder, an instruction, that in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence, *held* not erroneous as including the element of criminal negligence, in view of Pen. Code, § 20.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Refugio Mendez was convicted of an assault with a deadly weapon, and he appeals from the judgment of conviction and from an order denying a new trial. Affirmed.

Scott McReynolds, of Ventura, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. The defendant was charged with an assault with a deadly weapon with intent to commit murder. He was found guilty of an assault with a deadly weapon and appeals from the judgment of conviction, and from an order denying his motion for a new trial.

The defendant and the complaining witness, Rodriguez, were on friendly terms, and on the day of the assault the defendant visited the complaining witness at the home of the latter. While the evidence is conflicting as to just what transpired in the house on the occasion of this visit, there was nothing to indicate that the friendly relations theretofore existing did not continue throughout the entire time the defendant was at Rodriguez's house. While in the house it was agreed between them that they would retire therefrom and engage in a friendly wrestling contest. They left the house for this purpose in company with Rodriguez's wife and one Ortiz. On reaching the yard in front of the house they began wrestling with each other, with the result that on the third trial the defendant threw Rodriguez. At its conclusion the latter was desirous of continuing the contest and advanced toward defendant, evidently with this purpose in mind. The defendant retreated a few steps, avoiding Rodriguez, who continued to advance toward defendant. Whereupon, the defendant, when Rodriguez was about 15 feet from him, drew his pistol and fired, hitting the latter in the groin and inflicting a painful and serious injury upon Rodriguez. The defendant assisted in taking Rodriguez to the hospital, offered to pay the expense of his care, and expressed his regret over the affair. The sole defense of the accused was that he pointed his gun at the ground and fired to frighten Rodriguez, and that he had no intention of shooting him or injuring him in any manner.

Appellant submitted five instructions to the court, all of which were refused. The court also gave the following instruction at the request of the prosecution:

> "In considering the following definitions (of the several different kinds of assaults) you should remember that in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

Appellant now assigns as error the action of the court in refusing to give the five instructions proposed by him, and in giving the instruction above set forth, offered on behalf of the prosecution.

[1, 2] Proposed instruction No. 3, offered by the defendant and refused by the court, referred entirely to the crime of an assault to commit murder. The verdict of the jury, finding the defendant guilty of an assault with a deadly weapon, was an acquittal of him of the more serious crime of an intent to commit murder. The defendant, therefore, could not be injured by the refusal of the court to give proposed instruction No. 3, and if any error was committed by the court in refusing to give said proposed instruction, it was without prejudice to the defendant. People v. Wallace, 101 Cal. 281, 285, 35 Pac. 862. Moreover, the subject-matter of this instruction was, in our opinion, fully covered by the instructions given to the jury. Proposed instruction No. 4, refused by the court, was fully covered by instruction No. 11 as given by the court.

[3] Appellant's objection to the action of the court, in refusing to give proposed instructions numbered 1, 2, and 5, proposed by him, and his objection to the instruction above set forth, given by the court on behalf of the prosecution, is that the court's charge was calculated to mislead the jury into the belief that if the defendant was reckless in the use of his pistol for the purpose of intimidating Rodriguez, that he might be found guilty of the crime of an assault with a deadly weapon. Appellant's contention is that, before one accused of such a crime can be found guilty thereof, it must be established that he intended to inflict bodily injury upon the person assaulted, and that in the absence of such proof he must be acquitted of the charge, even if it be shown that he was guilty of criminal negligence in the use of a deadly weapon, and that the injury caused was the direct result of such criminal negligence on his part. He admits that, had the shot which took effect in Rodriguez' body caused the death of the latter, the defendant could be found guilty of manslaughter, but contends that unless death ensued he is not guilty of any crime as a result of the wound inflicted by him through his negligence.

The only authorities cited by appellant in support of this contention are the cases of People v. McMakin, 8 Cal. 547, and People v. Yslas, 27 Cal. 630. Neither of these cases sustained the position of appellant. On the other hand, the precise point was before the court in People v. Price, 9 Cal. App. 218–221, 98 Pac. 547, and decided adversely to appellant's contention. The defendant in this latter case was found guilty of an assault with a deadly weapon. The court refused to give the following instruction:

> "I further instruct you that in every crime or public offense there must exist a union or joint operation of act and intent."

On appeal the appellate court sustained the judgment, and in doing so used the following language:

> "The above instruction may well have been refused for the reason that it states that 'in every crime there must exist a union or joint operation of act and intent.' It leaves out the element of 'criminal negligence' which the statute contains. Pen. Code, § 20. The jury might well have inferred from the evidence in this case that even if defendant did not intend to shoot at Toomey or fire the shot that hit him, that it was criminal negligence to draw the pistol and fire it once in the ground to frighten Toomey, and then to hold it in his hand in such position that it might be discharged in the scuffle which ensued."

We think this is a correct exposition of the law upon this subject, and are therefore of the opinion that there was no error on the part of the court in the settlement of the instructions.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

68 Cal. App. 46

EDW. L. SOULE CO. v. SEVERTSON.
(Civ. 2827.)

(District Court of Appeal, Third District, California. July 1, 1924.)

1. Appeal and error 🔑595—Parties may stipulate that their separate appeals shall be heard on a single transcript.

Parties may stipulate that their separate appeals may be heard on a single transcript; stipulation being in effect that transcript is sufficient for determination of both appeals.

2. Appeal and error 🔑595—Defendant and plaintiff both appealing, defendant held not to have right to use plaintiff's transcript without stipulation.

Defendant had not the right to use plaintiff's transcript on appeal, where both parties had taken separate appeals from different parts of same judgment; no stipulation having been made that their separate appeals might be heard on a single transcript, and plaintiff having paid entire cost of transcript.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by the Edw. L. Soule Company against S. Severtson. From an adverse judgment, both parties appeal. On motion to dismiss defendant's appeal. Appeal dismissed.

Thelen & Marrin, of San Francisco, and Carr & Kennedy, of Redding, for plaintiff.

Carter & Smith, of Redding, for defendant.

FINCH, P. J. This is a motion by respondent to dismiss the appeal herein, on the ground that appellant has not filed a transcript of the record within the time required. The facts hereinafter stated are admitted.

Plaintiff sued for the sum of $1,112.25. By cross-complaint the defendant demanded judgment against plaintiff in the sum of $1,200. "November 19, 1923, judgment was entered * * * in favor of defendant and against the plaintiff on the complaint, and in favor of plaintiff and against defendant on the cross-complaint." On the following day the "plaintiff filed with the clerk of said superior court a notice of appeal from the judgment on the complaint, and on the same date filed with said clerk a request that he prepare the papers on the appeal from said judgment on the complaint in the manner provided by sections 953a, 953b, and 953c of the Code of Civil Procedure." The transcript on plaintiff's appeal, including the reporter's transcript of the proceedings at the trial, was filed in this court April 3, 1924. On January 7, 1924, the defendant filed notice of appeal from the judgment "on the cross-complaint," but has taken no steps to provide a record on his appeal; the only record on file herein being defendant's notice of appeal. Prior to the preparation of the record on plaintiff's appeal, its counsel offered to stipulate "that defendant might use the transcript which plaintiff had requested the clerk to prepare for his appeal provided defendant would pay one-half of the cost of preparing said transcript." The defendant declined to so stipulate, but now contends that, notwithstanding the fact that plaintiff has paid the entire cost of preparing such transcript, the defendant has the right to rely on and use the same on his own appeal. The only question presented on this motion is whether the defendant has the right to so use such transcript.

[1] The plaintiff and the defendant have taken separate appeals from different parts of the same judgment. A party desiring to appeal by the alternative method may, in lieu of preparing and settling a bill of exceptions, within 10 days after notice of entry of the judgment, file with the clerk "a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared." The clerk must thereupon require the stenographic reporter to transcribe the phonographic report of the trial. When such transcription is completed, after notice to respective counsel given by the clerk, it becomes the duty of the judge to certify to the truth and correctness of the transcript. "The respondents on said appeal may at the time said transcript is presented for settlement and allowance, require the insertion therein of such other papers, files, documents, records and proceedings of said cause as they then desire to have incorporated therein, and the said papers, files, documents, records and proceedings shall, when so incorporated, be deemed fully authentic for use on said appeal. The parties may by stipulation omit any matters from said record which they desire to so omit." Code Civ. Proc. § 953a. A transcript so prepared and certified may fully and fairly set forth every part of the record material to the determination of the issues raised by the appeal of one party, and, at the same time, be wholly insufficient to cover the issues presented on an appeal by the other party. One party may perfect his

appeal and file his transcript in the appellate court before the other party gives notice of his appeal. If in such case the second appellant has the right to rely on and use the transcript filed in the other appeal, the first appellant, respondent in the second appeal, may find himself bound by a record prepared without the grounds of that appeal in view and inadequate to the proper determination thereof. The parties may stipulate that their separate appeals may be heard on a single transcript. In such case, the stipulation is, in effect, that the transcript is sufficient for the determination of both appeals. Whether or not the record in this particular case is sufficient is immaterial, because the question under consideration is one of statutory construction.

[2] In Fair v. Stevenot, 29 Cal. 486, it was held that where both parties appeal from different part of the same judgment, and they do not stipulate that either transcript may be added to the other, each appeal must be heard on its own transcript. To the same effect is the decision in Gates v. Walker, 35 Cal. 289. In Estate of Bell, 157 Cal. 528, 532, 108 Pac. 497, 498, it is said:

> "There is no rule or statute authorizing an appellant to dispense with the filing of a transcript by making reference to a transcript on file in another appeal. Nor do we find any case in which it has been held that the appeals of separate independent appellants should be embodied in a single transcript. * * * In such case the necessity for filing a second transcript might be obviated by a stipulation of all the parties."

It is clear that appellant's position is untenable.

The appeal is dismissed.

I concur: PLUMMER, J.

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67 Cal. App. 618

WHITING MEAD COMMERCIAL CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 4845.)

(District Court of Appeal, First District, Division 1, California. June 9, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

1. Master and servant ⟹417(7)—Award cannot be based on inferences unsupported by evidence.

Industrial Accident Commission cannot base award on inferences not supported by evidence.

2. Master and servant ⟹367—Motor truck owner hauling material held not "employee" within Compensation Act, but independent contractor.

Motor truck owner who did hauling for company and pursued his work as he saw fit, using his own means and judgment to accomplish result, receiving as compensation full hauling charge imposed by company on purchaser of material hauled, *held* not "employee" within Workmen's Compensation Act, but independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by Ernest A. Wells, claimant, opposed by the Whiting Mead Commercial Company, employer, and the State Compensation Insurance Fund, insurance carrier. The Industrial Accident Commission awarded compensation, and the employer and the insurance carrier bring certiorari. Award annulled.

F. J. Creede and T. W. Slaven, both of San Francisco, and J. L. Kearney, of Los Angeles, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Petition for a writ of certiorari to review an award of the Industrial Accident Commission.

It appears therefrom that the State Compensation Insurance Fund, a state instrumentality, is the insurance carrier of the Whiting Mead Commercial Company. On June 18, 1923, one Ernest A. Wells sustained injuries by being pinned between an automobile truck and the side of a building, and he subsequently filed his application with the Industrial Accident Commission for the purpose of obtaining benefits under the Workmen's Compensation Act (St. 1913, p. 279), and he averred that his injury arose out of and in the course of his employment with the company above mentioned. Thereafter his application came on for hearing before the Commission, which subsequently made an award in his favor and against the State Compensation Insurance Fund, as insurance carrier, for the sum of $558.69, and it ordered that the Whiting Mead Commercial Company, the alleged employer, be released from further liability. A petition for rehearing was prayed for and denied, whereupon this proceeding was instituted. The sole question presented by the controversy is whether or not the evidence is sufficient to show that Wells was an employee, and not an independent contractor.

The facts are without practical conflict. They show that the Whiting Mead Commercial Company was engaged in the business of wrecking buildings and selling building material. In the conduct of such business it owns and operates some 25 trucks for the purpose of delivering its goods to customers. The drivers of these trucks are in the regular employ of the company and are paid regular wages. Wells was at one time such an employee. Some time prior to January, 1922, he left his employment, and at or about the last-mentioned date he, with his brother, interviewed the shipping clerk of the company, who had charge of its delivery yard, and solicited employment. At this time Wells was out of work, and the brother volunteered to assist him in procuring a truck. Owing to pressure of business the company, in addition to using its own trucks, found it necessary to contract with various draying concerns to make delivery of its materials. This extra hauling was sufficient in volume to furnish several independent owners of trucks with work. This fact was made known by the shipping clerk to Wells and his brother, and it was suggested that Wells might make more money driving a truck owned by himself than he could make by working for wages. The Whiting Mead Company sold all of its materials f. o. b. the company's yards. Where the customers did not have the means of transporting their purchases, the company would make delivery for them and impose a charge for so doing. When the company used its own trucks for this purpose it retained any profit arising from the hauling; but the shipping clerk informed Wells that if he procured a truck, the full amount of the charge for any load which might be turned over to him for delivery would be paid to him without any deduction therefrom by the company. This plan was different from the one adopted by the company, when it had occasion to employ certain independent trucking firms. In such case the trucks with their drivers were rented by the hour.

The situation and suggestion appealed to Wells and his brother. Wells procured a truck and solicited work from the company. He paid all his own expenses, including gasoline, oil, and repairs; he received in payment for such hauling as was given him the full charge made by the company to its customers; he had no certain hours of employent and was not required to report to any one at any specified time; he was free to go and come as he pleased, as the company never gave him orders or directed him in his work or exercised any control over his operations or activities, excepting, according to the testimony of Wells, he was once told to hurry back. On some days he did not visit the yard at all. It was his custom, however, along with other independent truck owners, to be at the yard of the company about 7:30 o'clock each morning, so as to receive such business as might be assigned to him after the company had exhausted its own capacity in distributing loads to its own drivers. Under his prior employment with the company, Wells had been earning $4 a day in wages. Under the independent new arrangement he made from $60 to $75 a week. He was not on the pay roll of the company during the time that he owned and operated his own truck. The superintendent of the company hired and discharged all employees, and he never hired Wells. The evidence shows that the company had certain cardboard signs upon which its name was printed, and when deliveries were made by the company's trucks it was customary to tack such signs upon the loads for advertising purposes merely, and that Wells had himself procured one of these cards and tacked it to his own truck. It further appeared by the testimony of Wells himself that the company had on some occasions furnished him with a helper. This fact was denied by the company, whose officers testified that it was against the rules to furnish independent drivers with helpers.

Under these circumstances, on January 18, 1923, a year after Wells commenced hauling for the company under this arrangement, and while he was in the course of making a delivery, his truck, operated by a friend of his who frequently rode with him, and who had no connection whatever with the company, skidded and pinned Wells between a house and his machine, and he received the injuries of which he here complains.

It is the claim of petitioner that these facts do not justify the finding of the Commission that the applicant was an employee of the company, and that the injury arose out of and in the course of his employment. Respondents, on the other hand, in support of the award, claim that, while the facts present a border-line case, certain inferences may be drawn therefrom which go to establish the fact that the relation of employer and employee existed at the time of the accident, and that all doubt upon this subject should be resolved in favor of the action of the Commission.

[1, 2] There is no question that it is not within the power of courts to set aside findings of the Commission, based upon reasonable inferences drawn from facts proven with legal sufficiency; but, where there is no evidence upon which such inferences may be based, it is equally true that the Commission is without power to draw them and base an award thereon. Here there is nothing contained in the facts from which any inference can be drawn that Wells was an employee of the company. On the contrary, they negative any such inference, as they show affirmatively that he was exercising an independent calling, and, so far as the company was concerned, he was free to prosecute his work in any manner he saw fit, using his own means and judgment to accomplish the result. The case is thus brought clearly within the rulings in Flickinger v. Ind. Acc. Comm., 181 Cal. 425, 184 Pac. 851, 19 A. L. R. 1150, and Fidelity & Casualty Co. v. Ind. Acc. Comm., 216 Pac. 578.

In the Flickinger Case it is held that where a person, operating a trucking business and having his own truck, is engaged to do certain hauling, and in the performance of such work loads his truck in his own way and at his own convenience, and who does not report before going to work and has no one controlling his actions at any time, he is an independent contractor and not an employee. To the same effect is Fidelity & Casualty Co. v. Ind. Acc. Comm. In this case the rule is laid down that the controlling factor in the determination of the question as to whether a person is an employee or an independent contractor is found in the solution of the question as to who has the power of control, not as to the result of the work only, but as to the means and methods by which that result is accomplished. The same principle is also declared in Stephens v. Ind. Acc. Comm. (Cal. Sup.) 215 Pac. 1025. See, also, Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721; Barton v. Studebaker, 46 Cal. App. 707, 189 Pac. 1025.

We do not consider further citation of authority necessary. We are of the opinion that there is no evidence in the record from which any inference can be drawn which justifies the finding that Wells was an employee of the company.

For the reasons given, the award is annulled.

We concur: KNIGHT, J.; ST. SURE, J.

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67 Cal. App. 728

CAMPBELL et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 4716.)

(District Court of Appeal, Second District, Division 2, California. June 20, 1924.)

Prohibition 🔑3(3)—Remedy by appeal from order appointing receiver held to preclude writ to prevent appointment.

Petitioners *held* not entitled to writ of prohibition to prevent appointment of receiver in absence of showing that an appeal from the order appointing the receiver, as authorized by Code Civ. Proc. § 963, did not afford a plain, speedy, and adequate remedy.

Application by Amy I. Campbell and husband for writ of prohibition against the Superior Court of Los Angeles County and Hon. W. C. Doran, as Judge thereof. Writ denied.

Douglas L. Edmonds, Collier & Laberere, and Louis F. Laberere, all of Los Angeles, for petitioners.

James F. McBryde and Eugene J. Wix, both of Glendale, for respondents.

WORKS, J. Petitioners are defendants in a certain action pending in respondent court, in which one Rose A. Parry is plaintiff. The action was commenced to compel the specific performance of an alleged contract whereby petitioners agreed to exchange certain of their real property for real property of Rose A. Parry. The action was tried by respondent court, findings and judgment were ordered for plaintiff, and her counsel were directed to prepare them. The signing of the findings and judgment was delayed for some months, and in the interim the plaintiff in the action served upon petitioners, as defendants therein, a notice of motion for the appointment of a receiver "to handle the properties affected by the * * * action during the pendency of said matter and the appeal that has been threatened; said receiver to do such things as may be necessary under such receivership." On the day for which the motion was noticed a hearing was had pursuant to the notice, and at its conclusion respondent court entered its minute order granting the motion. Thereafter and on the same day, the findings and judgment in the action were signed and the judgment was thereafter duly entered. Petitioner then presented to this court his petition for an alternative writ of prohibition restraining respondents from proceeding with the appointment of a receiver pursuant to the order made by respondent court, and an alternative writ was granted. The question now before us is whether a peremptory writ shall issue.

Upon demurrer to the petition respondents contend that this court cannot issue the writ for the reason that petitioners will have a plain, speedy, and adequate remedy by appeal from any order made by respondent court appointing a receiver. The Supreme Court said in Jacobs v. Superior Court, 133 Cal. 364, 65 Pac. 826, 85 Am. St. Rep. 204:

> "Formerly—and when Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, was decided—there was no appeal from an order appointing a receiver, but in 1897 (Stats. 1897, p. 55) section 939 of the Code of Civil Procedure was amended so as to allow such appeal, and at the same time section 943 was amended so as to provide for the staying of an order appointing a receiver by an undertaking on appeal. These amendments were apparently intended to afford a remedy for prodigal, unwise, and unwarranted appointments of receivers, which seems to be a growing evil; and we think that they do afford an adequate remedy, as contemplated by * * * section 1103 [of the Code of Civil Procedure] and the decisions of this court on the subject. The fact that a question of jurisdiction arises does not change the rule as to the adequacy of the remedy by appeal. See Agassiz v. Superior Court, 90 Cal. 101. The filing of the undertaking operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores the same to the appealing party, from whom it had been taken."

The same rule is stated in California F. G. Ass'n v. Superior Court, 8 Cal. App. 711, 97 Pac. 769, and in Western U. & M. Co. v. Superior Court, 22 Cal. App. 413, 134 Pac.

732. It is said, however, in Jacobs v. Superior Court that there "might perhaps, be exceptional facts in a case which would call for a writ of prohibition notwithstanding an appeal from an order appointing a receiver, but the general rule is as above stated," and language to the same import occurs in Western U. & M. Co. v. Superior Court. Are the facts of the present case such as to make it an exceptional one and not subject to the general rule? We think not. If petitioner shall appeal from any order of respondent court appointing a receiver, that order will become innocuous upon the giving of an undertaking for the purpose of staying the operation of the order. The receiver cannot then enter upon the performance of his duties, and, especially, cannot take possession or control of the properties involved in the action, nor exercise dominion over them. This condition will continue until disposition is made of the appeal from the order, and that event will probably occur either before or at the same time with the determination of the appeal which will doubtless be taken from the judgment in the action, which latter event will finally settle the controversy between the parties. Although the record here contains copies of the pleadings and findings in the action and of various affidavits used upon the motion made in the trial court, petitioners point us to nothing indicating that the case should be treated as an exception to the general rule that prohibition will not lie to prevent the appointment of a receiver. They merely say that the question is for us "to decide from all the circumstances of the case." There is nothing in those circumstances impelling us to determine that the case is not within the operation of the general rule.

It is to be observed that the right to appeal from an order appointing a receiver, said in Jacobs v. Superior Court, supra, to have been conferred by section 939 of the Code of Civil Procedure, is now provided for in section 963 of that Code.

The demurrer is sustained, the alternative writ of prohibition is vacated, and the application for a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

(67 Cal. App. 531)

LAPIQUE v. KELLEY et al. (Civ. 4690.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1924.)

1. Appeal and error 🔑659(1)—Motion to certify would be granted where documents would be included in judgment roll and might be certified by clerk alone.

Motion to certify and have documents filed as part of clerk's transcript would be granted where documents called for were such as would be included in judgment roll and might be certified by clerk alone.

2. Appeal and error 🔑659(1)—Motion requiring clerk to show cause why he should not be ordered to make demanded certificates should be made below.

Motion for an order requiring clerk of superior court to show cause why he should not be ordered to certify certain documents would be denied, especially where clerk was willing to certify documents called for, since order, if proper to be made, should have been applied for to superior court.

3. Appeal and error 🔑659(1)—Motion to have documents made part of transcript on appeal denied.

Lease and motion to vacate, both made subsequent to judgment, could not be a part of record on appeal and could not be included in transcript, unless first certified by trial judge, and hence motion to have them made part of transcript would be denied.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by John Lapique against E. L. Kelley and others. Judgment for defendants, and plaintiff appeals and moves for an order directing that certain documents be supplied from record and made part of transcript. Granted in part, and denied in part.

See, also, 228 Pac. 356.

John Lapique, of Orange, in pro. per.

Clyde Bishop and M. B. Wellington, both of Santa Ana, for respondents.

CONREY, P. J. On motion of appellant, suggesting diminution of the record, and applying for an order directing that certain documents be supplied from the record and thereby be made part of the transcript on appeal.

[1] The documents called for are, first, the summons issued October 9, 1922, "the return of the sheriff of Kansas City, Mo.," the affidavit for publication of summons, and the order for publication of summons. As to these documents, assuming their genuineness and regularity, and that they have any relation to the judgment from which the appeal has been taken, they are such documents as would be included in the judgment roll, and may be certified by the clerk alone. Therefore, without at this time considering in any way the legal effect of said documents, the motion to have them certified and filed herein as part of the clerk's transcript is granted.

[2] Appellant also, on notice, accompanied by his affidavit claiming that the clerk of the superior court refuses to certify to said documents, moves for an order requiring the clerk to show cause why he should not be ordered to make the demanded certificates. The clerk, by counsel, assures the court that he is ready and willing to certify to said documents, now on file in his office. For that reason, and also because such order to the clerk, if appropriate to be made, should be

made on application to the superior court, the motion for an order to show cause is denied. People v. Bartlett, 40 Cal. 142, 148.

[3] The second group of documents called for, as described in the motion, consists of "a certain so-called lease" (purporting to have been executed May 28, 1923), and a motion of plaintiff "to vacate and set aside said so-called lease," denied by the superior court on April 4, 1924. Manifestly, these cannot be a part of the record on appeal, since the appeal itself was taken on the 14th day of June, 1923, from a judgment entered on the 12th day of March, 1923. Moreover, said documents could not be included in the transcript unless first certified by the judge of the court in which the case was tried.

As to said so-called lease and said order of April 4, 1924, the motion is denied.

We concur: HOUSER, J ; CURTIS, J.

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68 Cal. App. 5

LAPIQUE v. KELLEY et al. (Civ. 4690.)

(District Court of Appeal, Second District, Division 1, California. June 26, 1924.)

Supersedeas ⚷3—Denied in action to quiet title where plaintiff would not be deprived of possession under court process.

Writ of supersedeas would be denied in action to quiet title to real property, where plaintiff was in no danger of being deprived of possession under any process of court, as remedy against persons acting independently of the court is not by supersedeas.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by John Lapique against E. L. Kelley and others. Judgment for defendants, and plaintiff appeals and applies for a writ of supersedeas. Writ denied.

See, also, 228 Pac. 355.

John Lapique, of Orange, in pro. per.

Bishop & Wellington, of Santa Ana, for respondents.

CONREY, P. J. On application for writ of supersedeas.

In this action to quiet title to certain real property, the court entered its decree against the plaintiff and at the same time granted relief on a cross-complaint and thereby quieted title to said premises in favor of cross-complainant, "The Re-Organized Church of Jesus Christ of Latter Day Saints," a corporation. The plaintiff Lapique has appealed from the judgment and now applies for a writ of supersedeas to be directed to the respondents, and that certain of the respondents be required to surrender possession of the premises to the plaintiff and appellant. The petition shows by the facts alleged therein that, since the appeal was instituted, a certain "Farmers' Gun Club" has taken possession of the premises under a purported lease from one McGuire, which lease also was executed after this appeal was instituted. The decree in this action determined that said McGuire, sued personally, has no title or interest in said premises; but the court's findings state that he is the presiding bishop of said church.

Assuming that under a decree quieting title as provided in the terms of the decree in this case, the prevailing party might obtain possession through a writ of assistance or other process of the court, and further assuming that supersedeas, directed to the trial court, would be a proper remedy to prevent that court from issuing any such process and from thereby taking possession of the property from the appellant during the time while the appeal is pending, nevertheless it is clear upon the showing made by appellant himself in his petition that he stands in no danger of being deprived of possession through the issuance of any process of the court in aid of the respondents or either of them.

Archer v. Miller (Cal. Sup.) 218 Pac. 410, much relied upon by petitioner, has no application to the situation presented in this case. In Archer v. Miller the court merely held that, for stated reasons, the clerk of the court below, as commissioner of the court to execute a deed under the terms of the decree, should not be permitted to execute and deliver such deed during the pendency of the appeal. On that ground the writ of supersedeas was granted. But in this present instance it is not threatened, nor do the circumstances indicate, that any attempt will be made to have anything done pursuant to the terms and provisions of the decree during the time of pendency of the appeal. If, as he complains in his petition, appellant has been deprived of possession of the premises described in this action by acts of parties proceeding independently of the court and without the aid of any process of the court, and if such acts constitute any wrong to appellant, his remedy may not be obtained through a writ of supersedeas in this action.

The petition is denied.

We concur: HOUSER, J.; CURTIS, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

67 Cal. App. 680

PEOPLE v. JOHNSON. (Cr. 763.)

(District Court of Appeal, Third District, California. June 13, 1924. Hearing Denied by Supreme Court Aug. 11, 1924.)

1. Criminal law 🔑108(1)—Convict removed from state prison to work on roads held to be under jurisdiction of state prison and prison guards.

Where a convict was taken from a state prison into another county to work on roads under prison guards, he was still under the jurisdiction of the state prison and prison guards as respected jurisdiction of prosecution for an escape.

2. Criminal law 🔑400(3)—Testimony that guards were acting as prison guards held sufficient.

In prosecution for escaping from state prison, testimony that guards from whom defendant escaped were acting as prison guards was sufficient without their authority or appointment being shown by written order.

3. Criminal law 🔑223—Accused held tried for offense for which held by committing magistrate.

Where committing magistrate held accused for trial for offense named in depositions, which showed an escape while at work outside of the prison under surveillance of prison guards, for which offense he was tried, he was tried for the same offense for which he was held to answer.

4. Criminal law 🔑108(1)—Court of county where escaped convict was captured held to have jurisdiction.

Where a convict confined in a state prison, while at work in another county under prison guards, escaped, and was captured in a third county, the superior court of that county had jurisdiction over prosecution for the escape.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Gust Johnson was convicted of escaping from the state prison, and he appeals. Affirmed.

Neil R. McAllister, of Sacramento, and Gust Johnson, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant and appellant in this case, while a prisoner, lawfully confined within the state prison at Folsom in the state of California, and serving a term therein upon conviction previously had and judgment pronounced, was taken from said prison to the county of Sierra to one of the construction camps there being maintained, and placed at work on road construction being carried on in said county of Sierra, and, while there escaped from the surveillance of the prison guards; was thereafter apprehended and brought to trial in the county of Sacramento, state of California. Judgment of conviction was had. A motion for a new trial was made by the defendant. This motion being denied, the defendant appeals therefrom and also from the judgment of conviction just referred to. A very lengthy brief was filed in this matter covering a number of minor points, but the main objection urged on this appeal is that the superior court of the county of Sacramento had no jurisdiction to try the defendant for the offense set forth in the information.

[1-4] The briefs submitted in this case present almost the identical questions considered by this court in the case of People of the State of California v. Vanderburg (Cal. Sup.) 227 Pac. 621. The question of jurisdiction was also considered by this court in the cases of People of the State of California v. French, 61 Cal. App. 275, 214 Pac. 1003; and People of the State of California v. Lewis, 61 Cal. App. 280, 214 Pac. 1005. These cases decide adversely to the contention of the appellant practically all the points that are made for reversal herein. The testimony set forth shows that the defendant was being confined at Folsom under a conviction of burglary; that he was taken from Folsom to the road camp above mentioned herein, was placed in charge of guards, and while at work upon the highway, under the charge of prison guards, escaped therefrom. In these respects the facts are almost identical with that of the Vanderburg Case, supra, and the ruling in that case as to the defendant still being under the jurisdiction of the Folsom state prison and prison guards is applicable here.

The point is made that the authority of the guards or their appointment was not shown by any written order. The testimony shows that they were acting as prison guards, which we think sufficient. The point is also made that the defendant was not tried for the offense for which he was held to answer by the committing magistrate. It appears from the record, however, that the magistrate held the defendant for trial for the offense named in the depositions. The depositions showed the offense for which the defendant was tried, to wit, an escape while at work outside of the Folsom prison to which the defendant had been committed, while under the surveillance of prison guards, in the county of Sierra. The cases heretofore cited hold that the superior court of the county of Sacramento has jurisdiction of such offenses.

There being nothing in the record justifying a reversal herein, it is hereby ordered that the judgment of the trial court and order denying a new trial herein be and the same are hereby affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

(67 Cal. App. 549)

PEOPLE v. GRAY. (Cr. 1081.)

(District Court of Appeal, Second District, Division 1, California. May 29, 1924.)

1. **Intoxicating liquors 🔑236(13)—Evidence held sufficient to show liquor sold was fit for beverage purposes and was intoxicating.**

In a prosecution for violation of the Wright Act, evidence *held* sufficient to show that liquor sold was fit for beverage purposes and that it was intoxicating.

2. **Criminal law 🔑304(20)—Court takes judicial notice that whisky is alcoholic, intoxicating, and usable as a beverage.**

Court takes judicial notice that whisky is an alcoholic liquor, intoxicating, and may be used as a beverage.

3. **Criminal law 🔑1036(1)—When admission in evidence of liquor not objected to, it cannot be complained of.**

In a prosecution for sale of intoxicating liquors, where accused did not object to the introduction in evidence of a bottle and its contents purchased from him, he cannot complain of its admission on appeal.

4. **Intoxicating liquors 🔑236(11)—Evidence held sufficient to support conviction for sale.**

In a prosecution for the sale of intoxicating liquors, evidence *held* sufficient to support a conviction.

5. **Criminal law 🔑1177—Accused cannot question judgment for error in his favor.**

Where one found guilty of a second violation of the Wright Act was sentenced to nine months' imprisonment but no fine was imposed as required by the National Prohibition Act, he cannot attack the judgment for failure to impose a fine, since the error was in his favor.

Robert Gray was convicted of violating the Wright Act, and he appeals. Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

CURTIS, J. The defendant was charged by information with a violation of the Wright Act (St. 1921, p. 79), so called, and a prior conviction thereof. He was found guilty as charged in the information and sentenced to imprisonment in the county jail for the period of nine months. On appeal to this court he attacks the judgment upon two grounds: First, that the evidence was not sufficient to support the verdict; second, that the court exceeded its authority in imposing upon him the sentence of nine months' imprisonment in the county jail.

[1-4] In contending that the evidence is insufficient to support the verdict, the appellant specifies three particulars in which he claims that the evidence is lacking. They are that the liquor which the evidence shows was sold by the defendant was not shown to have been fit for beverage purposes, nor was it shown to have been intoxicating, and that, to use the expression employed by appellant's counsel in his brief, "the integrity of the evidence is not good." The evidence introduced on behalf of the prosecution was to the effect that one McMillan bought from the defendant two pint bottles of whisky, paying him for the same the sum of $5. McMillan, the evidence shows, went to the defendant's car and asked the defendant for whisky, and upon this request being made to him the defendant produced the two pint bottles and delivered them to McMillan. One of these bottles of liquor was consumed shortly after its purchase, and McMillan, after tasting the contents of the second bottle, turned it over to the district attorney's office of Los Angeles county on the following day. McMillan testified that the bottle, the contents of which he tasted, contained whisky. A Mr. Langdon, another witness, testified regarding the purchase of the liquor substantially as did the witness McMillan. He further testified that he tasted the contents of each of the two bottles of liquor sold by the defendant and that the contents of each bottle was whisky. This evidence completely answers the two objections made by the appellant to the effect that the evidence failed to show that the liquor sold was fit for beverage purposes and that it failed to show that the liquor was intoxicating. In People v. Mueller, 168 Cal. 526-528, 143 Pac. 750, it was held that the court takes judicial notice that wine is an alcoholic liquor, that it is intoxicating and may be used as a beverage. The same rule would apply when the issue before the court is as to whether or not a particular liquor is whisky. Black on Intoxicating Liquors, § 5; 17 Am. & Eng. Ency. of Law, p. 198. See, also, People v. Allen, 37 Cal. App. 180, 174 Pac. 374; People v. Ellena, 56 Cal. App. 428, 205 Pac. 701. Upon the trial a bottle of liquor was introduced in evidence by the prosecution, after it had been shown that this bottle, with its contents, was the same bottle of liquor purchased by McMillan from the defendant and by him delivered to the district attorney's office. Appellant criticizes the custom employed in the district attorney's office in storing and keeping liquors purchased of alleged offenders against the Wright Act and kept for the purpose of being used in evidence in prosecutions under said act. As the defendant made no objection to the introduction in evidence of the bottle and its contents, he cannot now complain of its admission against him. Had it been admitted over his objection, the action of the court would not have been error for the reason that appellant's criticism goes, not to the legality, but only to the weight, of

such evidence. Under these circumstances, we are not disposed to question the integrity of the evidence upon which defendant was convicted. In our opinion, it was sufficient to support the judgment.

[5] Under the provisions of the National Prohibition Act (the Volstead Act [U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.]), as made applicable to the state of California by the Wright Act, any person who sells liquor contrary to the provisions of the statute, for the first offense, is punishable by a fine not exceeding $1,000, or imprisonment not exceeding six months; and for a second or subsequent offense, by a fine of not less than $200 nor more than $2,000, and by imprisonment for not less than one month nor more than five years. Defendant was found guilty of a second offense under this statute, and the court sentenced him to nine months' imprisonment in the county jail, but failed to impose upon him any fine whatever. It is conceded by the Attorney General, as well as by appellant that in order to meet the requirements of this statute, a valid judgment against a defendant found guilty of a second offense thereunder should provide for a fine of not less than $200, in addition to the sentence of imprisonment. Defendant now asks that the judgment in this case, for its failure to impose a fine against him of at least $200, be either reversed or the cause returned to the trial court for the entry of a proper judgment. This error in the judgment being one in favor of appellant, he cannot question the judgment. In re Reed, 143 Cal. 634–5, 77 Pac. 660, 101 Am. St. Rep. 138; People v. Oliver, 7 Cal. App. 601, 602, 95 Pac. 172. In the case of People v. Oliver, supra, the defendant was adjudged guilty of the crime of grand larceny after a prior conviction of burglary. The offense was punishable by imprisonment in the state prison for not less than ten years. He was sentenced to serve a term of seven years. On appeal the court affirmed the judgment and held that the judgment was not void and should not be returned to the trial court to be corrected to the detriment of the defendant.

The judgment and the order denying the motion for new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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68 Cal. App. 65

BLANCHARD v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4922.)

(District Court of Appeal, First District, Division 2, California. July 2, 1924.)

1. Master and servant 🔑398—Payment of compensation extends running of limitations.

Under Workmen's Compensation Act, § 11 (c), voluntary payment of compensation to injured employee, by employer's insurer extended the running of the statute as to such employer.

2. Master and servant 🔑373—Compensation for occupational disease apportioned among several employers, under statutory definition of "injury."

Under Workmen's Compensation Act, § 3, subd. 4, as amended by St. 1919, p. 911, defining "injury," where a glass-blower slowly contracted "glass-blowers' arm" during employment under three different employers, the Industrial Commission properly apportioned the award among the respective employers, based on periods of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury.]

3. Master and servant 🔑398—Payment of compensation for occupational disease by one employer held not to estop others from pleading limitations.

Where an employee slowly contracted an occupational disease during employment under three employers, and allowed period specified in Workmen's Compensation Act, § 11 (b), subd. 1, limiting commencement of compensation proceedings, to run before applying for compensation, payment of compensation by one employer without collusion with the others did not estop the others from claiming benefit of the statute.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Joseph Blanchard, claimant, opposed by the Pacific Coast Glass Company and others, employers, and the Ocean Accident & Guarantee Corporation and others, insurers. From an order of the Industrial Accident Commission, apportioning an award among the employers, plaintiff brings certiorari. Affirmed.

Heidelberg & Murasky, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for respondent Ocean Accident & Guarantee Corporation.

NOURSE, J. This is an original application in certiorari to review the award of the respondent Industrial Accident Commission made under the terms of the Workmen's Compensation Act of 1917. Stats. 1917, p. 831. The petitioner is a glass-blower by trade. He worked at his calling under 3 different employers as follows: For about 12 years with the Illinois-Pacific Glass Company, then for 6 months with the Pacific Coast Glass Company, and then for 6 months with the Southern Glass Company. While working under these employers he contracted what is known as "glass-blowers' arm." He was re-employed by the Pacific Coast Glass Company for about two weeks, during which period he was engaged in packing and lifting boxes. At the end of this period, about October 12, 1922, he was transferred to the glass-blowing department, where he worked for about 40 minutes and was then forced to discontinue his employment on account of the trouble with his arm. It appears that some 3 or 4 years before this date his right arm was affected with the disease and he was then compelled to discontinue the use of that arm. He then shifted his work to the left arm and was able to continue in his trade without medical treatment, though with diminished efficiency. Within a short time thereafter the left arm began to trouble him and then for the first time he reported his condition to his employer and was informed that he was suffering from the disease mentioned. He continued, however, in his employment until October 12, 1922, when, while in the employ of the Pacific Coast Glass Company, as above stated, he was forced to discontinue his work.

[1, 2] Application for compensation was first made on May 24, 1923, more than 6 months after he had thus quit work. However, the Ocean Accident & Guarantee Corporation, the insurance carrier of the last-named employer, paid some compensation to the petitioner during this period and thereby, under the terms of section 11 (c) of the Workmen's Compensation Act, the running of the statute of limitations was extended as to that employer. Upon the hearing of his application for compensation the Commission awarded the petitioner $1,249.80, being 15 per cent. of the total disability and prorated the amount awarded among the 3 employers above named. On this basis the amount of the award against the Pacific Coast Glass Company (three-eighths of the total) was $468.70, and no objection is made by that company or its carrier to the payment of that amount. The Commission then found that the remaining five-eighths of the total award, which was charged to the other two employers, was barred by the statute of limitations and the petitioner is therefore unable to collect the same. The purpose of this petition is, therefore, to seek the annulment of that portion of the Commission's award which prorates the compensation between the three employers and holds the two previous employers freed by reason of the statute of limitations.

Subdivision 4 of section 3 of the Workmen's Compensation Act, as amended (Stats. 1919, p. 911), defines "injury" for which compensation may be awarded under the act as follows:

> "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment, including injuries to artificial members. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

Under this section it was plainly the duty of the Commission to apportion the award of compensation among the respective employers, and in doing so the Commission was required to exercise a discretion based upon the evidence of the various periods of employment, which is not attacked in this proceeding. The petitioner contends that no apportionment should have been made, but that the Commission should have charged the entire award to the last employer. In support of this contention he cites In re Johnson, 217 Mass. 388, 104 N. E. 735, where the court held that, where an employee is compelled to discontinue his trade because of an occupational disease, the injury should be deemed to have occurred at the time of cessation from labor. The respondent urges that, under our statute, it is made the duty of the Commission to apportion the award among the various employers, and it is not the function of the court to declare, as the Legislature might have done, that in a case of occupational diseases running over a long period of employment, the last employer should be liable for the total disability. The rule of the Johnson Case was indirectly criticized in Miller v. American Steel, etc., Co., 90 Conn. 349, 361, 97 Atl. 345, 348 (L. R. A. 1916E, 510) where the court says:

> "It is notorious that the typical occupational disease is not an injury which can be said to have been 'sustained' at a given date. If, for the purpose of escaping this difficulty, it is attempted to substitute the date of the incapacity for the date of the injury, it will be necessary to repeal and reconstruct a considerable portion of the act."

On this branch of the case we therefore conclude that the respondent Commission acted in accordance with the statute when it apportioned the amount of the award among the three employers.

[3] As to the statute of limitations, the act is equally clear. Section 11 (b), subd. 1, provides that proceedings for the collection of benefits of this nature must be commenced within 6 months from the date of the injury. It is not disputed that the petitioner failed to commence any proceedings against the Illinois-Pacific Glass Company or the Southern Glass Company until long after this period had expired. It is admitted that while in the employ of one of these two companies he had knowledge of the disease which eventually incapacitated him, but that no application for benefits was made as against such employer. It is argued that, by reason of the payment of compensation by the Pacific Coast Glass Company, the last employer, the petitioner was lulled into a sense of security as to his two former employers, and that we should hold that they are therefore estopped from claiming the benefits of the statute. There is, however, no showing that the last employer was acting in collusion

with either of the two former employers or that either of these employers had any knowledge of either the fact that the petitioner was suffering from this occupational disease or that he was being paid compensation by the Pacific Coast Glass Company. For these reasons we conclude that the Commission correctly held that the petitioner was precluded by the statute of limitations from enforcing his claim for compensation against his two former employers.

The award is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

68 Cal. App. 19

PEOPLE v. REED. (Cr. 1091.)

(District Court of Appeal, Second District, Division 1, California. June 28, 1924.)

1. Criminal law 🔑517(4)—Evidence held to sufficiently establish corpus delicti for purpose of admitting confession.

Evidence, that on alleged night of burglary certain goods were taken from certain store without knowledge or consent of owners, and that entrance was obtained by breaking through door and unlocking inside fastening, *held* to sufficiently establish corpus delicti so as to warrant admission of confession.

2. Criminal law 🔑531(1)—Prosecution has burden of proving confession before officers was voluntary, before introducing it.

Before introducing defendant's confession, made to the district attorney in the presence of several officers, the prosecution must prove it was voluntarily made without inducement on officers' part.

3. Criminal law 🔑532(1)—Court must hear evidence as to involuntary character of confession before admitting it when question raised.

When question whether accused's confession was voluntary is raised, the court is bound to hear evidence on the subject, before allowing proof of the confession, and admit confession only if it finds it voluntary.

4. Criminal law 🔑522(1)—Confession within few days after threats, not admissible, unless they have ceased to operate as an influence.

Confessions within a few days after threats and inducements are made to prisoner are inadmissible, unless it clearly appears that the threats and inducements had ceased to operate on his mind, to bring about his statement.

5. Criminal law 🔑532(1)—Admission of evidence of confession without granting defendant's request to first show circumstances indicating involuntary character held error.

Admission of testimony of officer as to conversation with defendant containing some incriminatory matter, more fully covered in formal statement introduced as confession later, without granting defendant's request to first show circumstances, including offer of immunity and reward, *held* error.

6. Criminal law 🔑531(3)—Burden on state to show confession voluntary held not sustained.

Burden on state to show that confession was voluntary before introducing it in evidence *held* not sustained.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

M. S. Reed was convicted of burglary, and he appeals from the judgment and order denying a new trial. Reversed, and new trial ordered.

J. C. C. Russell, of Hanford, and Rowen Irwin, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and William R. McKay, Dist. Atty., of Hanford, for the People.

CONREY, P. J. Pursuant to an indictment charging that the defendant, on December 7, 1923, in the county of Kings, committed the crime of burglary, defendant was tried and convicted. He appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] An important part of the evidence without which we cannot say that probably the defendant would have been convicted, consisted of a statement made by him while in the custody of the sheriff. The statement was made to the district attorney in the presence of several officers and other persons, and amounted to a confession of guilt. The defendant objected to this evidence upon the ground that the corpus delicti had not been proved, and on the further ground that any statement made by the defendant was made following a promise of immunity from prosecution, which promise was made by the district attorney to the defendant.

Evidence had been introduced tending to show that on the night of the alleged burglary certain goods had been taken from the store of the J. S. Williams Company, in the city of Hanford, without the knowledge or the consent of the owners, and that the person or persons who took away said goods had obtained entrance to the store by breaking through the door and unlocking the inside fastening thereof. We think this was sufficient to establish the corpus delicti.

[3, 4] Before introducing in evidence such a confession of a defendant, the burden is upon the prosecution to show that the confession was made voluntarily and without inducement on the part of the officer. People v. Castro, 125 Cal. 521, 526, 58 Pac. 133. "It is the duty of the judge of the trial court, when the question is raised whether or not a confession of the defendant was voluntarily made, to hear evidence on the subject, before allowing proof of such confession;

and to admit the proof only in the event that he finds it to have been voluntary." People v. Fowler, 178 Cal. 657, 662, 174 Pac. 892, 893. "It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt." People v. Loper, 159 Cal. 6, at page 14, 112 Pac. 720, 723.

[5] It is admitted that the district attorney, within three hours before the confession was made, promised the defendant immunity from prosecution "if he would come through and tell everything." The first promise was made by the district attorney through one W. B. Dalby, a constable. The second was made a few minutes later by the district attorney personally. Dalby was present at the third conversation, wherein the confession was obtained. Being asked what was said at that time, he replied:

> "Well, Mr. McKay asked him in regard to his making a statement, if what he made was free and voluntary. I don't know; he went through the usual performance. I can't repeat the questions."

Near the close of Dalby's testimony, counsel for the defendant said:

> "If the court please, I don't care whether I make it now or later, but I would like to introduce some evidence in addition to that by this witness."
>
> The Court: "I am going to let the district attorney make his case first. He has a right to introduce a little evidence on that line before you introduce any more."

At that time the defendant had not introduced any evidence on that subject aside from cross-examination. A little later and following his objection to a question calling for a statement by Dalby of the substance of a conversation wherein the defendant stated the manner in which he had secured the goods, counsel for defendant further said:

> "Before any confession is gone into, we would like to introduce evidence to show what had been said, and the immunity and reward that had been offered to him at that time."

The court responded: "Proceed with your statement." Whereupon the witness answered the question. This answer contained some of the incriminatory matter of confession which was more fully contained in the formal statement afterwards introduced. It was error to admit such evidence without granting defendant's request to first introduce his evidence of the circumstances under which the confession was made. People v. Columbus, 49 Cal. App. 761, 194 Pac. 288.

[6] The formal statement itself was taken down in shorthand by Mrs. Schubart, a deputy sheriff, and was afterwards transcribed and signed by her. There is no evidence that this statement was ever read over to or signed by the defendant, but we do not understand that objection has been made to it on that ground. At the close of the testimony of Mrs. Schubart, the district attorney offered in evidence the said statement as written out by Mrs. Schubart. The defendant renewed his objection before made. The objection was overruled, and the statement then was read in evidence.

Following the reading of the statement in evidence, the sheriff, W. J. Hime, testified that he was present when said statement was made, and that the statement was given freely and voluntarily. He admitted, however, that he was not present at the beginning of the making of the statement and therefore did not hear any of the conversation until some half dozen of the questions contained in the statement had been answered. The testimony of the district attorney, wherein he claimed that he had retracted his promise, was all introduced after the confession had been read in evidence, and after the testimony of Mr. Hime.

After the people had presented their case the defendant introduced the testimony of Mrs. Reed, wife of the defendant. She stated, among other things, that she was present at the time when the alleged statement was given by her husband, and that the district attorney did not make any statement at that time that he had retracted his promise of immunity. In this connection it should be noted that Mr. Dalby, who was present at that same time and place, testified that he did not hear the district attorney say that he had retracted his promise of immunity. The district attorney himself in his testimony, while he claimed that he had retracted his earlier promise to the defendant, declined to say that he had in direct terms stated that he retracted what he had said. He testified that he had done so in substance. He also said, "Everything I said was taken down by the reporter." But when we turn to the statement as taken down by the reporter, we find in it no statement wherein any reference is made to the previous conversation in which the promise had been given. There are merely the formal questions and answers, to which Mr. Dalby referred in his statement that the district attorney "went through the usual performance."

We deem it unnecessary to discuss the other points relied upon by appellant. In large part, they have some relation to the admission in evidence of the alleged confession. The error committed, in allowing the introduction of that evidence, is so far prejudicial to the rights of the defendant that he is entitled to a new trial.

The judgment and order are reversed.

We concur: HOUSER, J.; CURTIS, J.

67 Cal. App. 792

WARD v. MASSACHUSETTS BONDING & INS. CO. (Civ. 2718.)

(District Court of Appeal, Third District, California. June 24, 1924.)

1. Attachment 🔑333—Sureties liable when attached property released though no record made.

Sureties on a bond for redelivery to defendants of attached property, were liable where sheriff upon approval of the bond returned attached property to attachment defendants though he never made a record thereof as required by Code Civ. Proc. § 560.

2. Estoppel 🔑22(3)—Recitals in redelivery bond operate as estoppels.

Recitals in bond for delivery to defendant of attached property operate as estoppels against attachment defendant and his sureties.

3. Evidence 🔑571(7)—Expert testimony held sufficient to establish value of ore destroyed by attachment defendants.

Where ore which had been attached was released to attachment defendants and completely destroyed by them by milling testimony of expert who knew character of ore in general way and who had mined and milled ore from same mine and chute was sufficient to establish its value in action on bond, especially where neither of attachment defendants offered any evidence as to value.

4. Attachment 🔑351—Measure of damages in action on redelivery bond stated.

In an action on redelivery bond, plaintiff can but recover amount of his judgment unless property attached is of less value than amount thereof in which case his recovery is limited by value of property released.

5. Trial 🔑255(14)—Court's failure to state amount of judgment and date thereof in action against surety on redelivery bond held not erroneous.

In an action on redelivery bond, court's failure to state amount of judgment and date and permit jury to compute amount due thereon at time of trial was not erroneous, where defendant offered no instructions, and it was not suggested that amount then due at time of trial was erroneously stated.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Chas. A. Ward against Massachusetts Bonding & Insurance Company, a corporation. Judgment for plaintiff and defendant appeals. Affirmed.

See, also, 57 Cal. App. 623, 208 Pac. 188.

John A. Wall, of Mariposa, for appellant.

F. W. Henderson, of Merced, for respondent.

WEYAND, Justice pro tem. This is an action to recover from the Massachusetts Bonding & Insurance Company, on account of an undertaking executed by said bonding company, for the redelivery to defendants of certain attached property.

The plaintiff above named brought an attachment suit in the superior court of Mariposa county and attached certain real and personal property, claimed to belong to M. C. McIntyre and J. C. Yancey, the defendants in said attachment suit. The property attached was a certain mine known as the "Early Mine," an ore bin and a lot of gold-bearing ore in the ore bin.

Immediately after the attachment, and before a return of the writ of attachment, McIntyre and Yancey gave an undertaking to the sheriff of Mariposa county, for the release of said property from the attachment. This bond was accepted by the sheriff, aforesaid, and the sheriff delivered the ore to the defendants in the attachment suit. The Early Mine was never released of record.

[1, 2] Appellant herein contends that the evidence was insufficient to justify the verdict, and this contention is based upon two separate claims. It is first asserted that as there was no proof of a release of the Early Mine and the ore bin, there can be no recovery. The evidence adduced at the trial herein clearly showed that McIntyre and Yancey had been operating the said Early Mine under some form of bond or working agreement, but that their rights under this bond had expired on November 17, 1915. The attachment herein was levied on or about March 11, 1916, some four months after their rights in this mine had expired. Between the date of the expiration of their working bond or agreement on this mine, and the attachment by the sheriff of Mariposa county, McIntyre and Yancey had been maintaining possession of the Early Mine by force and "under guns," as some witnesses expressed it. After the giving of the undertaking by the bonding company, it is true, the sheriff never made a record of the release of the attachment, as is required by section 560 of the Code of Civil Procedure. The undertaking given for the release of the property recites that it is given "in consideration of the release from said attachment of the property attached." The evidence clearly shows that upon the approval of this undertaking the sheriff did return the ore in the ore bin, and discharged the keeper of the property, and it further appears that McIntyre and Yancey took possession of and milled the ore. The sole and only property held by the sheriff, that was of value to the defendants in the attachment suit, was returned to them. The recital in this undertaking is to the effect that the release has been made. It is not recited that a release is to be made in the future. The usual doctrine applicable to bonds of this nature is that all recitals operate as estoppels against the attachment defendant and his sureties. See 3 Cal. Jur. p. 530.

In Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072, it was disclosed that an application had been made to the court for release of attached property, and the order for release was made. It was there held, in a case involving a like bond for release, that it was not a matter of answer or defense to show that the property was not released. In the instant case the proceedings were not of that nature; no formal application made to the court for the release, but the sheriff received and approved the undertaking for release, and did actually release to the attachment defendants all property of value held by him. Possession of the mining property, the ore bin, and the ore was turned over to McIntyre and Yancey. The Early Mine, under the evidence given, had, and could have had, no value whatsoever to the defendants in that suit. Aside from the suggestion that the surety is bound by the recital in his undertaking, the law should not require the performance of an idle act.

Upon the question as to the value of the ore, it was shown by testimony that, after the release of the attachment, McIntyre and Yancey milled the ore and extracted the gold therefrom. This was done between the time of the release from attachment and the rendition of the judgment in the attachment suit. The proceeds were taken by McIntyre and Yancey and no accounting was ever made to the plaintiff in that suit, or to the sheriff. Nothing was paid to the plaintiff from the proceeds of that ore.

[3] The actual ore having been completely destroyed by the attachment defendants, and no method being present to definitely determine its value, resort was had to the testimony of an expert, who knew the character of the ore in a general way, and who had mined and milled ore, from the same mine, and from the same chute in that mine. It is proper to recount that neither the defendant in the present suit, nor McIntyre and Yancey, defendants in the attachment suit, offered any evidence as to the value of this ore. The proof offered was sufficient to establish the value, as the same was determined by the jury trying the case. In Montana Min. Co. v. St. Louis Min. & Mill. Co., 183 Fed. 70, 105 C. C. A. 343, under a like situation, the federal court said:

> "The ore sued for had been taken and carried away by the Montana Company. The St. Louis Company was therefore unable to prove the value of the specific ore taken, but it was allowed to show the value of similar ores taken from the same vein near by."

Speaking of like testimony, the Supreme Court of California, in Antoine v. Ridge Co., 23 Cal. 219, 221, said:

> "If this resulted in causing the jury to return too large a verdict of damages, the defendants are themselves principally to blame; for they had the means in their own power of showing the correct amount of gold taken out by them."

It is quite true that these last-quoted cases were between parties directly involved, but the same principle must apply where one party is standing as surety for one who received the proceeds of released property. Under the circumstances the evidence as to value, offered by the plaintiff, was the best that could be offered, and was sufficient to sustain the finding of the jury.

Appellant complains of the following instruction, given by the trial court:

> "If you find that the plaintiff is entitled to recover from the defendant in this action, I instruct you that plaintiff is entitled to recover from the defendant the full value of the ore levied on in the case of Ward v. McIntyre and Yancey, not exceeding the sum of $1,857.50, the amount of the judgment in said action with interest and costs of suit therein, if you shall find that the value of said property was in excess of said sum. If you shall find that the value of said property was less than the sum of $1,857.50, the amount of said judgment with interest and costs, I instruct you that plaintiff is entitled to a verdict not exceeding the value of said ore levied on in said action."

The evidence disclosed that there were 180 tons of ore attached, and that like ore, from the same mine, and same chute, had yielded from $17 to $18.45 per ton. Against this there was properly deductible a milling charge of $3 per ton. Thus it will appear there was a total net value of $2,500 or upwards in the released property.

[4] Under authority of Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066, the above instruction states the true rule of law applicable. The plaintiff herein could but recover the amount of his judgment, unless the property was of less value than the amount of his judgment, in which case his recovery was limited by the value of the property released.

[5] Appellant seems to further contend that the court should have stated the amount of the judgment, and the date thereof, and left the jury to compute the amount due thereon at the time of trial. Again it must be borne in mind that counsel for defendant did not offer any instructions, nor was there any suggestion that the amount then due, at the time of trial, was erroneously stated. There is no merit in this contention.

Other alleged errors are claimed, but we see no necessity of considering them separately; suffice it to say they have no merit.

The judgment of the lower court is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

67 Cal. App. 753

COATS v. STEPHENS. (Civ. 2736.)

(District Court of Appeal, Third District, California. June 20, 1924.)

1. Landlord and tenant 🔑331(6)—Evidence held to sustain finding that tenant did not breach farm lease with respect to planting crops.

In action against tenant for breach of farm lease, evidence *held* to sustain finding that so far as rice was not raised in certain year it was because of topography of land making it impossible to conduct water thereto; that such defect was discovered too late to plant any other crop thereon during that year; that so far as land was not cultivated in following year it was because of farming practice of letting land lie fallow after planting of rice in previous seasons; and that allegations as to planting inferior quality of rice were not sustained.

2. Landlord and tenant 🔑324—Tenant held not liable in absence of negligence for result of mutual mistake in supposing land suitable for rice culture.

Under lease providing for raising of rice or other suitable crops on farm, which parties believed could be successfully irrigated, if tenant acted upon such belief and proceeded in good faith to prepare all land for rice, some of which could not be used for that purpose because of impossibility of irrigating, he could not be held in damages for result of such mistake, unless he was negligent in ascertaining true facts.

3. Landlord and tenant 🔑331(6)—Evidence held to show lease did not contemplate tenant should procure water from wells for irrigation of rice.

Under a lease providing for the raising of rice or other suitable crops on a farm, evidence *held* to show that at the time of execution thereof it was not contemplated that tenant should go to unusual expense of procuring water from wells for irrigation of the rice.

4. Landlord and tenant 🔑331(6)—In action against tenant for letting part of land lie fallow, certain evidence concerning financial results held immaterial.

In an action on farm lease for tenant's failure to farm as required thereby, objection to question whether tenant made more money the way he handled land by letting part lie fallow than by putting in grain crop should have been sustained; it being immaterial whether tenant received more from one crop above expense of production than he would have received from two.

5. Appeal and error 🔑1052(8)—Admission of immaterial evidence of certain fact held harmless, in view of findings as to other facts.

Admission of immaterial evidence of certain fact on behalf of successful part was harmless, where other facts found by trial court on sufficient evidence required judgment in his favor.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by A. S. Coats against J. H. Stephens. Judgment for defendant, and plaintiff appeals. Affirmed.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellant.

Downey, Downey & Seymour, of Sacramento, for respondent.

FINCH, P. J. The defendant was given judgment for costs, and the plaintiff appeals. The plaintiff leased 150 acres of land to defendant for a term of three years, commencing on the 1st day of December, 1918. The lease provided:

> "The party of the second part shall dig and construct such irrigating ditches on said premises as may be necessary properly to irrigate the crops to be grown by him on said premises. The party of the second part hereby covenants and agrees to and with the party of the first part that he will occupy, till, and in all respects cultivate the premises above mentioned during the term aforesaid in a farmerlike manner and according to the usual course of farming practiced in the neighborhood, and that he will plant and devote to the raising of rice or other suitable crops all of said leased premises. It is understood and agreed in this connection that, if at any time during the term of this lease there shall be a shortage of water so that said party of the second part shall be unable to secure water sufficient for the growing of rice, he shall have the right to plant and grow such other crops as he may deem best."

The lease further provided that the defendant would deliver to plaintiff as rent "one-fifth of the entire crops of rice or the usual proportion of such other crops as may be raised on said premises."

The complaint alleges that during the year 1919 the defendant failed to cultivate or plant "any crops of any kind or nature" upon about 10 acres of the land and planted an inferior quality of rice upon a portion thereof, and that during the year 1920 he failed to cultivate or plant any part of the land.

The answer alleges that—

> "During the first part of 1920 and the spring of said year defendant made arrangements and planned to and intended to plant said leased property to rice; that he was unable to secure, and it was impossible to secure, water sufficient for the growing of rice during 1920, but that said shortage of water did not develop until it was too late to plant any other crop in the spring of said year; that during the preceding season said leased premises had been entirely planted to rice, except about 10 acres thereof which had been planted to barley; that after said property had been planted to rice for a season, and rice had been harvested thereon, it was impossible to plant other crops successfully on said property until after said property had lain fallow for at least one season after the harvesting of said rice, and that the usual course of farming practiced in the neighborhood was, and is, to let land lie fallow after the harvesting of rice thereon for at least

one season before planting any other crop thereon; that, because it was too late to plant other crops until the fall of 1920 after the shortage of water for rice became apparent and developed, and because of the additional fact that said property would not have been suitable prior to that time for the growing of other crops, no additional crop was planted in the spring of 1920; * * * that said shortage of water was not the fault of defendant, and was due to shortage of water in California arising from an excessively dry year in 1919 and the spring of 1920; that the method of farming employed by defendant was followed in the neighborhood, was for the best benefit of said property and the parties to said lease, and was believed by defendant in good faith to be the best plan of farming to be followed, and was the best method of farming said property."

[1, 2] The court found that in the year 1919 no crop was raised on about six acres of the land; that both parties "contemplated the planting and threshing of rice on said six acres, and that said six acres were plowed, cultivated, and prepared for the planting of rice thereon during 1919, but that it was impossible to raise a crop of rice on said six acres, because the topography of said six acres made impossible the conduct of water thereto; that water is essential to the production of rice; that the unfavorable topography of said six acres was discovered too late to plant or mature any other crop thereon during the year 1919; that said six acres were tilled, cultivated, and planted to crops in the year 1920"; and that the defendant did not plant an inferior quality of rice in the year 1919. The other facts were found in accordance with the averments of the answer.

The leased land lies under and receives water for irrigation from the canal of the Yolo Water & Power Company. The defendant testified that the six-acre tract not planted in 1919 is too high to be irrigated from the canal, but that he did not discover that fact until it was too late, to plant to barley. From the terms of the lease it may be inferred that, at the time of the execution thereof, both parties believed that water could be carried through ditches to all of the land. If the defendant acted upon such belief, and, as he testified, proceeded in good faith to prepare all of the land for rice, he cannot be held in damages for the result of a mistake which was common to both parties, unless he was negligent in ascertaining the true fact, and the evidence does not warrant the inference that he was so negligent.

The defendant testified that no land under the company ditch system was planted to rice in the year 1920 by reason of a shortage of water; that he first learned definitely that no water would be available about the middle of March; that it was then too late to plant to other crops; that the soil is adobe, and that barley is planted in that section in the fall of the year; that the land will not produce a crop of barley in the year following a rice crop thereon, but that it is necessary to summer fallow it first; that that is the "customary practice that prevails with other rice farmers in Yolo county"; that the defendant could not have produced a crop of barley on the land in the year 1920; that in that year he did plant six acres heretofore mentioned to barley, but that it did not mature because of the dry year. In the years 1919 and 1921 valuable crops of rice were grown on the land; the plaintiff receiving therefrom the sum of $2,154.05 in 1919 and more than $1,900 in 1921. The foregoing evidence is sufficient to sustain the findings of the court.

[3] Appellant contends that it was not impossible for respondent to procure water for the irrigation of a rice crop in 1920, because the evidence shows that he could have put down wells and installed pumping plants to provide such water. The matter of obtaining water from wells was given consideration by the parties. February 24, 1920, defendant wrote plaintiff as follows:

"I am just in receipt of your letter of February 21st, and note what you have to say with reference to the wells, but personally I cannot see my way clear to spend so much money installing these wells, unless I am to be reimbursed. * * * Investigation shows that I will have trouble in securing the engine and pump, and I understand that the expenses would run about $5,000 or $6,000. * * * Would you be willing to reimburse me out of your share of the crops if I should see my way clear to install the wells?"

The plaintiff testified as follows:

"Q. Do you believe Mr. Stephens ought to go to the expense of putting wells there on your property? A. That was not in the proposition. Q. * * * You are not contending now, are you? A. No, sir."

Not only the foregoing testimony of plaintiff but the circumstances surrounding the parties at the time of the execution of the lease and the very terms of the lease itself show that it was not contemplated that the lessee should go to the unusual expense of procuring water from wells for the irrigation of rice. If the defendant had agreed so to procure water, he would have been bound to do so, as contended by appellant, however great the expense, but it is clear that neither party understood that he was so bound.

[4, 5] The court overruled plaintiff's objections to the following questions:

"State whether or not in your opinion he (defendant) handled it in a farmerlike manner, according to the usual practice? * * * In your judgment, did Mr. Stephens make more money the way he handled the land than by putting in a grain crop in 1920?"

The objection to each question was as follows:

"Objected to as irrelevant, immaterial, and incompetent."

It may be doubted whether the first question was subject to the objection made. The objection to the second question should have been sustained. It would have been material to show, by competent evidence, that plaintiff received more from the land as actually farmed than he would have received if grain had been planted in 1920, but whether defendant received more from one crop, above the expense of production, than he would have received from two over the expense of production thereof was wholly immaterial. But, independent of the answers to these questions, the other facts found by the court on sufficient evidence required a judgment in favor of defendant. Any error, therefore, in overruling the objections did not result in a miscarriage of justice, but was harmless.

The judgment is affirmed.

We concur: PLUMMER, J.; BURROUGHS, Justice pro tem.

(67 Cal. App. 758)

PEOPLE v. WILKINS. (Cr. 787.)

(District Court of Appeal, Third District, California. June 23, 1924.)

1. Criminal law ⚿1071—Application for appeal held to sufficiently state the "points" relied upon; "grounds."

Application for appeal, stating that "said defendant, hereby fixes as ground for his appeal the following," setting forth generally eight specifications, *held* to sufficiently state the "points" relied upon to satisfy Pen. Code § 1247, as against motion to dismiss appeal; the word "grounds" being equivalent to "points."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grounds; Point.]

2. False pretenses ⚿5—Accused telling payee that he had no funds to meet check held not guilty of intent to "defraud" within statute.

Where accused told the payee, when delivering his check, that he had no funds to meet it, but would have, on or about September 1st, there was no deception or intent to defraud, within Pen. Code, § 476a, punishing utterance of checks with such intent, though he failed to keep his promise; "defraud" meaning to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully (citing words and phrases, Second Series, Defraud).

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

W. C. Wilkins was convicted of issuing a check in violation of Pen. Code, § 476a, and he appeals. Reversed and remanded.

See, also, 226 Pac. 964.

H. Hugh Sydenham, of Sacramento, W. H. Slade, of Auburn, and Ralph H. Lewis, of Sacramento (C. M. Fickert, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURROUGHS, Justice pro tem. The defendant was convicted of issuing a check in violation of section 476a of the Penal Code and appeals from the judgment and an order denying him a new trial.

[1] The attorney general has made a motion to dismiss the appeal upon the ground that the defendant failed to comply with the provisions of section 1247 of the Penal Code. In so far as it is material to a consideration of the motion, that section reads as follows:

> "Upon an appeal being taken from any judgment or order of the superior court, to the Supreme Court or to a District Court of Appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the district attorney when the people appeal, must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

It is claimed in support of the motion that the application made by the defendant failed to state the "points" relied upon. The record discloses that defendant's application, filed in pursuance of said section, states: "And said defendant hereby fixes as ground for his appeal, the following." There is then set forth in general terms eight specifications of appeal and a request to the court for a transcript of all of the testimony offered and received, also all objections and exceptions, and all matters to which the same relate, and a further statement that all of the same is necessary "to fairly present the points relied on as aforesaid."

This question was before the court in People v. Preciado, 31 Cal. App. 519, 160 Pac. 1090, and decided adversely to respondent's contention, and it is there said:

> "We fail to appreciate respondent's argument that there is, in contemplation of the statute, a substantial distinction intended in the use of the terms 'grounds' and 'points.' By stating 'in general terms the grounds,' we think the defendant complied with the statute sufficiently to entitle his appeal to be heard."

The foregoing language applies with equal force to the motion in this cause. The motion to dismiss the appeal is therefore denied.

[2] The principal point relied upon by the defendant for a reversal of the judgment and order is that the proof fails to show an intent to defraud.

The evidence upon which this contention is based, stated in the light most favorable to the prosecution, is that at the time of the making and delivery of the check defendant stated to the payee that he did not have sufficient funds in the bank to meet the check, but would have on or about the 1st of September, and the further fact that he did not keep such promise and the amount of the check has never been paid.

Section 476a of the Penal Code provides:

> "Every person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers to another person any check or draft on a bank, banker or depositary for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he or his principal or the corporation of which he is an officer has not sufficient funds in, or credit with such bank, banker or depositary, to meet such check or draft in full upon its presentation, is punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

So far as we are advised, the question here presented has never been decided by either the appellate or Supreme Court of this state, but in People v. Bercovitz, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667, the Supreme Court says:

> "We are not here concerned with a case where the fact of want of sufficient funds and credit is made known by the drawer to the person to whom he delivers the check or draft at the time of the delivery, and the payee chooses, with such knowledge, to rely on a promise or representation of the drawer that he will make such provision that the amount thereof will be paid on presentation. It may be that as to such a case, a conviction could not properly be had under the section in question."

In People v. Wilbur, 33 Cal. App. 511, 165 Pac. 729, it is held that the intention to defraud is the gist of the offense under section 476a of the Penal Code, and in People v. Landman, 103 Cal. 577, 37 Pac. 518, it is said:

> "When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent."

In State v. Sichfield, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800, it is held the intent must be proved as a matter of fact and beyond a reasonable doubt. Can it be said that where the maker of a worthless check truthfully states to the payee, at the time of the delivery of the check, that he has no funds in the bank to meet the same, and the payee accepts it upon the promise of the defendant to make it good at some future day, that it was issued with intent to defraud? Cases of obtaining money or property by false pretenses bear some analogy to prosecutions under section 476a of the Penal Code. In each a specific element of the offense is the intent to defraud. In the former, however, there is the additional element that the injured party relied upon the false pretense and was thereby defrauded.

In State v. Miller, 47 Or. 562, 85 Pac. 81, a case of obtaining property by false pretenses, the defendant issued his check in payment of certain property. At the time of the making and delivery of the check defendant informed the payee that he had no funds in the bank to meet it. It was held by the Supreme Court of Oregon that the payee did not rely upon the check and was not defrauded thereby. It was also held that there was no intent to defraud shown, and the following pertinent language was used by the court:

> "Miller having told Goss that there was no money in the First National Bank of Sumpter to pay the check, there was no deceit and hence there was no intent on Miller's part to defraud Goss."

In 1 Words and Phrases, Second Series, p. 1273, it is said:

> "As defined by lexicographers, the word 'defraud' means to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully."

In the case at bar, the defendant having at the time of the delivery of the check to the payee, made known to him that he had no funds in the bank to meet the check, there was no deception. And the mere fact that he failed to keep the promise does not, in our opinion, constitute any evidence that at the time of the transaction the check was issued with intent to defraud.

There being an entire lack of evidence upon a material element of the offense, it follows that the judgment and order must be reversed, and it is so ordered, and the cause remanded.

We concur: FINCH, P. J.; PLUMMER, J.

67 Cal. App. 623

PEOPLE v. SMITH. (Cr. 1139.)

(District Court of Appeal, First District, Division 2, California. June 9, 1924.)

1. Criminal law 🔑728(2), 829(1)—Court's failure, without request, to instruct jury to disregard statements of district attorney, held not erroneous.

In a prosecution for passing a check without funds, court's failure to instruct that statements of district attorney that he intended to prove two other similar offenses by defendant should not be considered as evidence was not erroneous, where no instruction was requested covering subject-matter, and trial court fully and fairly instructed jury.

2. Criminal law 🔑938(1)—Failure to grant new trial on ground of newly discovered evidence held not erroneous.

Court did not err in refusing to grant a new trial on grounds of newly discovered evidence, where defendant failed to show why new witnesses had not been produced at trial, and newly discovered evidence was merely cumulative.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Charles B. Smith was convicted of an offense, and he appeals. Affirmed.

Harold D. Perry, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was charged with the violation of section 476a of the Penal Code, consisting in his passing, for a valuable consideration, in the city of Oakland, a check which he had drawn upon a bank in which he had neither funds nor credit. All the elements of the crime were proved by the prosecution by competent evidence, which was not contradicted. The only defense offered by the defendant was an alibi to the effect that on the day the check was passed he was ill at the home of his mother in the city of Oakland. On this showing the jury found the defendant guilty as charged in the information. He moved for a new trial, which was denied, and he now appeals from the judgment following the verdict, and from the order denying his motion for a new trial.

Three grounds are raised on the appeal: (1) That the district attorney committed error in stating to the jury at the opening of the trial that he intended to prove two other similar offenses by the appellant, but that no effort was made to prove these; (2) that the court failed to instruct the jury that statements made by counsel should not be considered as evidence; and (3) that the court should have granted a new trial on the ground of newly discovered evidence.

[1, 2] 1. As to the first assignment, it appears that appellant is not supported by the record. The district attorney did attempt to prove one of the other offenses referred to in his opening statement as having been committed by the appellant at about the same time that the offense for which he was on trial was committed.

2. As to the second assignment, we find that no request was made for an instruction covering the precise point mentioned. But in addition to this, we have examined the instructions given by the trial court and find that, on the whole, the jury was fairly and fully instructed.

3. As to the third assignment, the appellant failed to show any reason why the new witnesses had not been produced at the time of the trial. Furthermore, the evidence which is referred to as having been newly discovered was merely cumulative of the testimony which was offered by the appellant at the time of the trial, and we are satisfied that the trial court committed no error in denying the motion on the grounds which were presented.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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67 Cal. App. 769

MACHADO v. BANK OF ITALY et al.
(Civ. 4537.)

(District Court of Appeal, First District, Division 1, California. June 24, 1924. Rehearing Denied July 24, 1924. Hearing Denied by Supreme Court Aug. 23, 1924.)

1. Mortgages 🔑159—Mortgage for future advances held to have priority over deed to vendor.

Where vendor knew terms of vendee's deed of trust to a bank, which provided for future advances, and agreed that the deed should take priority over one securing payment of purchase price, the bank's deed constituted a valid prior lien for the advances, though made after notice of vendor's incumbrance; mere fact that the amounts to be advanced were left open being immaterial.

2. Mortgages 🔑50—Oral agreement to make future advancements held binding.

Oral agreement by bank, taking deed of trust providing for future advances, to make advancements up to 60 per cent. of the appraised value of property, *held* binding, though definite statement of the amount to be loaned was not set forth.

3. Banks and banking 🔑295—That agreed loan in excess of that permitted held not to affect priority.

That amount savings bank agreed to loan on real estate mortgage was in excess of 60 per cent. of the market value of the land, in violation of California Bank Act, § 67, subd. 4, is matter to be adjusted between the bank and the state authorities, and does not prevent priority of mortgage on theory that agreement was not binding.

4. Vendor and purchaser ⚷266(8)—Vendor's lien waived by accepting deed of trust and chattel mortgage and foreclosing.

Vendor's lien upon premises under contract of sale is waived by acceptance of security in nature of a deed of trust and chattel mortgage, and subsequent foreclosure of both.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Frank R. Machado against the Bank of Italy and others. Judgment for defendant, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., dissenting.

Ross & Ross, of Redwood City, for appellant.

John J. Jones, of San Jose, and Louis Ferrari, of San Francisco, for respondents.

TYLER, P. J. Appellant instituted this action against the Bank of Italy, a corporation, for the purpose of requiring it and others to state and set forth their rights and interests in and to certain lands described in the complaint, whether acquired through deed of trust, liens, or otherwise. The relief asked for was that the court determine the amount due, together with the cost of reconveyance, and upon payment or deposit in court of such sum the title of plaintiff be quieted. General relief was also asked for. Defendants, answering, set up the defense that they claimed certain rights and interests in the property as beneficiaries by virtue of a certain deed of trust given as security for a loan in the sum of $25,000, together with interest thereon, and that such deed of trust provided and required that defendant corporation make future advances. It is then alleged that said defendant did accordingly make such advances in the sum of $25,500, in addition to the original loan of $25,000, aggregating, with interest, more than $50,500. The answer prayed that plaintiff take nothing and that it be decreed that defendants have a lien upon the property under the terms of the deed of trust to the amount of its original note, together with the additional advances, amounting in all to the sum of $53,254.77 principal and accrued interest, and that such lien be declared to be prior in right to plaintiff in the premises.

After trial judgment went for defendants as prayed for, and plaintiff appeals.

The facts disclosed by the record are the following: Prior to and on the 21st day of February, 1920, the appellant was the owner and in possession of the lands described in the complaint. At that time the land was incumbered by two deeds of trust in favor of one Dussing, which were executed to secure the payment of notes aggregating the sum of $25,000 principal and some $300 accrued interest. One Francesco Amato desired to purchase the land, and he, together with an agent named Danzi, visited appellant and entered into negotiations with him with that end in view. Appellant was ready to sell and the parties agreed upon the terms. Amato, the intending purchaser, had no ready money, and he, accompanied by the agent, called at the defendant bank at its branch in the city of Santa Clara for the purpose of procuring a loan. They there met Fatjo, the manager, and Amato made the request that he be permitted to borrow the sum of $25,000 and such other sums later on as he might need to erect improvements on the land and make it fit for his business purposes. The principal sum requested was required by him to pay off the Dussing incumbrance. Mr. Fatjo stated that he would have the property appraised and would lend up to 60 per cent. of its value. Thereupon, at the suggestion of Mr. Fatjo, Amato and the agent interviewed one I. E. Pomeroy, the bank's official appraiser, and they proceeded to the premises, and the land was appraised by Pomeroy as of the value of $72,000. Thereafter Amato and Danzi again visited the bank, and, in a conversation with Manager Fatjo, Amato again requested that he be advanced sums in excess of $25,000 for the necessary improvements. Fatjo again agreed to lend up to 60 per cent. of the appraised value of the land. Subsequently Amato, Danzi, and the appellant Machado called at the office of John J. Jones, an attorney at law, for the purpose of having the oral agreement concerning the sale and purchase of the land reduced to writing. The agreement was prepared on February 21, 1920, and executed in duplicate. By the terms thereof appellant agreed to sell, and Amato agreed to purchase, the land for the sum of $72,600, and Amato also agreed to buy certain personal property used for Machado in his business for the further sum of $10,000. The sum of $25,000 was to be paid in cash on account, which sum it was agreed should be used to pay off the amount due under the Dussing deeds of trust then incumbering the land so as to make it clear of all liens, and the payment of the balance of the purchase price amounting to the sum of $57,600 was to be secured by the execution of a deed of trust by Amato on the real estate and a chattel mortgage on certain cattle. The agreement provided that beginning May 1, 1920, Amato should pay on account of interest and the purchase price the sum of $1,500 per month for the period of three months, and that thereafter and beginning August 1, 1920, he should pay not less than $2,000 per month, together with interest on all deferred payments. It further provided that the appellant should have an abstract of title prepared.

This was done, and it was brought down to the date of March 10, 1920. It showed title in the appellant subject to the incumbrances for $25,000 in favor of Dussing, and it also contained a copy of the executory contract of sale entered into between appellant and Amato. The abstract was delivered to Mr. Jones. The bank at this time had no regular attorney at Santa Clara, but it intrusted the matter to Jones, who up to this time was acting for Amato in the transaction with appellant. Jones made an examination of the abstract, found the title satisfactory, and the matter of sale and loan thereupon proceeded. One J. M. Atkinson acted for the appellant in the transaction. He drafted a deed from Machado to Amato, and a deed of trust and chattel mortgage from Amato to Machado, to secure the balance of the entire purchase price of $57,600. Jones, as attorney for defendant bank, also prepared a note from Amato to that institution for the sum of $25,000 and a deed of trust to secure the payment of said sum, together with future advances. The various instruments covering the transaction all bear date March 22, 1920, and all were signed and acknowledged as one transaction at the office of Jones in San Jose; there being present appellant Machado, Amato, Danzi, Atkinson, and Jones. The instruments being ready for delivery and recording, it was ascertained that Machado did not have the funds with which to pay a balance due as interest on the Dussing notes, amounting to some $300 or to purchase the necessary United States documentary stamps to affix to his deed to Amato. The parties thereupon adjourned to March 29, 1920. The defendant bank in the meantime advanced to Amato the sum of $5,000. The deed of trust given by Amato to the bank, as also the deed given by Amato to Machado, provided for future advances, and it was under this provision in favor of the bank that Amato obtained the $5,000. On the day last mentioned the parties again met, and the transaction was completed by delivery between them of the various instruments. They then proceeded to the county recorder, where the papers were delivered for recording. The reconveyance from Dussing to Machado was first recorded, following which came in the order recited the deed from Machado to Amato, the deed of trust from Amato to the Bank of Italy, the deed of trust and the chattel mortgage from Amato to Machado.

Thereafter Mr. Jones delivered the abstract of title to defendant Fatjo as manager of the bank, together with his written report. This report refers to one of the two deeds of trust to Dussing, the deed to Amato and the deed of trust of Amato to the bank, but it does not refer to the written agreement between appellant and Amato or the deed of trust from Amato to appellant, which were then both of record. In other words, the bank by this communication was not directly advised how Amato financed the transaction or that appellant had a deed of trust upon the property for the unpaid portion of the purchase price. Mr. Fatjo, who personally made all the loans for the bank, testified that he had no knowledge upon the subject. Machado individually, and through his attorney, had agreed to the priority of defendant bank's deed of trust, one of the provisions of which related to future advances.

Thereafter Amato went into possession of the premises under his deed, but failed to comply with his agreements with reference to payments, and the land and chattels were sold at a trustee's sale; Machado bidding in the property. Thereafter Machado tendered to defendant bank the sum of $28,000 due under its original loan of $25,000. The bank refused to accept this sum, claiming that the tender should have also included the amount of money loaned by way of future advances; and one of the claims of appellant is that the effect of such tender and refusal is to discharge the entire lien by reason of the provisions of section 1504 of the Civil Code. Thereafter this suit was instituted against the bank and the trustees named in the Amato trust deed to obtain the relief herein prayed as heretofore set out.

Under the facts as narrated, plaintiff claimed below, and does here, that while his deed of trust at the date of its execution was subordinate to that of defendant bank in so far as the original loan of $25,000 is concerned, it was not subordinate to the sums advanced by the bank under the clause of its trust deed relating to future advances. At the conclusion of the trial the court below found in substance that Machado agreed with Amato that defendant bank's trust deed should be a first lien upon the property and that he consented to all the provisions thereof, and that the deed of trust provided that such future advances should be secured by its provisions. It further found that advances were subsequently made by the bank to the extent of $25,500, which advances were obligatory upon the bank by reason of the oral agreement entered into by the manager thereof at the time the loan was negotiated by Amato, and that such agreement was an essential and integral part thereof. Additional findings are to the effect that the bank had no actual notice, either direct or indirect, of the execution, existence, or recordation of the deed of trust executed by Amato in favor of Machado as security for the balance of the purchase price of $57,600, nor did it have such notice at the times of the making of the additional loans aggregating the sum of $25,500. It was accordingly found that there was due to the bank from Amato on the 22d day of January, 1922, the sum of $53,254.77, which said sum was by the bank's deed of trust above referred to, according to the terms thereof, a first lien upon the premises.

[1, 2] It is contended by appellant that the evidence is wholly insufficient to sustain either one of such findings or the judgment based thereon.

If the finding of the court to the effect that appellant consented that the bank's lien should have priority and that his lien should be subordinate thereto finds support in the evidence, it is decisive of this case, irrespective of whether or not the bank had knowledge of the existence or terms of the incumbrance held by appellant.

That the evidence is ample upon this subject there can, in our opinion, be no question. As to the original loan and the sums due thereunder it is conceded that the appellant agreed that the bank's trust deed should have priority. All the parties knew of the terms of this deed when this consent was given. There was no limitation in any way affecting this agreement. The attorneys for both sides were quite familiar with all the conditions thereof, and plaintiff was represented by counsel. Under such circumstances, the future advances provided for tact, and the deed gives a valid lien for all advances made thereunder although made after notice of the subsequent incumbrance.

Nor does the mere fact that the amount of such advances was left open alter the situation or indicate that none was intended. Amato and the bank had not agreed upon any specific sum, but only that 60 per cent. of the appraised value of the property would be loaned. This oral agreement to advance at least such amount was obligatory upon the bank. Bank of Soquel v. Ashbury, 117 Cal. 96, 48 Pac. 1081; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 Pac. 58; Langerman v. Puritan Dining Room, 21 Cal. App. 637, 132 Pac. 617; Fuller v. McClure, 48 Cal. App. 185, 191 Pac. 1027.

Neither does the law require a definite statement of the amount to be loaned be set forth. Buck Co. v. Buck, 162 Cal. 300, 122 Pac. 466; Langerman v. Puritan, etc., supra.

Aside from the express terms of the deed of trust, the entire evidence fully supports the conclusion that such was the intention of the parties. Appellant knew that Amato was without funds and that the defendant bank was loaning him money. He also knew that he intended to bring a large herd of cows to the premises for dairy purposes, and that the barns and equipment on the place were insufficient for their accommodation, and that other improvements would have to be erected for this purpose. He saw the improvements being made. His security was proportionally strengthened by the advances; and if he did not desire them to take precedence over his liens he should not have consented thereto.

[3] The argument is made that the finding of the trial court that the advances amounting to $25,500 were obligatory upon the bank is unsupported by the evidence for the reason that the California Bank Act (St. 1909, p. 102, § 67, subd. 4) provides that a savings bank shall in no event make loans on property exceeding 60 per cent. of the market value thereof; and as the sums advanced exceeded this amount the obligation based thereon is void.

There are two answers to this contention. The act does not declare that an agreement in violation of its terms is void. The question of a loan being excessive under the act is one to be regulated and adjusted between the state authorities and the bank, and is a matter with which appellant has no concern. Brittan v. Oakland Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Blochman v. Investment Co., 177 Cal. 762, 171 Pac. 943. Then, again, the value of the premises was increased from time to time as the advances went into improvements upon the land, which increased its value to an amount beyond the limitation.

[4] Something is contained in appellant's briefs with reference to the right of appellant to a vendor's lien and its effect upon the bank's deed. Whatever right appellant may have had to a vendor's lien he waived when he accepted security in the nature of his deed of trust and chattel mortgage and his subsequent foreclosure of both. Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955.

From what we have said it follows that by reason of the provisions in the bank's trust deed permitting future advances to be made, which were, as the trial court found, understood and fully agreed to by the parties, the balance of the purchase price represented by the trust deed given by Amato to appellant was subordinated to the deed of trust of the bank not only for the amount of the original loan but also for the sums subsequently advanced. Fuller v. McClure, 48 Cal. App. 185, 191 Pac. 1027.

This conclusion renders unnecessary a discussion of the evidence and its sufficiency to support other findings.

The judgment is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

67 Cal. App. 777

SMITH et al. v. HALLWOOD IRR. CO.
(Civ. 2787.)

(District Court of Appeal, Third District, California. June 24, 1924. Hearing Denied by Supreme Court Aug. 23, 1924.)

1. Waters and water courses 🔑253—Evidence held to warrant finding vendor's stock in irrigation company was not appurtenant to land.

In action by purchaser of land for writ of mandate against irrigation company to compel furnishing water for irrigation, evidence *held* to warrant finding vendor's stock was not appurtenant to land, and that it was personal property and did not pass to purchaser.

2. Waters and water courses 🔑253—Purchaser of land held not to acquire interest in water, unless irrigation stock appurtenant to land.

Where 265 shares of stock in irrigation company were not made appurtenant to any portion of owner's 550 tract, as required by amended by-laws and Civ. Code, § 324, conveyance of 160 acres did not give purchaser any right to water.

3. Waters and water courses 🔑253—Whether shares in irrigation company had become appurtenant to land held question of fact.

Under amended by-laws of irrigation company, requiring owner to make shares appurtenant to equal number of acres of land, whether stockholder had made stock appurtenant to land *held* question of fact to be determined from his acts and those of irrigation company and manner in which water was used and furnished on his lands and those of other stockholders.

4. Waters and water courses 🔑263—Evidence held insufficient to establish prescriptive right to use water for irrigation.

In action by purchaser of land for writ of mandate against irrigation company to compel furnishing of water for irrigation, evidence *held* insufficient to establish prescriptive right to use of water.

On Petition for Hearing in Supreme Court.

5. Waters and water courses 🔑253—Stockholder's vote to make irrigation stock appurtenant to land held binding contract.

Stockholder in irrigation company, by voting for amendment to by-laws and articles of incorporation, requiring stock to be made appurtenant to equal number of acres of land, entered binding contract with fellow stockholders, which was not against public policy, estopping purchaser from claiming benefits of Civ. Code, § 552, except on performance of conditions.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Application for writ of mandate by W. H. Smith and others against the Hallwood Irrigation Company. From a judgment for defendant, petitioners appeal. Affirmed.

W. A. Latta and Elliott & Atkinson, all of Sacramento, for appellants.

Richard Belcher, of Marysville, for respondent.

FINCH, P. J. Petitioners applied to the trial court for a writ of mandate to compel defendant to furnish water for the irrigation of their lands. Judgment was rendered in favor of defendant, and petitioners have appealed.

[1] The defendant company was incorporated in February, 1910, with an authorized capital stock of 5,000 shares. Its purposes, as set forth in the articles of incorporation, were very broad, and indicated an intention to supply water to the public generally, but it is admitted that at all times it conducted its business as a mutual water company, furnishing water to its stockholders only, and permitting them to apply the water to all or any part of their lands as they saw fit; no steps being taken to make the water stock appurtenant to the land upon which the water was used. Prior to October 16, 1913, it issued 4,079 shares of its capital stock, of which 265 shares were issued to W. D. Smith, the grantor of plaintiff, who owned 550 acres of land under defendant's canal; 250 shares thereof being issued to him October 25, 1910, and 15 shares June 23, 1911. October 16, 1913, by amended articles of incorporation, the purposes of the company were limited to supplying water to its stockholders, "based upon the number of shares of stock held by each person." The original by-laws did not designate the territory to be supplied with water or specify whether water was to be furnished to stockholders only or to the public generally. Neither was there any provision making the right to the use of water appurtenant to the lands to be irrigated. The by-laws provided:

> "Shares of the corporation may be transferred at any time by the holders thereof or by attorney legally constituted or by their legal representatives by indorsement on the certificate of stock. But no transfer shall be valid until the surrender of the certificate and the acknowledgment of such transfer on the books of the company."

At the time the articles of incorporation were amended the by-laws were also amended to provide:

> "The water owned, controlled, or developed by this company shall be sold or disposed of for use on the following-described lands: (Here follows a description of an area which includes the Smith lands.) And said water shall be distributed only to stockholders of this corporation. Rights of stockholders to the water distributed by this corporation shall be evidenced by certificates of stock issued to such stockholders. Said stock shall be issued only to owners of the lands or portions of the lands hereinabove described and

> in proportion to their holdings, one share for each acre of said lands owned by stockholder. Said shares so issued shall be appurtenant to the lands for which they are issued, one share to each acre thereof, which lands shall be described in the certificate evidencing such shares, and shares of stock shall be transferable only with said lands, and shall pass as appurtenant thereto. * * * The stockholders will pay to the company such assessments as shall be levied by it. * * * The said water shall be used to irrigate the land described in the certificate of stock, for domestic purposes incidental thereto, and for no other purposes whatever. * * * The water to which the purchaser of said shares of stock is entitled and the water thereby made appurtenant to said land, shall be an equal pro rata proportion of all the water available for the irrigation of all lands covered by such stock."

This amendment was unanimously adopted at a duly called meeting of the stockholders at which the owners of 3,598 shares of the capital stock were present, in person or by proxy. Smith was not personally present at the meeting, but was represented by his proxy. A certified copy of the amendment was duly recorded in the office of the county recorder on the 8th of November, 1913. It does not appear whether other stockholders complied with the provisions of the foregoing amendments, but Smith did not comply therewith. In a written communication to defendant, dated April 27, 1914, he stated:

> "In accordance with law and the by-laws of Hallwood Irrigation Company I hereby locate upon and make appurtenant to the lands owned by me * * * the stock and shares of stock * * * owned and held by me * * * to wit, 265 shares; * * * hereby cancelling and annulling any previous location or locations of said water stock upon said lands or any part thereof made, or attempted to be made, for or by me or in my behalf. And I hereby authorize and empower you to issue to me in my name a certificate of stock for 265 shares of the capital stock of said Hallwood Irrigation Company in lieu of the certificates of stock in said company now held by me, and I do hereby make the said water stock appurtenant to the lands owned by me (describing the 550 acres first mentioned). * * * And I hereby tender and offer to surrender for cancellation the stock certificates now held by me * * * upon your delivering to me a certificate of stock for an equal number of shares of the capital stock of said Hallwood Irrigation Company, properly executed to show the location of said stock and the water right connected therewith upon and as appurtenant to the above-described real property."

The defendant refused to issue certificates of stock to Smith upon the terms proposed by him in the foregoing communication, and the certificates theretofore issued to him have never been canceled, nor have other certificates been issued in lieu thereof. The defendant derives no profit from its operations, but furnishes water to its stockholders at cost; the expenses thereof being provided by assessments upon the capital stock. All assessments upon the Smith stock have been paid. At all times herein mentioned the Smith lands have been farmed by a single tenant, and the defendant has furnished him water for irrigation until May, 1922, when any further supply was refused, except on condition that the 265 shares of Smith stock be made appurtenant to some designated 265 acres of the land. Not less than 160 acres of the Smith lands nor more than 200 acres thereof have been supplied with water during any one year, but all of such lands have received water from defendant at some time since its organization.

On the 26th day of May, 1916, by three grant, bargain, and sale deeds, in the usual form, W. D. Smith conveyed 160 acres of the aforesaid lands to plaintiffs. No reference was made therein to any shares of capital stock or to any right to the use of water. These deeds had not been recorded up to the time of the trial. Smith died in December, 1917. In the year 1920 a special administrator of his estate was appointed, but no further proceedings have been had in the administration thereof. It is conceded that the title to the 265 shares of capital stock owned by him is in his estate, unless a part thereof passed to plaintiffs by the aforesaid deeds as appurtenant to the lands thereby conveyed. Among other facts the court found:

> "That prior to the 16th day of October, 1913, neither the directors nor stockholders of said corporation took any action of any kind to make the water so used by said stockholders appurtenant to the land of said stockholders, or any thereof, and permitted water to be used by said stockholders on any part or all the land owned by stockholders as said stockholders saw fit to use it; * * * that said W. D. Smith in his lifetime did not comply with the provisions * * * of said by-laws as amended on the 16th day of October, 1913; * * * that the conveyance of the said three above-described tracts of land did not transfer the said stock of W. D. Smith, or any part thereof, and neither the said stock nor the water of said company nor any thereof became appurtenant to the said three tracts of land so conveyed or either or any of them; that the plaintiffs are not stockholders of said corporation."

[2, 3] Respondent has never denied the right of W. D. Smith, or his successors in interest, to water for the irrigation of any 265 acres of the Smith land to which the owner of the 265 shares of capital stock may cause the same to become appurtenant, but it is insisted that it would be an injustice to permit a shifting use of the water over the 550 acres, when other stockholders are limited to a designated acreage not exceeding the number of shares of stock owned by them. The soundness of this contention is manifest. But, regardless of any question of injustice, the plaintiffs have not shown themselves to be entitled to water from defendant's system. Clearly the Smith stock was not made appurtenant to any of his lands under the provisions of the amended by-laws and those of section 324 of the Civil Code. Appellants contend that they have acquired a right to the continued use of water under the provisions of section 552 of the Civil Code. That section is not applicable, however, because it is limited to "any corporation" which "furnishes water to irrigate lands which said corporation has sold." The defendant has sold no lands. Whether or not, then, Smith's stock became appurtenant to his land was a question of fact to be determined by the trial court from the acts of himself and the defendant and the manner in which water was furnished and used upon the Smith lands and those of other stockholders. Estate of Thomas, 147 Cal. 236, 240, 81 Pac. 539; Wiel on Water Rights (3d Ed.) § 550. It cannot be said that the evidence is insufficient to justify the court in finding as a fact that the Smith stock did not become appurtenant to the lands of plaintiffs. It follows that such stock is personal property, and, therefore did not pass to plaintiffs by the mere conveyance to them of their lands. It is not necessary to consider what rights the owners of the Smith stock may have to the use of water or on what lands the same may be used. It may be surmised from the evidence that some of the plaintiffs are heirs of W. B. Smith. There is nothing, however, to indicate who all the heirs are or the proportions of the Smith estate to which they are respectively entitled.

[4] Appellants contend that they have acquired a prescriptive right to the use of the water claimed by them. Their complaint is based upon their alleged right to the use of water as stockholders, on the theory that a proportionate share of the Smith stock is appurtenant to their lands. The evidence does not show a hostile or adverse use of water by the tenant of plaintiffs, but rather a permissive use. It does not appear whether water was used continuously upon plaintiffs' lands for a period of five years. The area of 160 to 200 acres of the Smith lands irrigated each year may not have been the same acreage during any two successive years. In other particulars the evidence is insufficient to establish a prescriptive right in plaintiffs, but the foregoing suggestions show that plaintiffs' contention is without merit.

The judgment is affirmed.

We concur: PLUMMER, J.; BURROUGHS, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [5] The petition for a transfer and hearing by this court after decision of the District Court of Appeal is denied. In view of the decision in the case of Merrill v. Southside Irrigation Co., 112 Cal. 426, 434, 44 Pac. 720, we cannot approve the construction placed in the opinion of that court upon section 552 of the Civil Code, but we do not deem that interpretation essential to the validity of the conclusion reached by that court. It may be conceded that in 1913 appellants' grantor, W. D. Smith, was seized of a water right which was appurtenant to his entire tract of 550 acres, and which constituted a servitude upon the works and system of the defendant company. But when he attended the stockholders' meeting of October, 1913, and there voted either in person or by proxy for the adoption of the amendment to the by-laws and articles of incorporation, he thereby in effect entered into a contract with his fellow stockholders and with the corporation to the effect that his water right should thereafter be subject to the limitations and conditions set forth in said amended by-laws and articles of incorporation. The like agreements on the part of his fellow stockholders and the corporation afforded sufficient consideration to support such contract, and the same was not unreasonable or against public policy. Riverside Land Co. v. Jarvis, 174 Cal. 318, 163 Pac. 54. We are not here concerned with the question of the effect of said amendments upon the rights of stockholders who did not participate in the adoption thereof or consent thereto. The contract so entered into was binding upon Smith, and is equally binding upon appellants who are claiming here as his successors in interest and privies. They are estopped thereby to claim the benefits of section 552 of the Civil Code, except upon the performance of the conditions of said contract. As pointed out in the opinion, the respondent has always stood ready to furnish the water claimed by them upon the performance of said conditions.

68 Cal. App. 7

PEOPLE v. WHITAKER. (Cr. 1102.)

(District Court of Appeal, Second District, Division 2, California. June 27, 1924. Hearing Denied by Supreme Court Aug. 25, 1924.)

1. Forgery 🔑44(2)—Evidence held to sustain conviction.

In a prosecution for forgery under Pen. Code, § 470, by indorsing, without authority, checks payable to fictitious payee in name of named payee and passing checks as genuine, evidence *held* to sustain conviction.

2. Courts 🔑91(1) — Decision of District Court of Appeals as authoritative as that of Supreme Court when petition to rehear denied by latter.

On denial by Supreme Court of a petition to hear and determine a cause after judgment of the District Court of Appeals, such decision possesses all the authority of a pronouncement by Supreme Court itself.

3. Criminal law 🔑365(2)—Testimony held not inadmissible as evidence of another offense.

In prosecution for forgery, court did not err in permitting witness to testify that defendant had stated that he procured forged checks to obtain money to settle another forgery charge, where such statement was but portion of conversation, much of which was relevant and material as part of res gestæ, and, unless supplemented by other evidence, had no tendency to prove other offenses, and, moreover, was statement of reason why defendant committed crime charged.

4. Criminal law 🔑829(1)—Refusal to give requested instructions covered by given instructions held not erroneous.

Refusal to give defendant's requested instructions was not erroneous, where trial court repeated in almost exact words parts of requested instructions, and gave them all in effect.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Charles L. Whitaker was convicted of forgery, and he appeals. Affirmed.

Frank W. Allender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CRAIG, J. The appellant herein appeals from a judgment based upon an information consisting of three counts, each of which charged him and one Val Amthor with the crime of forgery, under section 470 of the Penal Code. The appeal is also from an order denying his motion for new trial. Appellant was granted a separate trial, and a jury found him guilty under each count. The counts are alike in all respects material here, and embody copies of certain checks drawn on the First National Bank at Vernon, Cal., signed by R. E. Dusenberry, dated, respectively, the 7th, 14th, and 20th of November, 1923, and payable to "C. R. McPhearson Electric Co.," "C. R. McPhearson," and "C. R. McPhearson Electrical Co." It is charged that the defendants, without authority therefor, indorsed each of said checks in the name of the payee, and thereupon unlawfully, knowingly, falsely, fraudulently, and feloniously uttered, published, and passed them as true and genuine, with intent to cheat and defraud the payees and the bank.

There is no evidence in the record that either of the payees named in the checks in fact existed, and a witness for the people testified that he had been in business at Los Angeles for a period of 14 years but had never heard of C. R. McPhearson or of a company bearing that name, and that he had been unable to find either of them by a search of the city and telephone directories.

This testimony was objected to on the grounds that it was incompetent, irrelevant, and immaterial, and that such evidence would be admissible only upon a charge preferred against one "who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention attempts to pass, utter, or publish, * * * any fictitious bill, note, or check, purporting to be the bill, note, or check, * * * of some bank, corporation, copartnership, or individual, when, in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious," as provided by section 476, Penal Code.

It is conceded by counsel for the prosecution, and, in fact, he asserts that the evidence shows, that the names to whom the checks were made payable were believed to be fictitious, and they assert that the defendant knew that no such person or firm existed. In support of this theory J. F. McPherson was called as a witness for the people, and testified that he was an electrical contractor, but that he was not "C. R. McPhearson," and that he did not know of a person or company bearing the name appearing upon the checks in question.

This latter evidence was also objected to upon the usual grounds, and, specifically, that the initials were different, and that the name of the witness was unlike "McPhearson" both in spelling and in sound. The respondent argues that the prosecution was confronted with the difficulty of proving that the defendant did not sign the indorsement on the check with the authority of some unknown person, and that McPherson was called as a witness because he was the only person having a name resembling that of the fictitious payee, and for the purpose of proving that he did not authorize the indorsement, "and for the further purpose of conclusively proving that the payee named in the check was a fictitious person, firm, or corporation."

Section 470 of the Penal Code provides that "every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * any * * * check * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person," is guilty of forgery.

[1] The evidence introduced by the people which is not contradicted, was to the effect that R. E. Dusenberry, who issued and signed the checks set forth in the information, was the sole owner and proprietor of the Sound Construction Company, by whom appellant and Amthor were employed in connection with electrical work; that the defendant Whitaker obtained the checks from E. D. Lundberg, secretary of the Sound Construction Company, who had them signed by Duseenberry, upon representations that they were for purchases of electrical supplies from C. R. McPhearson Electrical Company. Duseenberry later discovered that no such supplies were purchased, and when appellant was confronted with this fact he stated that defendant Amthor was the McPhearson Electrical Company, but that Amthor received none of the money for said checks; that he, appellant, obtained and cashed them to settle another forgery charge. Defendant Amthor testified that he indorsed one of the checks "C. R. McPhearson Elec. Co.—C. R. McPhearson" at Whitaker's request, although he had never heard of such a firm or person, and that he received no money therefrom, but that he saw Whitaker cash the check at the bank. This was a sufficient showing of the fictitious character of the checks. People v. Brown, 61 Cal. App. 574, 215 Pac. 1031; People v. Eppinger, 105 Cal. 36, 38 Pac. 538.

Appellant offered no evidence, and conceding, for the purposes of the appeal, without admitting, the truth of the foregoing as facts, he contends that upon the evidence adduced he should have been charged and tried under section 476, Penal Code.

This claim may have been tenable prior to 1905 and under the provisions of the Penal Code as they were when People v. Elliott, 90 Cal. 586, 27 Pac 433, cited by appellant was decided. However, in 1905 (St. 1905, p. 673) section 470, Penal Code, was amended to include the signing of the name of a fictitious person to a check and the passing of such check as genuine. In 1909 People v. Jones, 12 Cal. App. 129, 106 Pac. 724, was decided upon a state of facts quite similar to those here presented. Jones falsely represented to Smith Bros., a corporation, that he was collecting money for Walter Miller, an invalid, and obtained from them a check payable to the latter, which was indorsed and cashed. It later developed that Walter Miller did not exist and Jones was prosecuted under section 470 Penal Code. He was convicted, and the judgment was affirmed by the District Court of Appeal for the First District, in whose opinion it was said:

> "But assuming that the act complained of here comes within section 476, still defendant's contention cannot be sustained, for after the decision in the Chretien Case section 470 was amended, so that the crime of forgery may be committed under that section by signing the name of a fictitious as well as of a real person to any of the instruments therein enumerated. The indorsement of a check is equivalent to an 'order for money,' and therefore is included within section 470. It seems plain to us that the case falls within that section, and it was unnecessary either to allege or prove whether or not Walter Miller was a real or fictitious individual."

[2] A petition to have that case heard by the Supreme Court was denied. Hence it is the law of the instant case as fully as though determined by the Supreme Court itself. Bridges v. Fisk, 53 Cal. App. 117, 200 Pac. 71.

[3] Appellant also insists that it was error on the part of the trial court to permit witnesses, over his objection, to testify that he stated to them that he procured and indorsed the three checks in controversy for the purpose of obtaining money to settle another forgery charge, because it constituted evidence of another offense. However, such statement was but a portion of the conversation related by the witnesses to have occurred between themselves and appellant, much of which was relevant and material as a part of the res gestæ, and unless supplemented by other evidence, it would have no tendency to prove other offenses. People v. Jones, supra. Moreover, it was a statement of the reason why he committed the forgeries with which he is charged here.

[4] The only remaining grounds upon which the appeal is based relate to the refusal to give certain requested instructions or to portions stricken from those given. The trial court repeated in almost exact words parts of the requested instructions, and gave them all in effect. It has been repeatedly held that this is sufficient. People v. Wolfgang (Cal. Sup.) 221 Pac. 907; People v. Bringhurst (Cal. Sup.) 221 Pac. 897.

Judgment and order denying motion for new trial affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

67 Cal. App. 693

PEOPLE v. FORMAN. (Cr. 1180.)

(District Court of Appeal, First District, Division 1, California. June 17, 1924. Hearing Denied by Supreme Court Aug. 14, 1924.)

1. Embezzlement 🔑11(1)—Proved when defendant used check deposited to credit of employer to cover shortage caused by previous defalcations.

That defendant, a railroad cashier, deposited a check which he was charged with having embezzled to credit of his employer, *held* no defense, where he credited amount of check to wrong accounts to cover up shortage caused by previous defalcations.

2. Embezzlement 🔑11(1)—Charge of embezzlement of money held supported by proof of crediting check to wrong account to cover prior defalcation.

Charge of embezzlement of money *held* supported by proof of receipt by defendant of check, and that, though depositing it to credit of employer, he credited it to wrong account to cover up prior defalcations.

3. Criminal law 🔑409, 517(4)—Evidence held sufficient to prove corpus delicti to warrant proof of extrajudicial admissions and confessions.

In prosecution for embezzlement, based on disposition by defendant of check received by him on certain day, proof that defendant's employer suffered loss in its assets on that day of amount of check, and that such loss was result of defendant's action in fraudulently manipulating accounts of his employer, was sufficient to prove corpus delicti, so as to allow proof of defendant's admissions and confessions.

4. Criminal law 🔑370, 371(2)—Evidence of general shortage admissible, in prosecution for embezzlement, to show guilty knowledge.

In prosecution for embezzlement, court did not err in receiving evidence of general shortage, which necessarily covered other acts of embezzlement; it being admitted to show fraudulent intent and guilty knowledge and to negative idea of mistake or inadvertence.

5. Criminal law 🔑419, 420(1)—Testimony as to shortage of defendant, ascertained by witness from books kept by defendant and others, held not objectionable as hearsay.

In prosecution for embezzlement, testimony of witness concerning total amount of defendant's general shortage, ascertained from books kept by defendant and from books not kept by him, *held* admissible as against objection that such testimony was hearsay, witness testifying to matters within his own knowledge acquired in discharge of his duty.

6. Criminal law 🔑1169(2)—Admission of hearsay testimony held harmless as being merely cumulative.

Admission of hearsay testimony, concerning facts established by extrajudicial confession of defendant, which was part of evidence, *held* not harmful.

7. Embezzlement 🔑48(4)—Refusal of instruction held proper as not conforming to indictment.

Refusal to give instructions, based on theory that defendant was charged with embezzlement of check or its proceeds, was not erroneous, where charge was of embezzlement of sum "in lawful money of United States."

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Bruce Forman was convicted of embezzlement, and he appeals. Affirmed.

Silverstein, Collier & Silverstein, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant, Bruce Forman, appeals from a judgment of conviction of the crime of embezzlement, and from the order denying his motion for a new trial.

Defendant was charged by indictment with the embezzlement of the sum of $6,468.54 in lawful money of the United States, belonging to the Western Pacific Railroad Company, a corporation. Forman for many years was the cashier of the freight office of said railroad company. During the month of December, 1923, while he was away on a vacation, the traveling auditor of the said company discovered a shortage in the cash accounts of the defendant of about $25,000. Thereupon the defendant confessed that he had been wrongfully taking the money from said company for a period extending over seven years. The amount stated in the indictment, and of which the defendant was convicted of embezzling, constituted a part of that shortage. The method employed by the defendant in misappropriating the particular money in question was as follows: The California Hawaiian Sugar Refining Company were shippers of large quantities of freight over the lines of said railroad company, upon which prepayment of freight charges was required. The accounts of the freight charges were kept in the following manner: A billing clerk, employed in the same office with the defendant, prepared in quadruplicate freight bills covering the various items of shipment. One copy, the original, was delivered to the defendant as cashier, and by him retained in the office until the bill was paid. The second copy was sent to the sugar company to notify them of the amount due. A third copy was sent to the head office of the railroad company, and the fourth copy was retained as an office record. The prepayment of freight charges was supposed to be a cash transaction and therefore, other than the copy of the bill itself, filed alphabetically in the cashier's office under the name of the shipper, no books, except a cash book, were kept in the office showing the freight bills due and unpaid.

Referring to the transaction in question said sugar company, after receiving said freight bills and verifying the correctness thereof, forwarded to said railroad company its check for $6,468.54, in payment of the same, together with a memorandum specifying the particular freight bills covered by the amount of the said check. The check and the memorandum accompanying the same were received by L. L. Davis, the agent in charge of said railroad company office, on November 5, 1923, and were by him delivered to the defendant, whose duty it was to receipt the original freight bills and forward them to the sugar company, then to deposit the check in the Central National Bank of Oakland to the credit of said railroad company and enter the bills as paid in the cash book, which it was his duty to keep. The check was drawn by said sugar company, in favor of the railroad company, against the account of said sugar company in a bank in which said sugar company had on deposit funds to meet its payment.

It appears that after the check was delivered to the defendant he receipted the original bills and sent them to the sugar company in the regular way. He also deposited the check in the bank to the credit of said railroad company. He failed, however, to make any entry in the cash book of the payment of those particular freight bills. Instead of doing so, he wrongfully carried those bills as being unpaid and credited the amount represented by said check to the payment of other freight bills of the said sugar company, which in fact had been previously paid, but upon which credit of payment had not been given, for the reason that the money which had been received by said railroad company in payment thereof had theretofore been embezzled by the defendant. Briefly stated, the defendant used the money represented by the check for $6,468.54 to cover prior defalcations. By the manipulation of the accounts in the manner thus narrated, he was able to balance his cash accounts at the close of the day, but nevertheless the books of the company showed a decrease in the company's assets in the amount represented by said check.

[1] The first contention made by appellant upon this appeal is that, inasmuch as he deposited the check for $6,468.54 to the credit of the railroad company, he committed no crime, even though he did credit the amount of said check to the wrong accounts for the purpose of covering up a shortage caused by previous defalcations. Appellant cites and relies upon the cases of Commonwealth v. Este, 140 Mass. 279, 2 N. E. 769; Dickey v. State, 65 Tex. Crim. 374, 144 S. W. 271; Gibson v. State, 13 Ga. App. 459, 79 S. E. 354. It may be conceded that the cases cited by appellant do hold as he contends. But, whatever may be the rule in those jurisdictions, it is quite certain that a different rule prevails in this state, for in the case of People v. Rowland, 12 Cal. App. 6, 106 Pac. 428, it is clearly held that the fraudulent secretion of money by an employee under the circumstances here shown, with intent to appropriate it to his own use, constitutes embezzlement, and that it is immaterial whether he actually drew the cash on the day on which the check was drawn or used the shortage of that day to cover up previous defalcations to the extent of the embezzlement which was committed on that day. That case is similar, both in fact and in law, to the instant case, and the rules therein stated are therefore controlling, not only on this point, but they also dispose of most of the other contentions made by appellant on this appeal.

In that case a depositor of a bank delivered to the defendant Rowland, as cashier of said bank, a check drawn upon and payable to said bank for $1,036.15, in payment of a note and interest held by said bank against said depositor. Rowland delivered to said depositor the canceled note, placed the check at the disposal of the bookkeeper for proper cancellation and entry, and personally entered the receipt of the interest, $36.15, in the interest account. Rowland failed, however, to make out and file the proper tag showing the payment of said note, and likewise omitted to make proper entry thereof in the "loan register" as he should have done. He actually applied the balance of said check, $1,000, to the payment of other accounts in order to cover up previous defalcations. The result of this transaction was that, notwithstanding the cash books of the bank balanced at the end of the day, the assets of the bank were decreased to the extent of $1,000. It was held embezzlement, the court saying:

> "By this we mean to be understood as saying that even if he actually took no money from the bank on the day of the Cook transaction but merely used it to juggle the books as to some other account in order to make it balance or appear straight, he nevertheless thereby misappropriated that particular money and in substantial effect wrongfuly converted it to his own use, the fraud of the transaction being indubitably shown, as we have seen, by the fact that he allowed the canceled note of Cook & Passalacqua to remain as though a living asset of the bank. If this is not embezzlement within the meaning of the law (Pen. Code, § 504), then we confess that we are at a loss to know what acts will constitute that offense."

Appellant makes the further contentions that there is a fatal variance between the proof and the indictment; that the court erred in admitting in evidence the admissions and confessions of the defendant for the reason, as he contends, that the corpus delicti had not been established, and that it also erred in admitting evidence of other acts of embezzlement and of the general shortage. All of those points are disposed of adversely to appellant's contention by the case of People v. Rowland, supra.

[2] Referring to the question of variance, appellant has cited several cases to the point that the proof of the embezzlement or larceny of a check or other evidence of money, without proof of the conversion of that check into money by the defendant, will not support a charge of embezzlement or larceny of money, and he argues, therefore, that it cannot be said here that a check actually received and deposited in the proper account and to the credit of the owner constitutes embezzlement of the actual money. In People v. Rowland, supra, the same as here, the defendant did not cash the check. The bank received credit for the amount thereof, but the sum represented by said check was used by the defendant to cover up his previous defalcations. The defendant there, as here, was charged, not with the embezzlement of the check or the proceeds of the check, but with secreting a specified amount of cash with intent to appropriate the same to his own use. The court pointed out that it was not necessary that the appellant actually appropriate the money alleged to have been embezzled, but that it was sufficient to prove that he fraudulently appropriated that amount of money to his own use and purpose, not in the due and lawful execution of his trust, the court saying:

> "So, as stated, if in the case here the money was either secreted within the meaning of the statute, or used to cover up some other shortage or actually taken from the vaults of the bank and used in some transaction with which the bank had no connection, the crime is, in either event, proved."

[3] There is no merit in the contention that the corpus delicti was not sufficiently established to allow proof of the extrajudicial admissions and confessions of the appellant. The fact that the state proved that the railroad company suffered a loss in assets on that day of $6,468.54, and that such loss was the result of the action of the appellant in fraudulently manipulating the accounts of said railroad company, was sufficient. People v. Rowland, supra.

[4] The trial court did not commit error in allowing evidence to be received of a general shortage which necessarily covered other acts of embezzlement. This evidence was admitted for the purpose of showing fraudulent intent and guilty knowledge, and to negative the idea of mistake or inadvertence. Those precise points were involved in People v. Rowland, and it was held that they were without merit. It is therefore unnecessary to discuss them further here. The case of People v. Walker, 142 Cal. 90, 75 Pac. 658, relied upon by appellant in support of this contention, is not applicable here for the reason that there the so-called shortage consisted merely of a general indebtedness due from the defendant to his employer, the inception of which was free from fraud or crime. Here it consisted of wrongful defalcations of the appellant.

[5] The further contention is made by appellant that error was committed by the trial court in receiving, over his objections, testimony of a witness for the state concerning the total amount of the general shortage of the appellant, ascertained by said witness from books kept by the appellant and from books of said sugar company not kept by the appellant. It is claimed that such testimony was hearsay. We are of the opinion that it was not hearsay, for the reason that the witness was testifying to matters within his own knowledge, acquired in the discharge of his duty. Moveover, the facts covered by this testimony were all established by the extrajudicial confession of the appellant, which was a part of the evidence in the case. Therefore the testimony given by the witness, if it did involve hearsay, was merely cumulative and therefore not harmful.

[6] Appellant also complains of the refusal of the trial court to give certain instructions proposed by the appellant. Those instructions were drafted upon the theory that appellant was charged with the embezzlement of a check or the proceeds of a check. As already pointed out, such was not the fact. He was not so charged The subject of embezzlement was $6.468.54 in "lawful money of the United States." The instructions proposed were therefore not applicable to the charge, and the refusal to give the same was not error.

The concluding point made by appellant is that if the appellant was guilty of any crime at all it was that of the embezzlement of the smaller amounts, which constituted a misdemeanor, part of which were repaid by the appellant out of the amount represented by the check in question, and that, since those smaller amounts were appropriated by the appellant more than a year prior to the date of the finding of the indictment, the misdemeanor resulting from said transactions was barred by the statute of limitations.

[7] It is obvious, we think, without discussion, and from what has already been said, that appellant was not charged with the embezzlement of the smaller amounts, but with the misappropriation, on November 5, 1923, of the sum of $6,468.54, in lawful money of the United States. Therefore there is no merit in the point last made.

Finding no error in the record, the judgment of conviction and the order appealed from are affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

67 Cal. App. 635

KIMBALL et al. v. BAXTER. (Civ. 4299.)

(District Court of Appeal, Second District, Division 2, California. June 9, 1924. Rehearing Denied July 9, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

1. Partnership 🔑244—Surviving partner has duty to wind up partnership business without unnecessary delay.

Surviving partner occupies fiduciary position towards representatives of deceased partner and has the duty to wind up partnership business diligently and without unnecessary delay.

2. Partnership 🔑245(1)—Right of surviving partner to possession of assets stated.

Under Code Civ. Proc. § 1585, surviving partner is entitled to possession of firm assets and to settle partnership affairs unconfused by any control by representatives of deceased partner.

3. Partnership 🔑255(1)—Liability of surviving partner continuing business without consent of decedent's representatives, stated.

Under Code Civ. Proc. § 1585, when surviving partner continues partnership business unnecessarily without consent of decedent's representatives, he becomes liable either for profits made in business, including those made after his partner's death, or to account for surplus at death of decedent with interest, and representatives of decedent have right of election of those remedies.

4. Partnership 🔑258(10)—Findings in action for accounting against one as surviving partner held not contradictory.

In suit by personal representatives of deceased partner against one as surviving partner for an accounting, an interlocutory finding that defendant continued business as surviving partner was no more in effect than finding that he was surviving partner, and final finding that defendant had claimed the partnership assets as his own and appropriated them to his own use was not contradictory to finding of interlocutory judgment.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Carolyn Kimball, as administratrix, and another, as administrator, of the estate of Wade H. Kimball, deceased, against W. E. Baxter. From judgment for plaintiffs, defendant appeals. Affirmed.

Wm. A. Freeman, of Los Angeles, for appellant.

D. A. Stuart, of Los Angeles, for respondents.

WOOD, Justice pro tem. The plaintiffs, as personal representatives of Wade H. Kimball, deceased, allege a partnership between decedent and defendant, and ask for an accounting. The answer denies the partnership. It avers in effect that the relationship between defendant and decedent was that of employer and employee, that the compensation to the decedent was to have been one-half of the net profit of the business, and that there was no net profit. By way of counterclaim defendant alleges a substantial indebtedness by decedent to defendant.

Evidence was taken and an interlocutory judgment entered. Thereby it was adjudged that the agreement between the parties was one of partnership, and a referee was provided "to take an account of all of the partnership dealings and transactions * * * from the time of the commencement thereof to the time of the dissolution thereof by the death of said Wade H. Kimball, and of the moneys received and paid by the said partners respectively in regard thereto, and of all dealings in and transactions had in regard to the property, assets and effects of said firm since its dissolution by the death of the said Wade H. Kimball, and of the property belonging to the business of said partnership sold or disposed of by said W. E. Baxter, either as surviving partner or otherwise, and of the moneys received and paid out by him on account thereof." From the interlocutory judgment no appeal was taken.

Kimball died May 18, 1919. The interlocutory judgment was entered December 31, 1920. The referee made an extensive examination requiring months of time, prepared a tentative statement pursuant to agreement of the parties, submitted this to them and held hearings thereon, and thereafter made and presented to the court his report and findings. Exceptions thereto were filed, testimony taken before the court, and on July 5, 1922, final findings of fact and conclusions of law were made. Thereby it was found that upon the death of Kimball defendant came into possession of all the property, effects, books, and papers of the partnership; that defendant did not proceed to wind up the partnership business, but proceeded to enlarge it, made new contracts, incurred new and enlarged indebtedness, increasing the liability from $56,359.02 at the time of Kimball's death on May 18, 1919, to $99,925.69 on July 26, 1920; that such increase was not necessary to the winding up of the partnership business; that on July 26, 1920, defendant exchanged the partnership business and properties for stock of a corporation organized by him; that upon the death of Kimball defendant "became possessed of all of the assets of the partnership business as the surviving partner and trustee by reason of being such surviving partner, and immediately claimed all of said assets as his own and appropriated the same to his own use, and resisted plaintiff's proceedings to force him to account to them as the representatives of the estate of decedent"; that the conduct of the business by defendant after Kimball's death resulted in a loss; that the plaintiffs have elected to accept in lieu of any other claim the amount of the profits of the partnership business which belonged to decedent at the time of his death, with interest thereon. The profits of the partnership from the beginning to the death of Kimball were then determined, based upon the referee's report with certain modifications, the counterclaim of the defendant was allowed, and the court concluded that the plaintiffs were entitled to judgment for the difference, with interest from Kimball's death. For this judgment was entered. Defendant appeals.

[1-3] A surviving partner is entitled to possession of the partnership assets and to settle its affairs, unconfused by any control by the representatives of a deceased partner. Code Civ. Proc. § 1585; Theller v. Such, 57 Cal. 447; Cooley v. Miller & Lux, 168 Cal. 120, 142 Pac. 83; Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673. However, he occupies a fiduciary position toward such representatives and is held to a strict accountability. It is his duty to wind up the partnership business diligently and without unnecessary delay. When he continues it unnecessarily without the consent of the decedent's representatives, he acts at his peril and becomes liable either for the profits made in the business, including those made after his partner's death, or to account for the surplus at the time of the death of the deceased partner, with interest thereon, and the representatives of the deceased partner have the right of election of these remedies. Code Civ. Proc. § 1585; Theller v. Such, supra, p. 460; Berson v. Ewing, 84 Cal. 94, 23 Pac. 1112; Brown's Appeal, 89 Pa. 147; Killefer v. McLain, 78 Mich. 249, 44 N. W. 405; Hooley v. Gieve, 9 Daley, 104, 112; Id., 73 N. Y. 599; Dickens v. Dickens, 174 Ala. 345, 357, 56 South. 809; Goodburn v. Stevens, 1 Md. Ch. 420; Clay v. Field, 138 U. S. 473, 11 Sup. Ct. 419, 34 L. Ed. 1044; Storey on Partnership (7th Ed.) § 344; 30 Cyc. 640. This rule is peculiarly salutary where, as here, the survivor denied the partnership and claimed its assets as his own.

[4] Defendant contends that the court in its interlocutory findings and judgment determined that since Kimball's death Baxter "has conducted said business as the surviving partner and has been in possession of all the books, business and assets of said partnership"; that this finding is final (Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; Williams v. Reed, 43 Cal. App. 425, 185 Pac. 515); and that the subsequent finding and judgment that defendant claimed the assets as his own and appropriated them to his own use is irreconcilably contradictory to the finding of the interlocutory judgment. This part of the later finding is not necessary to the judgment; but assuming it to be, appellant's position cannot be sustained. There is nothing necessarily contradictory between the two findings. Baxter did come into possession of the partnership as the surviving partner. He may have conducted that business "as the surviving partner"—he could not in contemplation of law do otherwise. To find that Baxter "conducted the business as surviving partner" is nothing more in legal effect than a finding that he was the surviving partner. It is surely not a finding that he conducted the business rightfully, or that he proceeded without delay to close the partnership affairs. This could not be determined except by a long and involved accounting in court or through the medium of the referee. The trial court appropriately chose the latter method. When the referee's work was completed, it clearly appeared from his findings and from evidence taken by the court upon the objections thereto that Baxter, while acting under his trust as surviving partner, had not proceeded to wind up the partnership affairs but had enlarged the business, increased its liabilities, attempted to appropriate to his own use the whole of the partnership property, and finally had sold its assets as his own to a corporation organized by him and for stock issued to him. The final finding to such effect then made was proper.

What we have said disposes of all of appellant's contentions except the one that the referee and the court erred in the finding as to the surplus at the time of Kimball's death. An examination of the record shows this point to be without merit. The referee founded his report upon the best evidence available, and it was sufficient.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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68 Cal. App. 62

PEOPLE v. HINES. (Cr. 1181.)

(District Court of Appeal, First District, Division 2, California. July 1, 1924.)

1. Criminal law ⚷511(2)—Evidence corroborating accomplice held sufficient to warrant conviction on his testimony.

Evidence adduced in corroboration of accomplice *held* to tend to connect defendant with offense charged so as to warrant conviction on testimony of accomplice.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Walter Hines was convicted of robbery, and he appeals. Affirmed.

H. D. Perry, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of the crime of robbery and from that judgment he has appealed. On the nights of the 14th and 15th of November, 1923, two men robbed R. E. Barr in Alameda county. Immediately prior to the robbery R. E. Barr and Miss Alice Heeney were seated in an automobile in front of her residence at 1817 Castro street in Oakland. At some time around 11:30 in the evening two men approached the automobile, one on the right-hand side, one on the left-hand side, and by threats caused the occupants to get out of the front seat and to enter the car and take seats in back, while the two men proceeded to occupy the front seat. One man drove the car and the other held the gun. The street lights were sufficient for both Mr. Barr and Miss Heeney to see, and they did see the two men more or less distinctly. While these persons were seated in the car as described above, the man at the wheel drove to Brush street, thence out to Market and down Park street, and then back to San Pablo and out San Pablo to Stanford avenue, then down Stanford avenue to the point where the robbery took place. As stated above, Mr. Barr and Miss Heeney sat immediately behind the robbers during that period of time. From what he saw Mr. Barr testified that the defendant resembled the taller man of the two. He said he could not see the defendant's face, but the other man he could identify. Miss Heeney testified:

> "One of the men was a little taller than the other. The tall man was the stockier of the two. Considering the size, weight, and stature of these men I saw that night the defendant resembles the tallest man."

As to when the accused were arrested the record does not show, but before the 21st day of December both of the accused were in custody. On a date somewhat prior to the date last mentioned the defendant and Charles Leraux were before John Mulhern, an inspector of police in Oakland. At that time Leraux had confessed to being one of the robbers. Mulhern had been talking to Hines, and sent for Leraux to be brought in. When Leraux came in Hines was asked whether he knew Leraux. He stated that he did, but that he had not seen him for several months or a year; that he really forgot the time. On the trial he was sworn as a witness in his own behalf, and testified that he had not seen Leraux for 18 months; that is, since the 26th of August, 1922. Ione Ratelle testified that she was the wife of the man who goes by the name of Charles Leraux. She said that she met the defendant with her husband at her home on 18th street in Oakland in the evening about the middle of November, 1923. They came to the house about 9 o'clock in the evening and stayed there for an hour or so and left. They came back some time after midnight, and stayed at the house until the next morning. After breakfast the defendant left. Charles Leraux testified that he and the defendant committed the robbery.

On this appeal the appellant makes one point, and that is that there was not sufficient corroboration to warrant a conviction. In this behalf the appellant points out that Leraux was an accomplice under the facts stated, and the appellant claims that the testimony of Leraux was entirely unsupported by any other evidence. Thereupon he cites and relies upon People v. Morton, 139 Cal. 719, 73 Pac. 609; People v. Robbins, 171 Cal. 466, 154 Pac. 317; People v. Sciaroni, 4 Cal. App. 698, 89 Pac. 133; People v. Main, 114 Cal. 632, 46 Pac. 612; and People v. Smith, 189 Cal. 31, 207 Pac. 518. While the proposition of law as stated by the appellant is perfectly sound, its application to the facts of this case is entirely unsupported. Without referring to the evidence of the accomplice, there was clearly evidence before the trial court which tended to connect the appellant with the offense charged.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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67 Cal. App. 659

HASEROT v. KELLER. (Civ. 4387.)

(District Court of Appeal, Second District, Division 2, California. June 13, 1924. Hearing Denied by Supreme Court Aug. 11, 1924.)

1. **Trusts 🔑354—Seller has remedy against proceeds of property conveyed by fraudulent vendee to innocent purchaser.**

When a fraudulent vendee has conveyed property or any interest therein to a third party who by reason of his innocence acquires a good title as against equity of original vendor, latter has remedy against substituted property.

2. **Patents 🔑192—Patentee held accountable for royalties under licenses granted after obtaining assignment of interest by fraud.**

Patentee, who by fraud procured his co-owner to assign his interest, had patent reissued to himself as sole patentee, and granted exclusive rights to innocent licensees, was bound to account to co-owner for share of royalties.

3. **Contracts 🔑318—Forfeitures not favored.**

Forfeitures are not favored in the law, and any inconsistent acts or dealings by party claiming a forfeiture will be regarded as a waiver thereof.

4. **Estoppel 🔑57—Waiver need not be supported by valuable consideration.**

To constitute a waiver of a forfeiture, there need not be a new agreement nor a valuable consideration; a simple voluntary relinquishment of a right with knowledge of all the facts not to demand a certain thing being sufficient.

5. Patents 🔑192—Patentee held to have waived right to reassignment of co-owner's interest in patent.

Patentee waived a reassignment of a co-owner's interest in a patent under a contract providing for assignment on failure to sell a certain number of patented articles during year following execution of contract, where patent was not issued until almost four months after expiration of year and patentee requested co-owner not to sell before issuance of patent, and falsely represented to co-owner that by reason of certain improvements patent was valueless to co-owner.

6. Patents 🔑192—Co-owner of patent held excused from tendering performance under contract.

If provision in contract for reassignment by co-owner of interest in a patent on failure to sell a certain number of patented articles did not amount to covenant for a forfeiture, co-owner was excused from performance under Civ. Code, § 1511, where patentee falsely represented that patent was valueless to co-owner because of certain improvements.

7. Fraud 🔑11(1)—Representations must be of fact.

Generally in an action for deceit, the representations must be of a fact as distinguished from a mere matter of opinion, which ordinarily is not presumed to deceive or mislead.

8. Fraud 🔑11(1)—Expression of opinion may be actionable.

When one of the parties possesses or assumes to possess superior knowledge regarding subject-matter of representation and other party is so situated that he may reasonably rely upon such supposed superior knowledge, a representation, though it might be regarded as an expression of opinion if made by any other person, is not excused if false.

9. Patents 🔑192—Patentee's statement that improvements on patented device rendered it valueless to co-owner held a positive assertion of fact.

Patentee's statement to co-owner to induce an assignment of co-owner's interest, that undisclosed improvements perfected by him on patented device rendered it valueless to co-owner, was a positive assertion of fact as to which he possessed means of information not accessible to co-owner, and not a mere opinion.

10. Contracts 🔑265—Party seeking to rescind contract must place other party in status quo.

Party seeking to rescind a contract and obtain retransfer of property must ordinarily place or offer to place other party in same position he would have occupied if contract or transfer had not been made.

11. Contracts 🔑266(2)—Person attempting to rescind for fraud not required to restore that which he is entitled to retain.

A person attempting to rescind a transaction for fraud is not required to offer to restore that which in any event he would be entitled to retain.

12. Patents 🔑192—Failure of plaintiff's complaint to offer to refund such sum as might be due after taking of account held immaterial.

In an action to cancel an assignment of plaintiff's interest in a patent and to compel defendant to account for profits by reason thereof, failure of plaintiff's complaint to contain a formal offer to refund such sum as court might decree to be due from him after taking of the account was immaterial, in absence of a special demurrer, where he alleged that he was ready to perform all terms and conditions of his original agreement.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Rupert W. Haserot against Clarence D. Keller. Judgment for plaintiff, and defendant appeals. Affirmed.

James E. Kelby and Kemp & Clewett, all of Los Angeles, for appellant.

W. C. Shelton, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to cancel an assignment of plaintiff's interest in a patent and to compel defendant to account for the profits gained by him by reason of the assignment. The gravamen of the action is fraud on the part of defendant, by reason whereof plaintiff was induced to execute the assignment. Judgment passed for plaintiff, and defendant appeals.

The facts as found by the trial court in response to issues tendered by the pleadings are substantially these: Plaintiff and defendant were friends and neighbors residing in the city of Los Angeles. On July 18, 1917, the parties executed a written agreement, the embodiment of a similar oral agreement previously entered into by them on June 1, 1917. The written agreement, after reciting that defendant is the inventor of an automobile windshield improvement, that he desires to make application to the United States government for letters patent, and that both parties desire to exploit the invention to the best possible advantage, sets forth, among other covenants, the following: (1) Plaintiff agrees to bear the expense of securing the patent, to pay to defendant the sum of $250 after the patent shall have been issued, to bear the expense of putting the invention on the market, and to sell a minimum number of 25 sets of windshields per month; (2) defendant agrees to transfer to plaintiff an undivided one-half interest in the invention and in the letters patent to be obtained therefor; (3) in case plaintiff, for any reason, should fail to manufacture and sell a minimum of 25 sets per month, he is to reassign his undivided one-half interest to defendant on demand, such demand not to be made prior to one year from the date of the contract.

On June 14, 1917, the parties, pursuant to their oral agreement, made application for letters patent in defendant's name, the cost whereof was paid by plaintiff as he had undertaken to do. On June 17, 1917, defendant, pursuant to his agreement, transferred to plaintiff an undivided one-half interest in the invention. On November 12, 1918, a United States patent was issued to plaintiff and defendant jointly.

Subsequently to the application for letters patent but prior to the issuance thereof, plaintiff requested defendant to supply him with samples of the device so that he could exploit the invention and put it upon the market pursuant to his agreement. Defendant not only refused to comply with this request, but told plaintiff that he did not want the latter to exploit the patent or to sell any of the patented devices until letters patent should be issued. Plaintiff, in compliance with this expressed wish on the part of defendant, made no effort to exploit the invention or to manufacture or sell any of the devices. Thereafter, but prior to the issuance of the letters patent, defendant told plaintiff that the patent applied for would be of no value to plaintiff for the reason that the former had perfected certain improvements upon the device and that such improvements belonged solely to him. The nature of these asserted improvements was not disclosed to plaintiff. Defendant's statements that the patent applied for would be rendered valueless to plaintiff by reason of defendant's improvements upon the device were false and fraudulent, were known by defendant to be false, and were made for the purpose of discouraging plaintiff and to induce him to abandon his contract, to the end that defendant could thus obtain the entire control of the patent and procure a reassignment to him of plaintiff's undivided half interest for a nominal consideration. Plaintiff, believing defendant's statements and relying thereon, was induced thereby to fail to advance the final payment for the patent, amounting to $20, and also was induced to refrain from further attempting to carry out the terms of his agreement.

Again, on January 11, 1919, the date of the assignment which plaintiff is seeking to have canceled by this suit, and on several occasions prior to such assignment, defendant, for the purpose of misleading and defrauding plaintiff and to induce him to assign his interest in the patent for a nominal consideration, reiterated his statements to plaintiff that he (defendant) had perfected certain improvements upon the patented device, the nature of which he refused to disclose, and that by reason thereof the patent was rendered valueless to plaintiff, and that he (plaintiff) would lose all he had invested in the patent unless he sold and assigned his undivided one-half interest therein to defendant. These statements that the improvements would render the patent valueless to plaintiff, like those previously made by defendant, were false, were known by defendant to be false, and were made at a time when defendant was actually negotiating with third parties for the payment to him of substantial and profitable royalties in return for licenses to manufacture and sell the patented article. Plaintiff had no knowledge of these negotiations, and the fact that they were pending was fraudulently concealed from him by defendant. By reason of this concealment and of defendant's false and fraudulent statements that the improvements upon the patented device would render the patent valueless to plaintiff, the latter, on January 11, 1919, for the nominal consideration of $100, was induced to and did assign to defendant all of his half interest in and to the invention and in and to the letters patent. Thereafter defendant caused a reissue of the letters patent to be made to him by the government. Since then defendant has transferred to the third parties with whom he previously had carried on negotiations the exclusive right to manufacture and sell the patented device within the territory of the United States, and has received therefor royalties aggregating $7,708.70.

Before commencing this action plaintiff tendered to defendant $100, the amount which defendant had paid to plaintiff at the time of the latter's assignment of his interest in and to the patent. At the same time plaintiff demanded rescission and a cancellation of his assignment to defendant.

By its judgment the court decreed: (1) That plaintiff's assignment of his one-half interest to defendant be rescinded; (2) that defendant holds an undivided one-half interest in and to the reissued patent in trust for plaintiff; (3) that within ten days defendant, by proper assignment, convey to plaintiff such undivided one-half interest, and that upon his failure so to do the clerk of the court execute such conveyance; (4) that defendant holds in trust for plaintiff an undivided one-half interest in and to the royalty contracts made by defendant; and (5) that plaintiff have judgment against defendant for $1,849.35, with interest. The last-mentioned sum is one-half of the royalties received by defendant from his licensees, less the amounts which plaintiff had obligated himself to pay when he entered into his original agreement with defendant. The net sum so awarded to plaintiff was the result of an accounting taken by the court whereby the respective equities of the parties were adjusted.

In addition to the findings already mentioned, the trial court found that the written agreement of July 18, 1917, was a partnership agreement for the joint exploitation of the patent. Both parties to this appeal seem to assume that this finding of a partnership constitutes the sole basis for plaintiff's right to compel defendant to account for the royalties received by him from the licensees to whom he had granted, after the reissue to him of letters patent, the exclusive right to manufacture and sell the patented device in the United States.

The grounds of the appeal are: (1) That a partnership relation was not created by the original parol agreement nor by the written agreement of July 18, 1917; that therefore the finding of a partnership is not supported by the evidence; and that if there be no partnership plaintiff is not entitled to any part of the royalties received by defendant from the licensees. (2) That plaintiff is not entitled to any relief whatever because: (a) He did not fully perform either his oral agreement of June 1, 1917, or his written agreement of July 18, 1917, and therefore defendant was entitled as of right to a reassignment of plaintiff's interest in the patent; (b) defendant's representation that the patent was rendered valueless to plaintiff was the statement of an opinion and not the misrepresentation of a fact; (c) plaintiff's tender of $100 at the time when he demanded a rescission was not a sufficient offer to restore the status quo.

[1, 2] As we view the case it is immaterial whether the joint venture created by the original oral agreement or by the written agreement of July 18, 1917, did or did not amount to a partnership, and it therefore is of no consequence whether the evidence does or does not support the finding of a partnership. In either case respondent would be entitled to one-half of the royalties received by appellant, less the credits allowed the latter by the court's decree. It is a familiar principle that when a fraudulent vendee has conveyed the property, or any interest therein, to a third party, who, by reason of his innocence, acquires a good and valid title as against the equity of the original vendor, the latter has a remedy against the substituted property, which in this case is that part of the royalties received by appellant as the result of his transfer to the licensees of respondent's individual right in and to the monopoly created by the patent.

Appellant claims that the principle last announced is inapplicable where, as here, a patent right is the subject-matter of the transfer to the fraudulent vendee. The case chiefly relied upon by appellant to support this claim is Blackledge v. Weir & Craig Mfg. Co., 108 Fed. 71, 47 C. C. A. 212. The facts pleaded by the plaintiff in that case showed that the defendant, a co-owner of letters patent, did no more than transfer to licensees its own separate right in the patent as a co-owner thereof. It is true that the declaration, which was in assumpsit, alleged that the defendant, at Chicago and elsewhere throughout the United States, had by itself "exercised the exclusive rights of both owners" by granting licenses, shop rights, and other rights under the letters patent. But it was held that under the facts there alleged it was not possible that defendant could have exercised the rights of both co-owners —for which reason it was held that the defendant was not accountable to its co-owner for any part of the profits received by it. There the defendant, unlike the defendant in this case, had not clothed itself with the apparent lawful title to the entire patent; and the defendant's licensees, so it would seem, knew that their licensor was only a part owner of the patent. It was evidently in view of this knowledge on the part of the licensees that the federal court, in sustaining a general demurrer to the declaration, said:

> "Knowing the law, the parties to the contract [i. e., the defendant and its licensees] knew that the stipulated grant could confer upon the licensees only the right of the licensor—that is to say, the right to make, use and vend the patented article—but not an exclusive right, because the other patentees might confer upon rival manufacturers or dealers equal privileges under the patent. This being so, it is to be presumed that the price agreed to be paid for the individual license, which left the other patentees free to use and to license others to use the invention, was less than would have been paid for a license from all of the patentees. * * * The separate action of any one owner or of his licensees can be an exercise or use only of his individual right, which, though exclusive of all besides, is not exclusive of the other patentees, their assignees or licensees. On principle, therefore, there can be no accountability on the part of a part owner of an invention to other owners for profits made by the exercise of his *individual* right, whether it be by engaging in the manufacture and sale, or by granting to others licenses, or by assigning interests in the patent. His use of the invention in any lawful way is not an appropriation of anything which belongs to another. *The separate rights of the other owners remain unaffected.* They are equally free to use the invention in all legitimate ways for their individual profit. * * * It follows that the charge in the declaration that the defendant 'has by itself exercised the exclusive rights granted to both the plaintiff and defendant' is not true." (Italics ours.)

Between that case and this there is a wide gulf. In the present case appellant, by his fraudulent conduct, caused himself to be vested with all the indicia of title to the patent as the sole and exclusive owner thereof and of all the monopoly created thereby. As the result of his fraudulent conduct in procuring the assignment from respondent, appellant was able to and did procure the reissue of letters patent to himself as the sole patentee. Having thus wrongfully garbed himself with the apparent title to the patent as the sole owner of all of the monopolistic rights created thereby, appellant granted to innocent licensees the exclusive right to manufacture and sell the patented device throughout the United States—granting to one the exclusive right to manufacture and sell in all the territory east of the Mississippi river, and to another a similar right to manufacture and sell west of the Mississippi river. As innocent licensees for value, the parties from whom appellant received the royalties may successfully contest any right which respondent may assert to manufacture or sell the patented device in any part of the United States. It thus will be seen that appellant, by his fraudulent conduct, has completely destroyed respondent's right as a co-owner of the letters patent. It follows, therefore, that the mere cancellation of the assignment which respondent executed to appellant, or even a reassignment by appellant of an undivided one-half interest in the patent, would be but the shadow of a victory for respondent; and unless appellant can be made to account to respondent for the latter's share of all royalties paid or agreed to be paid by the licensees, respondent, to all practical intents and purposes, will be remediless. Throughout the opinion in Blackledge v. Weir & Craig Mfg. Co., supra, there runs the implication that one wronged as was this respondent is entitled to an accounting. Thus in the concluding sentence of its opinion the court in that case says:

> "* * * It is not alleged that the defendant has intentionally and wrongfully so exercised its individual right under the patent as to destroy the value of the equal right possessed by the plaintiff."

This language implies that if the defendant in that case had intentionally and wrongfully destroyed the value of the equal right possessed by its co-owner, the latter would have been entitled to his share of the royalties and to an accounting therefor.

Our conclusion on this branch of the appeal is that appellant, by granting exclusive rights to innocent licensees at a time when he was the apparent owner of all the monopoly created by the reissued letters patent, undertook to and did exercise not only his own individual right as a co-owner but also the individual right which, in equity, belong to respondent as a co-owner, and that therefore appellant was properly held accountable for the profits which accrued to him by his wrongful exercise of respondent's right.

[3, 4] Appellant's next claim is that, irrespective of the fraud practiced by him upon respondent to induce the latter to execute the assignment, he was in any event rightfully entitled to such assignment by reason of respondent's failure to perform his agreement to manufacture and sell a minimum of twenty-five sets of windshields per month. We can perceive no merit in this claim. The provision in the contract whereby respondent agreed that if for any reason he should fail to sell a minimum of 25 sets of windshields per month he would "reassign his undivided one-half interest in said invention and in said patent * * * on demand, * * * said demand not to be made prior to a year from the date of this contract," partakes of the nature of an agreement for a forfeiture. It contemplates a loss of respondent's rights under the contract and a loss of his right in and to the patent should he fail to sell the stipulated number of windshields during the year following the execution of the contract. The only purpose which could be served by a formal written reassignment, in the event that respondent should so lose his rights, is that by such formal reassignment appellant could be furnished with written evidence that he had become reinvested with respondent's title as the result of the forfeiture of the latter's rights. But forfeitures are not favored in the law; and any inconsistent acts or dealings by the party claiming a forfeiture will be regarded as a waiver thereof. To constitute a waiver there need not be a new agreement nor a valuable consideration. Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Roblee v. Masonic Life Ass'n, 38 Misc. Rep. 481, 77 N. Y. Supp. 1098. A simple voluntary relinquishment of a right with knowledge of all the facts—an expression of intention, by speech or conduct, not to demand a certain thing—is sufficient to constitute such a waiver.

[5, 6] Here the facts found by the court show conclusively that, by his speech and conduct, appellant waived the forfeiture and therefore his right to a reassignment. The year within which respondent was to sell the minimum number of windshields did not expire until July 18, 1918. The patent did not issue until November 12, 1918, or almost four months after the expiration of the year within which respondent was to put the windshields on the market. As we have stated, the court found that shortly after the execution of the contract of July 18, 1917, appellant, when requested to furnish respondent with the necessary samples wherewith to put the invention on the market, replied that he (appellant) did not want respondent to sell any of the patented articles until after the issuance of the letters patent. This alone was a waiver of appellant's right to a forfeiture. But more than this, appellant, as we have seen, falsely represented to respondent, prior to the issuance of the patent, that by reason of certain improvements which he claimed to have made the patent was rendered valueless to respondent. This representation was made for the very purpose of discouraging respondent and to induce him to abandon his contract. Such conduct on the part of appellant was wholly inconsistent with his right to claim a forfei-

ture, and unquestionably amounted to a waiver of any right to a forfeiture of respondent's rights as a co-owner of the patent. And even if the provision for a reassignment to appellant did not amount to a covenant for a forfeiture, respondent nevertheless would be excused from performance by that provision of section 1511 of our Civil Code, which reads:

> "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: * * * (3) When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

[7, 8] Appellant's positive assertion as a fact that the patent was rendered valueless to respondent by reason of the improvements made by the former was not the mere expression of an opinion, but was the representation of a material fact. It is, of course, generally speaking, true that in an action for deceit the representation must be of a fact as distinguished from a mere matter of opinion, which ordinarily is not presumed to deceive or to mislead. But to this general rule there are many qualifications and modifications which are as important as the rule itself. Thus when one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject-matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false. Palladine v. Imperial Valley Farm Lands Ass'n, 225 Pac. 291; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Grim v. Byrd, 32 Grat. 293; Turk v. Botsford, 70 Ore. 198, 139 Pac. 925; White v. Peters (Tex. Civ. App.) 185 S. W. 659; Allen v. Hart, 72 Ill. 104; Benolkin v. Guthrie, 111 Wis. 554, 87 N. W. 466; Schoefield Gear & Pulley Co. v. Schoefield, 71 Conn. 1, 40 Atl. 1046; Wilson v. Nichols, 72 Conn. 173, 43 Atl. 1052. "A matter of opinion may amount to an affirmation of fact, when the parties are not dealing upon equal terms, and one of them has, or is presumed to have means of information not equally open to the other." Boelk v. Nolan, 56 Ore. 229, 237, 107 Pac. 689, 691. As was aptly said by Judge Hand in Vulcan Metals Co. v. Simmons Mfg. Co., 248 Fed. 853, 161 C. C. A. 7:

> "We should treat very differently the expressed opinion of a chemist to a layman about the properties of a composition from the same opinion between chemist and chemist."

It has been said by an eminent jurist:

> "It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. * * * If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." Lord Bowen in Smith v. Land, etc., Corporation, 28 L. R. Ch. Div. p. 15.

Schoefield Gear, etc., Co. v. Schoefield, supra, was an action against the fraudulent vendor of a patented article who had falsely represented to the vendee that there was a large demand for the article and that he had found the making of it "a good and profitable business." There the court said:

> "Whatever opinion he [the fraudulent vendor] communicates is so blended with the statement of the facts upon which it arises that it becomes itself a statement of fact. He could best tell whether his business was profitable, and his invention in demand, and these were points on which the execution of the contract turned. Opinions might differ as to what measure of profit might make a business profitable, or how many orders might suffice to constitute a large demand, but the conclusion arrived at was one as to the existence of a state of facts, and certainly 'related to matters of fact of which the defendant had knowledge.'"

[9] Appellant, when he stated that the patent was rendered valueless to respondent by reason of the improvements, possessed means of information not accessible to his vendor. He knew, but respondent did not know, the nature of the improvements. Indeed, the improvements, whatever they may have been, their nature, and their attributes, were sedulously concealed by appellant from respondent. Under these circumstances appellant's statement that his improvements upon the patented device rendered the patent valueless to respondent was not the expression of mere opinion and surmise not based on knowledge, but was the positive assertion of a fact claimed to be based on an intimate knowledge of facts from which an inerrant conclusion could be deduced with certainty. That appellant was fully cognizant of the falsity of his representation that his improvements would render the patent valueless to respondent is conclusively shown by the circumstance that at the very time when he was making the representation he was successfully negotiating with third parties for the payment to him of valuable royalties in exchange for the right to manufacture and sell the patented device. The foregoing authorities and sound principle justify our holding the representation to be actionable.

As his final point appellant urges that to entitle respondent to rescission and to a cancellation of his assignment it was not sufficient merely to make tender of the amount which was actually paid to respondent at the time when the assignment was fraudulently procured, namely, the sum of $100, but that it was necessary that respondent, before bringing his action, should also make tender of the several amounts which were payable by him under the terms of the original agreement, i. e., the sum of $20, the final payment due to the government upon the issuance of the letters patent, the sum of $250, the amount which respondent had agreed to pay appellant after the patent should be granted, and a sum equal to the total expense of putting the invention upon the market, the amount whereof, as found by the court, was $1,150. In other words, it is argued that to restore the status quo it was not sufficient to tender the $100 and revive respondent's obligations under the original agreement, but that it was necessary for respondent to offer to perform those obligations.

[10, 11] Without doubt, the party seeking to rescind a contract and to obtain a retransfer of property must, ordinarily, place or offer to place the other party in the same position he would have occupied if the contract of transfer had not been made. There are, however, exceptions to this rule of restoration. One is that a person attempting to rescind a transaction upon the ground of fraud is not required to offer to restore that which, in any event, he would be entitled to retain. Richards v. Fraser, 122 Cal. 456, 461, 55 Pac. 246; Gatje v. Armstrong, 145 Cal. 370, 374, 78 Pac. 872; Matteson v. Wagoner, 147 Cal. 739, 740, 82 Pac. 436. Another exception recognized by the courts is where the taking of an account is necessary for the ascertainment of the sum to be repaid.

> "Where a plaintiff comes into a court of equity asking for the rescission in whole or in part of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. In such case the plaintiff cannot determine, in advance of the suit, the amount by him to be repaid, and is not required to make an actual tender of such amount before commencing his action." Sutter St. R. R. Co. v. Baum, 66 Cal. 52, 4 Pac. 916.

See, also, California, etc., Co. v. Schiappa-Pietra, 151 Cal. 740, 91 Pac. 593, and Billings v. Aspen Min., etc., Co., 51 Fed. 338, 2 C. C. A. 252.

[12] The case at bar comes clearly within this statement of the rule. While it is true that respondent's complaint does not contain a formal offer to refund such sum, if any, as the court might decree to be due from him after the taking of the account, he nevertheless does allege that he is "ready, willing and able to perform all the terms and conditions" of his original agreement. In the absence of a special demurrer, this allegation of willingness and ability to pay must be taken as the equivalent of a formal offer to refund such sum, if any, as might be decreed to be due from respondent after an accounting. In view of this allegation and the facts as found by the court—facts which establish beyond peradventure that there is no balance to be paid by respondent, but that, on the contrary, a net balance is due to him—a gross miscarriage of justice would result if the judgment should be reversed merely because the complaint does not contain a formal offer to pay any balance which might be found to be due from respondent after the taking of the account demanded by him in his complaint.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

67 Cal. App. 683

PEOPLE v. ELLENA. (Cr. 1077.)

(District Court of Appeal, Second District, Division 1, California. June 14, 1924. Rehearing Denied July 14, 1924. Hearing Denied by Supreme Court Aug. 11, 1924.)

1. Criminal law 🔑517(4)—Evidence held sufficient to establish corpus delicti to warrant admission of confession.

In prosecution for driving automobile on public highway while intoxicated, evidence *held* sufficient to establish corpus delicti so as to warrant admission of confession.

2. Criminal law 🔑532(1)—Admission of confession before corpus delicti fully proven held not error.

In prosecution for driving automobile while intoxicated, admitting evidence of defendant's confession that he was driving automobile at time of accident before commission of criminal offense had been fully proven *held* not error.

3. Criminal law 🔑532(1)—Rule stated as to order of proof of confession and corpus delicti.

Although as general rule before corpus delicti is established confession of defendant is inadmissible, order of proof in such circumstances is not important, if aside from such confession corpus delicti be established by independent evidence.

4. Highways 🔑186—Particular evidence held admissible in prosecution for driving automobile while intoxicated.

In prosecution for driving automobile while intoxicated, for purpose of showing that driver was intoxicated it was proper to show that all persons riding on front seat were intoxicated immediately after accident resulting from careless driving.

5. Criminal law 🔑1144(10)—In absence of argument, assumed that error of judge alleged generally in cross-examining witness not prejudicial.

Where no special error was charged, nor argument made, nor authority cited in support of accused's contention that trial judge erred in asking witness immaterial questions on matters fully covered by district attorney, it will be assumed that there was no prejudicial error.

6. Criminal law 🔑437—Map made by witness held admissible as against objection that he was not sufficiently qualified to make it.

In prosecution for driving automobile while intoxicated, map of scene of accident resulting from driving of defendant, made by witness who had been for seven years deputy county surveyor, and who had made map from notes taken by himself at place of accident, *held* admissible as against objection that he was not sufficiently qualified to make map.

7. Criminal law 🔑1169(4)—Alleged error in admitting map without being sufficiently identified held cured by subsequent evidence.

Any error in admitting map of scene of accident, resulting from alleged drunken driving of automobile by defendant because not sufficiently identified, *held* cured by subsequent evidence received on question of identity.

8. Criminal law 🔑1130(2)—Alleged error in rulings on evidence not considered because of indefiniteness of specifications and of failure to argue.

Specification of error in rulings on evidence, covering 8 pages of accused's brief entire testimony of witnesses, from which excerpts were copied covering 40 pages of reporter's transcript not considered, where counsel failed to point out rulings he considered erroneous or to argue any of the objections.

9. Criminal law 🔑763, 764(20)—Instruction held to constitute unwarranted charge on matter of fact.

Instruction that admission of accused, immediately subsequent to act charged as offense was not sufficient of itself to warrant conviction, standing by itself trenches upon Const. art. 6, § 19, forbidding judges to charge juries with respect to matters of fact.

10. Criminal law 🔑822(1)—Meaning of instruction ascertained by considering it as part of entire body of instructions.

In construing an instruction, it must be taken, not as separate statement of the law, but its true intent and meaning must be ascertained by considering it as part of entire body of instructions.

11. Criminal law 🔑823(11)—Instruction warranting inference that defendant had made certain admissions held not cause for reversal, in view of other instructions.

Instruction from which it might have been inferred that defendant had made certain admissions *held* not cause for reversal as likely to mislead, in view of other instructions as to province of jury as to facts.

12. Witnesses 🔑363(1)—Question as to payment of money to witness and bringing suit against defendant's family held proper.

In prosecution for driving automobile while intoxicated, questions to witness who was riding in automobile whether she had received money from accused's family, or whether settlement of her claim for damages against his family had been made, and as to proposed action against his family, were proper to show interest.

13. Criminal law 🔑317—Failure to call alleged impeaching witness held not to raise presumption of bad faith in laying foundation for impeachment.

Where district attorney asked witness question, in form complying with Code Civ. Proc. § 2052, as to whether witness at specified time and place and in presence of certain lawyer made certain statement, it could not be presumed from mere failure to call lawyer as a witness that district attorney was acting in bad faith in laying foundation for impeachment.

14. Criminal law 🔑730(10)—Comment on defendant's failure to testify held not cause for reversal in view of instruction to disregard.

Comment of district attorney in argument on fact that when accused was put on stand he was asked but single question, in view of direction of court to disregard statement, *held* not so prejudicial as to result in miscarriage of justice.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Frank Ellena was convicted of driving an automobile when intoxicated, and he appeals. Affirmed.

E. W. Bartlett, of Colton, and Jesse R. Shafer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted of the offense of driving an automobile upon a public highway at a time when defendant was under the influence of intoxicating liquor. He appeals from the judgment and from an order denying his motion for a new trial.

In brief, as shown by the evidence, the facts were that defendant and five other persons were riding in an automobile from which, by reason of the careless manner in which it was driven, three of them were thrown to the highway resulting in the death of one of such persons and the serious injury of one of the others.

[1] The first point made for reversal of the judgment is that the corpus delicti was not established. In this connection it is urged that the corpus delicti of the offense with which defendant was charged consists in the proof of the ultimate facts that the automobile in question was being driven on a public highway by some person who was then and there under the influence of intoxicating liquor. In this regard the only question which is raised goes to the sufficiency of the evidence tending to establish the fact that the driver of the automobile was under the influence of intoxicating liquor. The testimony of one of the witnesses was to the effect that immediately after the accident occurred he saw defendant and his

brother get out of the front seat of the automobile, and that at that time each of them was under the influence of intoxicating liquor. Other evidence tended to show that of the party of six people, two men and a young woman, were riding on the front seat of the automobile at the time the accident occurred, and that all of them were intoxicated; from which it follows that the corpus delicti was established.

[2, 3] Before the commission of a criminal offense had been fully proven, testimony was introduced as to the admission or confession by defendant that it was he who was driving the automobile at the time the accident occurred. Some authorities are cited by appellant to the effect that, in the first instance, a confession cannot be used to aid the prosecution in its proof that a crime has been committed; or, in other words, that before the corpus delicti is established a confession of defendant that he committed the offense is inadmissible. While the broad general principle for which appellant contends is recognized as good law, it is also a well-settled rule that the order of proof in such circumstances is of no great consequence, provided that aside from such confession the commission of the criminal offense be established by independent evidence. Cal. Juris. vol. 8, 235, and cases cited. And the testimony of the several witnesses herein satisfactorily shows that with reference to any confession or admission by defendant all the facts necessary to the proof of the corpus delicti were introduced in evidence.

[4] Error is predicated upon the order of the court overruling an objection to a question asked a witness as to whether or not defendant and his brother and the young woman, who were riding on the front seat of the automobile, were intoxicated immediately after the accident occurred. As before indicated, in order to show that a criminal offense had been committed it was necessary to establish the fact that the driver of the automobile was under the influence of intoxicating liquor, which could properly be done by showing that all the persons riding on the front seat of the automobile were drunk at the time it was alleged that the automobile was being driven on a public highway.

[5] It is also urged that error was committed by the judge of the trial court in that he cross-examined one of the witnesses, and in so doing asked several immaterial questions on matters which had theretofore been fully covered by cross-examination by the district attorney. No specific error is charged, nor does appellant either argue the question or cite authority in support of his contention. In such circumstances, it must be assumed that at least no prejudicial error exists.

[6, 7] It is next contended by appellant that the trial court erred in allowing a witness to testify concerning the making of a map of the scene of the accident, and in permitting the map to be used as an exhibit in the case. At the trial defendant's counsel objected "to the map being put upon the board or shown to the jury at the present time until it is connected up in such a way so that it can be identified, if there is anything in regard to the accident or where it occurred; we object to it for the reason that the witness is not qualified for making the map on December 20th." With reference to the qualifications of the witness it was shown that at the time the map was made, and for about seven years preceding that time, his occupation was that of a deputy county surveyor in San Bernardino county, and that he had made the map from notes taken by himself at the place where the accident occurred. His qualifications, therefore, in the premises were satisfactorily shown. After defendant's objection to the introduction of the map was overruled, a great deal of evidence was received, without objection from any source, which clearly identified the map and authorized its use as an exhibit in the case. Whatever error existed when the map was first offered was not prejudicial to defendant's rights, and was certainly cured by evidence which was later introduced going to the point of defendant's objection.

[8] The trial court admitted in evidence certain statements made by defendant. In connection therewith appellant presents a further specification of error as follows:

> "Inasmuch as the aforesaid evidence and objections thereto are somewhat lengthy, and in the interest of space, we desire to call the court's attention to the said evidence, objections, and court's rulings thereon, as contained in this brief, beginning at page 10b, line 2, to page 12a, line 4."

An examination of appellant's reference to the matter discloses that such testimony covers 8 pages of the brief, in which may be noted many objections made by counsel for defendant to questions propounded to the witnesses, some of which objections were sustained and others of which were overruled. The entire testimony of the several witnesses from which excerpts are copied into appellant's brief, as heretofore noted, is contained in approximately 40 pages of the reporter's transcript of the evidence received at the trial. Appellant does not point out which of such rulings are considered by him as being erroneous, nor does he furnish this court with either argument or authority to sustain his position as to any of such objections, but contents himself with such a specification of error as is hereinbefore set forth. Such an unsupported generalization with reference to alleged error is not entitled to serious consideration.

[9] Appellant further complains of the action of the trial court in instructing the jury as follows:

> "I instruct you that the admission or admissions made by defendant at the time immediately subsequent to the act committed is not sufficient of itself to find the defendant guilty, and that such admission or admissions must be corroborated by evidence direct or circumstantial of the fact of the act having been committed as charged."

[10, 11] While it is true, as appellant urges, that there is an implied statement of fact contained within the foregoing instruction, in that it is indirectly stated therein that defendant made an admission "immediately subsequent to the act committed," the testimony given by three witnesses, which was not contradicted either by defendant or by any of his witnesses, was to the effect that at a time within two hours after the accident occurred defendant admitted that he was the driver of the automobile in question. The instruction, standing by itself, and without taking into consideration other instructions given by the court to the jury, trenches upon the constitutional provision (section 19, art. 6), which forbids judges to charge juries with respect to matters of fact. But it is a rule, supported by numerous authorities, that in construing a given instruction it must be taken, not as a separate statement of the law applicable to the case, but that its true intent and meaning must be ascertained by considering it as a part of the entire body of instructions. In the instant case, among other instructions, the jury was told that "the jury are the judges of the effect and value of the evidence"; that "the jurors are the sole judges of all questions of fact and of the credibility of witnesses." The jury was also instructed that "the burden of proof is with the plaintiff, and to sustain a verdict of guilty the defendant must be proven guilty beyond a reasonable doubt"; and the jury was further twice instructed, in effect, that, if it believed from the evidence in the case beyond a reasonable doubt that defendant did operate and drive a motor vehicle at a time as alleged in the information, and while he was under the influence of intoxicating liquor, it would become the duty of the jury to find defendant guilty. Futhermore, the jury was given the instruction that—

> "You are the sole and exclusive judges of the weight of evidence and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. With the facts the court has nothing to do. I have not expressed, nor intend to express, nor have I intimated or intend to intimate, any opinion as to what witnesses are, or are not, worthy of credence; what facts are, or are not, established; or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, such expression must be entirely disregarded by you.
>
> "But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge of the facts upon the testimony and other evidence produced here in court. * * *"

It thus appears that, while by inference the judge told the jury that defendant had made certain admissions, the jury was also informed that the burden was on the people to establish such facts beyond a reasonable doubt, and that the jury was the sole judge of the degree of credit to be accorded the witnesses in the case. Moreover, that the court had nothing to do with deciding the facts, or with any inferences which might be drawn therefrom, and that if the court had given expression to anything which would seem to indicate that the court had any opinion with reference thereto, such expression was to be entirely disregarded by the jury. In such circumstances it would seem most improbable that the jury was misled by reason of the inference which might have been drawn by the jury from the criticised instruction to the effect that, as a matter of fact, defendant had made certain admissions.

[12, 13] It is charged that the district attorney who represented the people on the trial of the action was guilty of misconduct which prejudicially affected defendant's rights, and by reason of which a new trial should be granted. The first specification of alleged misconduct by the district attorney consists in the asking by him of a series of questions of one of the young women who was riding in the automobile at the time the accident occurred as to whether or not she had been receiving money from the Ellenas (supposedly referring to defendant's family); also as to whether or not a settlement of any claim by the witness for damages against the Ellenas had been made, or a lawyer had been employed to represent the witness in any proposed action for damages against the Ellenas; and finally whether or not, at a specified time and place in the presence of a certain lawyer, witness had stated that she and her sister and Mitchell (the man who was killed in the accident) were riding in the back seat of the automobile at the time the accident occurred. Manifestly, each of the questions relating to the payment of money to the witness, or the bringing of an action against the Ellenas, was proper for the purpose of showing interest on the part of the witness. The form of the remaining question regarding a statement supposedly contrary to what the witness had previously testified was in compliance with the requirements of the statute where the testimony of a witness is sought to be impeached. Section 2052, Code Civ. Proc. Defendant's principal objection is that the district attorney failed to follow said examina-

tion by calling the lawyer as a witness for the purpose of impeaching the witness of whom the district attorney had asked the question. It may be, however, that a very good reason may have existed for not calling such impeaching witness; for instance such witness may have been ill, or the district attorney may have been unable to subpœna him; or, in this particular case, in view of the fact that the proposed impeaching witness was an attorney at law, the district attorney may have concluded that the communication was privileged and consequently inadmissible. On the other hand, from the fact that the district attorney did not call the impeaching witness it need not necessarily follow that defendant was entirely helpless in the premises. Assuming that defendant had evidence supporting any suspicion which he may have had of bad faith in the district attorney in connection with the matter, it is probable that a record of such evidence tending to show such bad faith might have been made in the trial court and presented in this proceeding for examination by this court. However, there is considerable question as to the propriety of granting a motion for new trial because of misconduct of the district attorney, especially where such misconduct is not accompanied by some error of the trial court in connection therewith. People v. Amer, 151 Cal. 303, 90 Pac. 698; People v. Kromphold, 172 Cal. 512, 159 Pac. 599. But, in any event, although the district attorney in the instant case did not pursue the matter of impeachment by calling to the witness stand the person to whom the witness was supposed to have made the statement, it cannot be presumed from that fact alone that the district attorney was acting in bad faith in laying the foundation for the impeachment.

[14] Appellant next charges that the district attorney was guilty of misconduct in that in the course of his argument to the jury he said:

> "We will look to the testimony to see whether or not the defendant is guilty of the charge made in the complaint. Counsel for the defense says that he is in favor of fairness and of the enforcement of this law; and I ask you, gentlemen of the jury, when he puts the defendant on the stand, in possession of all the facts, and he asks him but a single question, knowing that the rules of evidence and procedure clothe the defendant with protection so that we cannot further interrogate beyond the matter involved in that question—I ask you whether or not counsel is acting in good faith, when he says he is in favor of fairness and the enforcement of the law."

In response to an objection made by defendant's attorney to the foregoing statement and a request that it be stricken from the record, the trial judge in addressing the jury said:

> "Gentlemen of the jury, you will disregard that portion of the argument relative to the testimony of the defendant and the rule relative to his testimony, the same as though it had not been made."

The case of People v. Kromphold, 172 Cal. 512, 159 Pac. 599, is in point. It was there held that, while it was wrong for the district attorney to comment upon defendant's failure to testify upon a particular phase of the case, in view of the fact that upon objection thereto by defendant's counsel the trial judge informed the district attorney that he should not comment on the defendant's omission to testify to any particular fact, and suggested that he be extremely careful in that respect, the jury could not have been influenced to the prejudice of defendant by the statement of which complaint was made. And see, also, People v. Sansome, 98 Cal. 235, 33 Pac. 202; People v. Finali, 31 Cal. App. 479, 160 Pac. 850; People v. Diamond, 57 Cal. App. 162, 206 Pac. 1010. It will be noted that in the instant case, immediately upon the attention of the court being directed to the objectionable matter in the argument of the district attorney, the court instructed the jury to "disregard that portion of the argument relative to the testimony of the defendant * * * the same as though it had not been made." Following the rule laid down in the case of People v. Kromphold, supra, "we cannot hold that the statement (of the district attorney) 'has resulted in a miscarriage of justice.' "

The judgment and the order denying the motion for new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

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68 Cal. App. 69

DOUSKOS v. GILMORE. (Civ. 4839.)

(District Court of Appeal, First District, Division 2, California. July 2, 1924.)

1. Work and labor ⚿28(4)—Testimony that bill represented reasonable value of services rendered was some evidence of reasonable value.

Testimony of defendant mechanic that his bill for repairs on plaintiff's truck absolutely represented reasonable value of services, labor, material, and supplies furnished *held* some evidence that prices charged were reasonable value of services, etc.

2. Appeal and error ⚿1012(1) — Appellate court cannot disturb trial court's conclusion as to preponderance of conflicting evidence.

The appellate court has no power to disturb the conclusion reached by the trial court in deciding the preponderance or weight of conflicting testimony.

3. Pleading ⚷150—One sued for reasonable value of repairs held entitled to set off, without pleading it, expense of remedying defects in performance.

Where in replevin of truck, cross-complaining defendant claimed full performance of his contract with plaintiff to put truck in first class running order for reasonable value of services, and sought recovery on that basis, plaintiff was entitled, without pleading to that effect, to deduct from amount claimed by defendant reasonable charge necessary to put car in first-class running order.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by J. Douskos against J. J. Gilmore, who interposed cross-complaint. Judgment for defendant, and plaintiff appeals. Modified, and, as so modified, affirmed.

Lelia R. Leep, of San Francisco, for appellant.

Arthur Joel, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain possession of an automobile. The defendant appeared and in his answer and cross-complaint set forth facts showing that he had a lien on the automobile for labor and materials supplied in the repair of the car. After a trial before the court sitting without a jury, the trial court fixed the amount of the defendant's lien in the sum of $551.30, the amount claimed in the defendant's answer and cross-complaint. From the judgment the plaintiff has appealed under section 953a, Code of Civil Procedure.

On the trial of the case the plaintiff assumed the burden of proof. He brought forward a bill itemized, and which purported to show the hours of labor put in by the defendant and assistants in making the repairs, and also showing the articles furnished by the defendant and the price charged therefor. For the labor the defendant charged $1.80 an hour, and for the articles furnished he charged the list price thereof.

[1, 2] On his direct examination the defendant, as one of the witnesses called by the plaintiff, testified that the bill absolutely represented the reasonable value of the services, labor, material, and supplies furnished. There was testimony introduced on the cross-examination of the witness and on the examination of other witnesses to the effect that some persons charged $1.50 an hour and some charged $1.80 an hour. There was some testimony introduced to the effect that one engaged in the business of repairing automobiles obtains a discount of 50 per cent. on some of the parts used to replace worn-out parts in making repairs. The appellant makes the point that there should have been evidence introduced to the effect that the prices charged were the reasonable value. The point is not sustained by the record. The testimony given by the defendant was some evidence of reasonable value. The most that can be said in behalf of the appellant's contention is that there was other evidence in the record, which might be considered as breaking down the testimony given by the defendant. However, the conflicts in the testimony were for the consideration of the trial court, and, when it does not appear that the trial court has abused its discretion, this court has no power to disturb the conclusion reached by the trial court in deciding the preponderance or weight of the conflicting testimony.

[3] When the plaintiff sent his car to the defendant to be repaired he called on the defendant, and the oral agreement was afterwards stated by the defendant in giving his testimony. After the two had discussed the condition of the car, the defendant testified that the plaintiff stated to him, "All right, go ahead, and put the car in first-class condition, and when the truck is ready your check is ready." At the time the plaintiff commenced this action, he caused to be placed in the hands of the sheriff a writ authorizing the sheriff to take possession of the car. The sheriff executed the writ, and towed the car to a garage conducted by John Skrine. On the trial of the case the plaintiff called Skrine as a witness. He testified that, when the car was towed into his garage, they heard a noise in the rear end of it. He further testified that he and his assistants took the cover from the rear end, and found the master gear loose, and found some bearings broken in it, and that they replaced them, and also that they took off the old flat top, and that they also adjusted the generator. He further testified that the work which was done in his garage was necessary to put the car in running order. For the services which he performed Skrine charged $20, and there is no dispute but what the charge was reasonable. The appellant contends that the $20 should have been deducted from the amount of the claim of the defendant. To this point the respondent replies that the plaintiff did not plead a claim for the $20. There was no necessity for pleading it. The plaintiff had employed the defendant to put the car in first-class running order. The amount of his compensation was to be the reasonable value. The whole theory of the defendant's case is that he performed his part of the contract, and claimed the possession of the car to secure the charges made by him. But if he had not made the repairs as completely as he agreed to make them he was certainly not entitled to the full amount claimed.

The judgment should be modified by deducting the amount of $20 from $551.30, the sum found due the defendant, and it is so ordered. As modified the judgment is affirmed, and the respondent will be allowed his costs on this appeal.

We concur: LANGDON, P. J.; NOURSE, J.

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67 Cal. App. 784

BLAND v. BOARD OF TRUSTEES OF GALT JOINT UNION HIGH SCHOOL DIST. et al. (Civ. 2768.)

(District Court of Appeal, Third District, California. June 24, 1924. Hearing Denied by Supreme Court Aug. 21, 1924.)

Schools and school districts 🔑133—Election as principal of high school without designation of term held not to entitle him to retain office until removed for cause; "principal."

Plaintiff *held* not entitled to reinstatement as principal of high school on theory that, having been elected as principal without designation of term, he continued to be such unless removed for cause, in view of Pol. Code, § 1609, subd. 5, subsecs. (e), (j), as amended by St. 1921, p. 1664, construed as giving power to board of trustees in such case to elect successor at end of school year whether plaintiff occupied classification as principal as distinguished from teacher, or whether word "principal" includes meaning of word "teacher" as completely as though plaintiff were described as principal teacher; "principal" as an adjective meaning highest in rank, authority, character, importance, or degree.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Application by William Bland for writ of mandate against the Board of Trustees of Galt Joint Union High School District and E. H. Barber and others, as trustees thereof. Judgment on demurrer for defendants, and plaintiff appeals. Affirmed.

Chas. L. Gilmore, of Sacramento, for appellant.

Hughes, Bradford & Cross, of Sacramento, for respondents.

PLUMMER, J. The plaintiff began this action seeking the mandate of the superior court commanding and requiring the defendants to permit the plaintiff to exercise and perform the services of and to reinstate the plaintiff in the use and enjoyment and occupancy of the position of principal of the Galt Joint Union High School. To the plaintiff's complaint the defendants interposed a general demurrer. This demurrer was sustained without leave to amend, and from the judgment entered thereupon the plaintiff has appealed.

The complaint alleges that the defendants above named constitute the board of trustees of the Galt joint union high school district; that for more than nine years last past the plaintiff has been and now is elected by and in the employ of said board of school trustees and their predecessors, and said Galt joint union high school district, as the principal of the Galt Joint Union High School; that said Galt Joint Union High School has been in existence during the said period of time and during the yearly term just preceding the commencement of this action; has employed seven teachers under a principal as the teaching force thereof; and that during the school year just past the plaintiff occupied the position as principal of said school at a salary of $2,800 per annum; that on or about the 27th day of August, 1923, the defendants wrongfully and unlawfully, and without cause, or probable cause, precluded and prevented the plaintiff from performing, and from the right to perform, the services and duties of principal of said high school, and ever since said date have so precluded and now preclude and prevent the plaintiff from performing the duties of said position; that at divers times since said date the plaintiff has demanded of the defendants permission to discharge the duties of said position, but that the defendants have refused and still refuse to permit the plaintiff so to do; that at no time prior to the 27th day of August, 1923, or at any other time, have the defendants, or any of them, preferred any charges against the plaintiff for immoral or unprofessional conduct, incompetence, evident unfitness for teaching, persistent violation of or refusal to obey the school laws of California, or any of the rules prescribed for the government of public schools, and also that the defendants did not on August 27, 1923, or at any other time, hold any public hearing on any charges against the plaintiff; and that said defendants did not and have not precluded nor prevented plaintiff from the use and enjoyment of said office and duties of principal because of abolishing said position or because of a reduction in the number of teachers employed in said high school. It is also alleged in the complaint that on the 27th day of August, 1923, and for many years next prior thereto, plaintiff was and still is the holder of a teacher's first grade state certificate of the state of California, and also of a high school life diploma of the state of California. Does such a complaint state a cause of action?

There is no allegation in the complaint showing that the plaintiff was employed as a teacher; the allegation simply being that he was at some time or other elected principal of the Galt Joint Union High School. There is no allegation as to the date of his election, nor is there any allegation as to the period of time for which he was elected, nor is there any allegation in the complaint that the plaintiff was employed as principal by the board of trustees of said high school district for any particular period, or that any contract was ever entered into between the plaintiff and the trustees of said district fixing or designating the term of the plaintiff's employment. There is no allegation in the complaint showing that the plaintiff was dismissed or removed from his position as principal of said high school during any school year for which he was employed. The allegation simply is that in the month of August, 1923, he was prevented from assuming the duties of such position, and further in the complaint that he had discharged the duties of principal of said high school, and performed the functions of said office during the preceding school year. Based upon the foregoing facts the appellant contends, in substance, that his term of office continues from year to year; that after once being elected as principal, there being no designation as to the term, or, at least, nothing being said in his complaint as to the term of his election, a cause of action is stated, and the plaintiff is entitled to continue teaching until he has been removed for cause, as set forth in subdivision (j) of the fifth subdivision of section 1609 of the Political Code. Section 1609, supra, provides that—

> "Boards of school trustees * * * shall have power and it shall be their duty: First—To employ a principal for each school under their control. * * * Second—To employ the teachers, as provided in part fifth of this section, * * * provided, that no board shall enter into any contract with such employees, other than teachers, to extend beyond the close of the next ensuing school year; except that teachers may be elected on or after May second for the next ensuing school year and each teacher so elected shall be deemed re-elected from year to year except as hereinafter specified; provided, that any teacher who shall fail to signify his acceptance within twenty days after notice of his election or employment shall have been given him by the clerk or secretary of the governing board of the school district, or shall have been mailed to him by such clerk or secretary by depositing such notice in the United States post-office, with postage thereon prepaid, addressed to such teacher at his last known place of address, shall be deemed to have declined the same."

Provision is then made in the section for making payment monthly during the current year instead of during the time when the teachers employed are actually engaged in such services. It will be noticed that in the provision relating to the election of teachers and that they shall be deemed re-elected from year to year except as hereinafter specified, the section, as it stands, amended by the act of the Legislature, approved June 3, 1921 (St. 1921, p. 1664), omits therefrom the following: "* * * Unless the governing body of the school district shall on or before the tenth day of June give notice in writing to such teacher that his services will not be required for the ensuing school year," leaving the section as it now stands amended, absolutely silent as to the exceptions in which the teacher should not be deemed to be re-elected. In other words, the language used in the section has failed to express the full intent of the Legislature concerning the circumstances under which a teacher may or may not be deemed re-elected from year to year.

By the section as now amended there appears an intent on the part of the Legislature to draw a distinction between a principal of a school and a principal teacher. In other words, it would seem to be a question of employment and not of designation under the statutes whether a person is employed as a principal of a school or whether he is employed as a principal teacher of a school. The first clause of the section referred to giving powers to the board of school trustees, provides, as above stated, that the board shall employ a principal for each school under their control. In many districts there manifestly would be only one teacher, and that teacher would necessarily be the principal of said school. Again, we know the practice has been in many schools where two or three teachers are employed, or, perhaps, more than that, one of the persons who also teaches in the school is designated as the principal thereof. The person so designated is called the principal of the school, and he is also a teacher in the school. On the other hand, we can readily conceive of a situation where the school would be so large that it would require the services of one person to act as principal, and that the duties of the position would be such as to reasonably occupy all of his time, and, under such circumstances and under the statute, the board would have authority to employ a person who did not devote any of his time to actual teaching but all of his time to supervision and direction. As the section now reads there is no expression therein from which we can reach the conclusion that a person once elected as principal, and as principal only, could be deemed re-elected from year to year, if, in fact, under the omission of the section which we have above noted, any person could be deemed re-elected to any position from year to year, after having been once so elected by the board of trustees. Again, under the fifth subdivision of the section of the Code with which we are dealing, the board of trustees is empowered to classify teachers as substitute teachers, probationary teachers, and permanent teachers. Subdivision (e) of the fifth subdivision of the section authorizes and empowers the classification of permanent teachers, provided that successful service shall have been performed as teachers in a district employing at least eight teachers, under a principal, who shall devote at least two hours per day to the school or schools under his control. The complaint in this case sets forth that only seven teachers had been so employed, and therefore, if that section is valid, no such classification could exist in the case at bar and the plaintiff is not aided thereby. The constitutionality of this subdivision is challenged by the respondent on the ground that it is special legislation, but, as we do not rest our opinion in this case on that subdivision, we express no opinion as to whether the subdivision challenged is or is not constitutional. Subdivision (j) of the fifth subdivision of said section 1609 grants power to the board of trustees to dismiss in the following language:

> "To dismiss permanent teachers, principals, or supervisors of special subjects, except as hereinafter provided, only for one or more of the following causes, after a fair and impartial public hearing. Causes for dismissal are immoral or unprofessional conduct, incompetence, evident unfitness for teaching, persistent violation of or refusal to obey the school laws of California, or reasonable rules prescribed for the government of public schools."

It is then provided that:

> "Dismissal for cause shall be made only after the following provisions shall have been complied with: The governing board shall give at least ten days notice in writing to any permanent teacher or principal or supervisor of special subjects against whom charges shall have been preferred. * * *"

The section then proceeds to prescribe the manner in which a permanent teacher may have a hearing, may introduce evidence in his own behalf, and then empowers the board of trustees to dismiss a permanent teacher. There is nothing said in the section, or in the subdivision which we are now considering, about dismissing principals or supervisors of special subjects other than simply giving power of dimissal as above stated. No procedure is provided for hearing charges against other than permanent teachers. The procedure set forth in the section relates only to permanent teachers. The subdivision also very carefully sets forth how teachers may be dismissed when the circumstances or conditions of the school no longer require their services. Unless we read into the section words not there used or an interpretation which does not appear in the literal language of the section, there is no procedure pointed out, or method indicated, by which a board of trustees may carry into effect its power to dismiss a principal, who is simply a principal, or dismiss a supervisor of special subjects. The evident intent of the framers of the section under consideration was to make secure the position of persons eligible to be classified as permanent teachers without regard to the tenure of persons classed as principal only and supervisors of special subjects. On the part of the appellant it is contended that in the silence of the section on the subject, or by reason of the omission to provide for the dismissal of a principal, that when once elected a principal the person so elected a principal of any school continues to be such until removed for cause, and for authority to support this contention cites the case of Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042. That case, however, is not based upon section 1609 of the Political Code, but rests upon the provisions of section 1793 of the Political Code, which differ materially in terms, and hence that case is not authority here. Section 1793, supra, provides:

> "The holders of city certificates are eligible to teach in the cities in which such certificates were granted, in schools of grades corresponding to the grades of such certificates, and when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct."

There is nothing of that kind in section 1609 of the Political Code relating to principals, and from what we have said it is also very doubtful if there is anything of the kind which relates even to teachers. In the Kennedy Case the plaintiff was elected a principal teacher, and brought her action and prosecuted the same as a principal teacher, seeking a reinstatement as a principal teacher, and not simply as a teacher.

In 31 Cyc. 173, we find the definition of the word "principal," when used as an adjective, as meaning highest in rank, authority, character, importance, or degree. This is, in substance, also the definition by Webster, and this definition would apply where one was employed as the principal teacher, as appears in the Kennedy Case. From the facts alleged, the plaintiff in this case has no standing as a "permanent teacher," assuming that all of the provisions relating to permanent teachers in the section of the Code under consideration are constitutional. The school in which plaintiff has been engaged has not employed the requisite number of teachers. This brings us again to the subject of dismissal of his standing simply as a principal. As we have shown, there is nothing in the section from which he can be deemed to have been elected from year to year. The procedure for his dismissal is wanting in the section. The power to dismiss is therein given. The power to dismiss for cause is therein given. A reasonable interpretation of this provision of the Code would be that in the exercise of the power of dismissal the board is limited in removing a principal to the causes specified during the term for which he had been elected. In other words, a principal elected for a year, or other period of time, could only be removed for cause during the term and not arbitrarily. This does not mean that at the expiration of the year the board would not have the power to elect somebody else to such position. There being nothing in the statute from which a principal could be deemed re-elected, the reasonable inference would be that a principal might be elected for such period of time as might be agreed upon between the parties, and in the event no term or period has been agreed upon or prescribed, at the expiration of the school year the board of trustees would be at liberty to re-elect or elect a successor to the one who had previously occupied the position of principal of the school over which the board was exercising jurisdiction. It thus follows that whether the plaintiff in this action was occupying the classification as a principal, as distinguished from a teacher, or whether, as contended by respondent, the word "principal" includes the meaning of the word teacher as fully and completely as though the plaintiff were described as principal teacher, the complaint in this action does not set forth facts sufficient to justify a judgment in the plaintiff's favor. The demurrer, therefore, was properly sustained, and the judgment of the lower court is hereby affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

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67 Cal. App. 544

LUITWIELER v. LUITWIELER PUMPING ENGINE CO. (Civ. 4207.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1924.)

Corporations ⟹316(4)—Corporation held estopped by long acquiescence and performance to deny validity of contract with director to exploit machinery patented by him.

Corporation, making agreement with former director by which it was to exploit machinery patented by him, *held* estopped to raise question that majority of directors did not vote therefor, by long acquiescence and performance of the contract, through use of the inventions and manufacture and sale of the products, resulting in acquisition by corporation of all the profit which there was any probability of obtaining thereunder.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by S. W. Luitwieler against the Luitwieler Pumping Engine Company, a foreign corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

W. S. Taylor and E. W. Forgy, both of Los Angeles, for respondent.

CRAIG, J. Prior to the year 1908 a corporation, hereinafter referred to as the California company, was incorporated pursuant to the laws of this state, bearing the same name as appellant, of which respondent was president and a director, and was engaged in the manufacture of pumps and their component parts. Said company then held and utilized the patent rights covering certain inventions of respondent, and a considerable amount of its capital stock was owned by him. In 1908 the corporation taxes were not paid as required by statute, and the charter of the California company expired. Respondent and others incorporated in the state of New York, by the same name, the appellant corporation, hereinafter called the New York company, in which shares of stock were exchanged equally for outstanding shares of the California company, and the respondent was president and a director of the new corporation. Its directorate, in accordance with its articles of incorporation and bylaws, consisted of five directors, and on November 5, 1909, a directors' meeting was held at Rochester, N. Y., at which time but four of said directors were present, which said meeting appears from the minutes to have been an adjourned regular monthly meeting.

Three of the directors present at such meeting, one of whom was respondent, voted in favor of adopting and executing a written contract with respondent—a director other than respondent voting in the negative—reciting that whereas the respondent was the inventor of certain valuable improvements in pumps and pumping engines and analogous apparatus, for which there had been issued five specified patents, and was possessed of certain other inventions for which he had applied for letters patent, all of which the New York company was desirous of acquiring, and the respondent had theretofore granted to the California company exclusive right to make, use, and vend apparatus embodying his several inventions for which letters patent had been issued or applied, it was therefore agreed that the respondent should grant and convey said five patents and other inventions, as well as all inventions which he might thereafter devise as improvements thereon. It is further recited that in consummation of said agreement respondent therewith delivered to appellant a license to be recorded at the patent office. In consideration of such sales appellant therein agreed to create a demand and a market for said apparatus, and to deliver to respondent 193 shares of stock in exchange for a like number of shares in the California company, and one share of common stock for each share of common or preferred stock sold from its treasury, "as payment pro tanto for the rights granted hereby to licensee." Respondent further agreed that he would from time to time file applications for patents on such future inventions as appellant might desire to have protected.

Respondent instituted this action for the collection of $7,421.52 alleged to be due him from the appellant corporation on account of dividends accumulated on shares and scrip certificates described in his complaint.

Appellant filed an answer and cross-complaint, alleging that on the 31st day of July, 1909, respondent was the owner of 549½ shares of said corporation, and that on November 5, 1909, respondent caused the appellant to enter into a contract with him that for each share of capital stock sold and issued to any person, firm, or corporation it would issue one share of common stock to respondent; that appellant was then the owner of the patents and rights described in the complaint, and that it entered into said agreement inadvertently and without consideration; that all of respondent's certificates of stock in excess of 549½ shares were thus illegally obtained, and he had been paid $10,500.36 in dividends on all stock held by him; that $1,458.24 was justly due respondent as dividends upon shares legally issued to him, and that he was entitled to a credit of $919.50 in redemption of 66 shares on January 1, 1921. Appellant prayed judgment against respondent for $8,122.42 alleged to have been overpaid him, and for cancellation of all certificates of stock issued to him pursuant to the agreement mentioned.

As a further defense appellant alleged that on the 5th day of November, 1909, and up to the 7th day of February, 1916, respondent dominated and controlled the affairs of said corporation, and its directors and officers, and that on the date of the contract he caused them to execute the same in consideration of the acquisition of patents which the corporation already owned, and in which respondent had no personal interest; that in pursuance of such agreement, and in payment of dividends to which respondent was not entitled, 859½ shares of common stock were illegally issued to him. Respondent filed an answer to appellant's cross-complaint, which embodied a copy of the contract in question, and denied each of the material allegations, alleging that said agreement was regularly executed, and was entire and complete for mutual and dependent considerations, and that he had at all times fully performed all the conditions and obligations thereof until prevented from so doing by action of appellant's officers on February 7, 1916.

At the trial appellant stated that in addition to failure of consideration, as alleged in its answer, it would further contend that, since only four of the five directors were present at the meeting of November 5, 1909, one voting against the adoption of the contract, respondent's vote was required to constitute a majority, but that, inasmuch as a contract between respondent and the corporation was involved, his vote was illegal, and that the motion therefore was not effectually carried, and the action of the board was void. An order was made that the answer be deemed to have been thus amended and denied.

The trial court found that all of the allegations of the complaint were true, and rendered judgment against the appellant corporation for $7,984.30.

Respondent testified that the California company never owned any of the patents in controversy, but held merely a license to use them; that upon the termination of said company's existence and the organization of the New York company a new contract was executed and operations began at Rochester, N. Y., where his patents were used in the manufacture of pumps; that thereafter he created a new piston and other apparatus, which he prosecuted to patent, and that the corporation received them, and continued to use them up to the time of the trial; he said that the company manufactured from eight of his patents many machines and parts, including a driving mechanism for triplex pumps, "and to the best of my knowledge are using it yet." It appears that in 1916 differences arose between respondent and the officers of the corporation, and that respondent then ceased to be president, but the foregoing testimony stands uncontradicted, and there is no evidence anywhere in the record tending to show that the agreement in controversy was ever questioned by any one until suit was filed. Respondent also testified that he acquired some shares of stock from other persons, and that certificates were sent him through the mails by the company's secretary as late as 1910. He and his transferees voted the shares of stock in question for about seven years, and the corporation has availed itself of the continued use and benefit of respondent's old and new inventions, so far as the record discloses, without interruption from November 5, 1909, during the years that respondent was active in its official management and since he severed connection with its board of directors in 1916.

Appellant's whole defense upon the trial, and its briefs upon this appeal, have been devoted to an attack upon the validity of the directors' meeting of November 5, 1909, and the contract alleged to have been adopted at that time, but aside from its assistance by way of detail we cannot say that the existence of this writing is vital to respondent's cause of action. The trial court found upon the evidence before it that respondent, "pursuant to said contract and at all times thereafter, continued to render and perform all of the services and the consideration in said contract provided"; and that appellant "at all times since has retained and held the same, and that the parties thereto have at all times since continuously acted upon the same as a valid and regular contract of said corporation."

In Standard Oil Co. v. Syle, 164 Cal. 435, 446, 129 Pac. 589, 593, it was said by the Supreme Court:

> "Under clear principles of estoppel that corporation may not now assert the invalidity of a corporate act regular upon its face. The courts have almost uniformly sustained contracts which litigants who have profited thereby have later sought to avoid on the ground that such agreements were executed without proper authority. Such has been the ruling in the following cases: Main v. Casserly, 67 Cal. 128, 7 Pac. 426; Gribble v. Columbus Brewing Co., 100 Cal. 71, 34 Pac. 527; Lawrence v. Johnson, 131 Cal. 176, 63 Pac. 176."

And the same rule was applied in McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927, where it was said:

> "In other words, it is the policy of the law and the endeavor of the courts to hold corporations as well as natural persons to their contracts and make them liable for the obligations they have incurred. * * * The rule is based upon the strongest principles of justice and public policy, that a contract should be enforced against a corporation when it has received the consideration or the benefits of the contract."

It is not contended by appellant that the contract was unfair, or that any defect in the apparatus or the patents ever arose to cause dissatisfaction with its bargain; appellant has retained and benefited by the skill and efforts of respondent devoted to its interests in consideration of reciprocal covenants to which appellant took no exception for many years and until occasion seemed to demand an excuse for refusal to further compensate him.

Long acquiescence and the performance of the contract through use of the inventions, and the manufacture and sale of the products, resulting in the acquisition by appellant of all profit which there is any probability of obtaining thereunder, forbid that the corporation should now escape liability for obligations due under a consummated agreement.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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67 Cal. App. 734

CITY OF GILROY v. KELL et al.
(Civ. 4780.)

(District Court of Appeal, First District, Division 2, California. June 20, 1924. Hearing Denied by Supreme Court Aug. 18, 1924.)

1. Waters and water courses ⟾197—Deeds held admissible to show recognition of water rights possessed by city's predecessor in interest.

In a suit by city to restrain interference with plaintiff's prescriptive right to take water from certain creek, deeds executed by defendant's predecessor in interest 40 years before, transferring lands further up the creek and reserving the right of way and privilege of taking water to plaintiff's predecessor in interest, *held* admissible as showing recognition of the water rights, though not as furnishing notice to defendants.

2. Waters and water courses ⟾138—Pipe line held "usual improvements" as respected adverse possession.

Code Civ. Proc. § 325, which requires a substantial inclosure or "usual improvements," where adverse possession is made under claim of title not written, as applied to a prescriptive right to divert water from a stream, is satisfied by existence of a pipe line.

3. Adverse possession ⟾89—No necessity to pay taxes where no taxes levied and assessed.

Where no taxes are levied and assessed against property claimed adversely under claim of title not written, it is not necessary to show, as is ordinarily required by Code Civ. Proc. § 325, a payment of taxes.

4. Waters and water courses ⟾133—Water permit held not to interfere with vested rights.

A permit of the state water commission, allowing defendants certain water rights "subject to vested rights," did not interfere with the vested rights of plaintiff.

5. Waters and water courses ⟾190—Decree authorizing city to replace pipe line held to give owner no right to compensation.

A decree permitting city to replace its worn-out pipe for diversion of water from a stream with new pipe of the same size did not entitle riparian owner to compensation, where court found burden would be no greater than that already existing by prescription.

6. Waters and water courses ⟾191—Decree establishing city's prescriptive right to enter land to repair water system construed as right to reasonable exercise of license.

Decree establishing city's prescriptive right to enter defendant's land to make repairs on city's water system *held* not to give the city a right to roam over all of defendant's land, but only to enter at reasonable times, in a reasonable manner, upon a direct practical route and for the exclusive purpose mentioned.

7. Easements ⟾53—Easement by prescription implies right to make repairs not injuriously increasing burden upon servient tenement.

An easement by prescription implies the right to make repairs if such repairs do not injuriously increase the burden upon the servient tenement.

8. Easements ⟾53—Owner of easement may make repairs, improvements, or changes not affecting substance of easement.

An owner of an easement cannot change its character or materially increase the burden upon servient estate or injuriously affect the rights of other persons, but within such limits he may make repairs, improvements, or changes not affecting the substance of the easement.

9. Waters and water courses 🔑191—Use of teams to repair city's water system under prescriptive right held not dependent upon previous use of teams.

A city possessing an easement by prescription to enter defendant's land to make repairs on city's water system need not have previously entered the land with teams in order to so enter now.

10. Waters and water courses 🔑191—Owner of prescriptive easement to repair water system may make incidental changes.

A city with a prescriptive right to enter defendant's land to repair the city's water system *held* empowered to make repairs on a dam and erect a settling box where such changes are necessary for the enjoyment of the same and do not increase the burden upon the servient estate.

11. Waters and water courses 🔑197—Decree defining city's prescriptive right to replace worn-out water pipe held not indefinite.

Where a decree specifically stated that city was, by reason of its prescriptive water right, entitled merely to replace its worn-out pipe with new pipe of the same size, and in the same place and in same grade, it was not necessary that the findings and decree state the exact number of gallons of water which the city could take each day.

12. Waters and water courses 🔑190—That débris in water pipe lessened flow of water held not to preclude city from cleaning pipes.

A city which has a prescriptive right to water from a stream has the incidental right to clean away gravel and débris lodged in the intake water pipes, though the flow of water through its pipes is increased.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit by the City of Gilroy against Thomas P. Kell and another. Judgment for plaintiff, and defendants appeal. Reversed in part and affirmed in part.

H. A. Blanchard, of San Jose, for appellants.

John P. Fitzgerald, of San Jose, Walter Fitzgerald, of Gilroy, and Rea & Caldwell, of San Jose, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a decree adjudging that the city of Gilroy is the owner of the right to take water from Uvas creek in the county of Santa Clara, state of California, at a point where it has erected a dam across the same upon certain real property described in the complaint and owned by the defendants. The further provisions of the decree will be discussed hereinafter.

Plaintiff alleged that it was the owner of said right to take water from Uvas creek and also of certain dams and pipe line beginning at the upper end of said dams and running down and along the westerly bank of said stream until it reaches the southerly line of said property belonging to said defendants, and thence to the city of Gilroy, together with the right to enter upon and pass over the lands of defendants for the purpose of maintaining and repairing said pipe line and dams in a clean condition and free from driftwood and obstruction to the flow of the water; that for more than 30 years the plaintiff has maintained said pipe line over the lands of defendants and has taken water from said creek at said point of diversion and has caused the same to run through said pipe line, and has traveled over and across the lands now claimed by said defendant for the purpose of maintaining and repairing said pipe line and dams, and has, during all of said time, entered thereon with teams whenever necessary for the purpose of hauling material thereon to repair said pipe line and dams and during said time has used the gravel from the bed of said creek for the purpose of making said repair; that said use and occupancy has been continuous, uninterrupted, peaceful, open, and notorious with the knowledge of the owner of said land under claim of right and adversely to the whole world; that the uses to which said water has been and now are being put is for irrigation, household, and domestic uses by the inhabitants of the city of Gilroy and that said plaintiff and said inhabitants thereof have no other adequate supply of water or means of obtaining the same; that at the time of the filing of the complaint the pipe line referred to therein was broken and required immediate repair; that defendants have driven and continue to drive the employees of plaintiff from said property and refuse to allow them to enter upon said property for the purpose of repairing said pipe line. It was also alleged that the defendants maintained corrals for hogs upon the borders of said stream, thereby polluting the waters thereof. An injunction was asked, restraining the defendants from interfering with said alleged rights of plaintiff.

Defendants filed an answer and cross-complaint, denying plaintiff's right to take the water of the creek, admitting its ownership of the dams and pipe line, but alleging that these were constructed upon the property by permission of the predecessors in interest of defendants; and denying that plaintiff had any right to enter upon said land for the purpose of maintaining or repairing said dams or pipe line, or for the purpose of keeping the stream in and about said dams and pipe line free from driftwood or any obstruction to the flow of the water, save and except by permission of defendants. It is alleged that the use and occupancy of the said land by the plaintiff has always been by permission of defendants and their predecessors and not adversely to said owners, and with the understanding that any water taken from said creek over and across said real property should be taken subject to the riparian rights of the owners of the land. The cross-complaint denies interference with the employees of plaintiff while engaged in the necessary repairing of the pipe line. It is also alleged that the plaintiff has never paid any taxes levied or assessed against said real property or any portion thereof, but that the defendants and their predecessors in interest have always paid the same; that plaintiff has never inclosed any portion of said real property with any substantial inclosure or any inclosure, and that plaintiff's entry upon said property was not under color or claim of title or founded upon a written instrument, but was with the permission of the owners of the land; that plaintiff is not the owner of any lands riparian to said Uvas creek and its use of the water of said Uvas creek is subject to the riparian rights of the defendants. It is also set forth that defendants are riparian owners along said Uvas creek and entitled to a reasonable use of the waters of said creek for household and irrigation purposes; that the state water commission of the state of California had issued to defendants its permit granting to defendants, subject to vested rights, "that the amount of water diverted by her should be on the basis of one cubic foot per second, continuous flow, to 80 acres of irrigated land, and that water may be diverted to the full capacity of the ditches to be constructed for such time during any thirty days period as to result in an amount equivalent to said continuous flow allowance"; that any and all rights of plaintiff, are subject and subordinate to the rights granted to defendants under said permit of the said state water commission of the state of California; that plaintiff threatens to change and alter the construction, course, level, grade, and location of its pipe line and dams now upon said property and thereby will take all the waters of Uvas creek, or far in excess of the amount of waters of said creek to which they may be entitled and will thereby deprive defendants of the waters of said creek, Defendants then set out various reasons why any change in the construction of the pipe line would irreparably injure them, and prayed that the court determine the rights of the respective parties to the action, declare that the rights of plaintiff are subject to the rights of defendants as set forth and alleged in the cross-complaint and that the plaintiff be enjoined from committing the acts complained of by defendants. The answer to the cross-complaint denied practically all of its allegations, and after hearing a large amount of evidence, the trial court found: That the rights of the plaintiff were, substantially, as alleged in its complaint and that for more than 20 years last past plaintiff has maintained said pipe line over said lands of defendants and has taken water from said creek at said point of diversion and has caused the same to run and flow through said pipe line and has traveled over and across the lands of defendants for the purpose of maintaining and repairing said pipe line and dam, and has, during all of said times, entered thereon with teams whenever necessary for the purpose of hauling materials thereon; that said use and occupancy has been continuous, uninterrupted, peaceful, open, and notorious with the knowledge of the owners of said land, under a claim of right and adversely to the whole world during all of said times; that during said time the said city of Gilroy used all the water of said Uvas creek with the exception that in flood times great quantities flowed over and across said dam, and in the summer months a small quantity of water seeped through the bottom of said dam and appeared in small pools at certain distances below the said dam; that in the year 1901 Catherine Dunne, the then owner of the real property now owned by defendants, and defendants' predecessor in interest, granted to plaintiff the right, in writing, to rebuild said dam as it is now constructed and the pipe line as it is now installed, with the express understanding and provision therein contained that nothing contained in said agreement should prevent the said city of Gilroy from diverting from the said Uvas creek a volume of water equal to the capacity diverted before the reconstruction of said dam and pipe line; that before said written instrument, and since about the year 1870, plaintiff had diverted and used all of the water of said Uvas creek, except that in flood time a large amount of water in said creek was not used by it, and during the summer months a small amount of water seeped down through the gravel of the creek in the bed of the dam as then constructed, and reappeared below in pools for a short distance below said dam; that at the present time the said upper dam and the said pipe line herein referred to are out of repair, and that unless the same are immediately repaired the city of Gilroy and the inhabitants thereof will be without an adequate supply of water and thereby irreparable injury will be occasioned to plaintiff; that the said pipe line is rusted and broken and that it is necessary to replace the same entirely as the same is now constructed through the property of said defendants; that plaintiff has the right to enter upon the lands of defendants for the purpose of replacing said pipe and laying new pipe for the entire length of said pipe line across the lands of defendant provided said pipe is replaced with the same size of pipe as is now laid on said land and in the same place and upon the same grade as the same is now laid, coupled with the right to do all necessary work and make all necessary excavations for accomplishing said purpose, and also has the right to repair the southerly end of said dam in the manner hereinafter set forth.

With reference to the dam, it was found: That the said upper dam across said Uvas creek has developed many leaks along the bottom and has been damaged at the southerly end thereof where the high water has washed away the dirt bank. The accumulation of gravel about the dam has rendered the valve in the clean-out pipe inoperative, and has recently greatly reduced the efficiency of the fourteen-inch diversion pipe from said dam. That it will be necessary, in order to remedy this condition and to allow plaintiff to divert the water to which it is entitled, to protect the free flow of water into its said diversion pipe immediately above said dam and to prevent the accumulation of sand and gravel and other obstructions to such free flowage, and it also has the right and it is its duty to protect the water taken from said Uvas creek for the use of its inhabitants from contamination and impurities, and to that end it is necessary to construct and maintain an open box around the intake of the clean-out pipe and also for the purpose of permitting the free operation of the valve in the clean-out pipe and also for the purpose of maintaining a body of clear and pure water around the intake of the diversion pipe; that in order to prevent the deposit of sand and gravel in the open box above described, it is necessary that the top of the box should be covered with heavy planking placed at the level of the bottom of the spillway in the dam so that all sand and gravel moving in the creek during flood waters will be carried through the spillway and deposited along the bed of the creek below the dam. That it is necessary to remove a part of the gravel bank which has accumulated immediately above the dam during flood waters; that it is necessary after the forebay has been cleared of said gravel that there should be constructed upon the bedrock on the up-stream side of said dam a settling box of redwood cribbing, with a concrete foundation eight inches at the top in the shape of an equilateral triangle each side thereof being sixteen feet in length. Further details relating to the construction of the settling box are then set forth in the findings of the court, and it is found: That said above repairs and replacements will cause no injury to defendants or their land and will be no greater or different burden upon said servient tenement than the dam and construction as it now exists and has existed during all the times mentioned herein; that said construction and said repair will not allow plaintiff to divert any more water than that to which it is entitled as herein found and will not prevent, and is not intended to prevent the water in summer time from seeping through the bed of the creek in and above the dam as it has done in the past; that after the making of said repairs the condition of the defendants' land and the amount of water available for defendants' use will not be materially changed from present and past conditions.

Appellants' first objection is to the finding that the city of Gilroy has a right to use the gravel of the stream for the purpose of making repairs and the portion of the decree based thereon. Appellants contend that the evidence does not justify this finding, and they are probably correct in this contention. However, the respondent has stated that it is willing to waive this right and will consent to an amendment of the findings and decree to this extent. It is unnecessary, therefore, for us to discuss the matter further.

[1] Appellants object to the introduction in evidence of two deeds from Catherine Dunne, their predecessor in interest, to Parr and McLeon, dated and recorded on February 19, 1881. At this time Catherine Dunne was the owner of the Kell property and the lands transferred were further up the stream. Mrs. Dunne reserved in both deeds the right of way and privilege of taking water from the Uvas creek to Gilroy Water Company, the predecessor in interest of the plaintiff. This was evidence that as early as 1881 it was recognized that Gilroy Waterworks had some rights and that Mrs. Dunne was protecting herself when deeding lands up stream to other parties. True, these deeds would not be in the chain of title to the Kell property and would not furnish notice to appellants of the contents thereof. They were immaterial for that purpose, but they serve another purpose in the record as before indicated, and their admission was not error.

[2] It is contended that the plaintiff could not establish its right to the water by adverse possession (section 325, Code Civ. Proc.) without proving that its pipe line was protected by a substantial inclosure, which it was found by the court did not exist; and without proving that it had paid all taxes levied and assessed against the property claimed by it.

Section 325, Code of Civil Procedure, requires a substantial inclosure or usual improvements, and it appears that the usual improvements connected with a right to take water from the creek were placed upon the premises in the form of a pipe line. The right to divert water from a stream, in its very nature, cannot be protected by a substantial inclosure, and if the usual improvements connected with the enjoyment of such an easement are made, the statute is satisfied. Daniels v. Gualala Mill Co., 77 Cal. 300, 304, 19 Pac. 519; Allen v. McKay & Co., 120 Cal. 338, 52 Pac. 828.

[3] As to the contention that the plaintiff should have paid the taxes upon its ease-

ment, it appears from the record that no taxes were ever levied or assessed against the same. The statute requires the payment of such taxes as are levied and assessed against the property, and where none are levied or assessed, there is no requirement to pay them to establish adverse possession. 1 Cal. Jur. p. 601, § 74; Frederick v. Dickey, 91 Cal. 358, 27 Pac. 742; Elliott v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; Monroe v. Pleasants, 41 Cal. App. 139, 182 Pac. 330; Oneto v. Restano, 78 Cal. 374, 379, 20 Pac. 743; Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. 804.

[4] Appellants rely upon the permit of the state water commission allowing her to take a certain quantity of water from Uvas creek for irrigating her land. This permit itself stated that it was given "subject to vested rights," and in the proceedings before us upon appeal it was found that the plaintiff had certain vested rights and the permit granted to defendants did not even purport to interfere with these rights.

[5] Appellants state their positon to be that they are entitled to compensation for any water taken by the plaintiff from Uvas creek in excess of what was diverted by the old dam in 1900. This contention is answered by the findings of the court that the repairs to the pipe line authorized by the findings and decree will cause no greater burden upon said servient tenement than the dam and construction as it now exists and has existed during all the times mentioned in the findings; that said construction and said repair will not allow plaintiff to divert any more water than that to which it is entitled; and that after the making of said repairs the condition of the defendants' land and the amount of water available for defendants' use will not be materially changed from present and past conditions. There is evidence in the record to support these findings, and the decree merely permits plaintiff to replace its worn-out pipe with new pipe of the same size as is now laid upon said land and "in the same place and upon the same grade as the same is now laid."

[6-9] Complaint is made of the finding that the plaintiff has the right to enter upon the land of defendants for the purpose of maintaining and repairing its pipe line and keeping the stream in and above the dam in a clean condition and free from driftwood and gravel; that said right to enter includes the right to enter with teams and wagons for the purpose of hauling materials thereon for the purpose of repairing and maintaining said dam and pipe line. It is contended that this finding is too general and uncertain and should have defined and limited the road that the plaintiff must take in entering to make its repairs, and also that the evidence does not show that the plaintiff ever did more than to enter and clean out leaves in the stream, and that the record does not disclose that it ever exercised a right to enter with teams upon the property. With reference to the first point, since the finding is that plaintiff has the right to enter for the purpose of making repairs, of course, plaintiff has no right to roam all over the property as the appellants seem to fear, but must be held to a reasonable exercise of the license. The finding does limit the entry when it provides for an entry simply to make repairs; that means an entry at reasonable times, in a reasonable manner, upon a direct practical route and for the exclusive purpose mentioned. We do not think it is necessary that the plaintiff should have entered previously with teams in order to maintain its right to so enter now. If the repairs heretofore required for the water system did not require the use of teams, that circumstance should not make it necessary for the plaintiff to send its men in on foot when the ravages of time make it necessary to use large amounts of material in making necessary and proper repairs. An easement by prescription implies the right to make repairs if such repairs do not injuriously increase the burden upon the servient tenement.

> "Every easement includes what are termed 'secondary easements'; that is, the right to do such things as are necessary for the full enjoyment of the easement itself. But this right is limited and must be exercised in such reasonable manner as not to injuriously increase the burden upon the servient tenement." North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69.

In the instant case, it was found that the exercise of this right as permitted by the decree would not increase such burden.

> "It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance." Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922.

See, also, Pico v. Colimas, 32 Cal. 578, 581.

[10] These authorities answer the objections made to the portions of the decree permitting repairs to the dam and the erection of the settling box. These are incidental changes which do not change the substance of the easement of the plaintiff and which are necessary for the enjoyment of the same and do not, according to the findings, increase the burden upon the servient estate.

[11, 12] Appellants call attention to pages of testimony of the city engineer indicating changes which he contemplated making in the grade and size of the water pipes, all of which is immaterial and utterly beside the questions involved upon this appeal, since the findings and decree specifically state that the plaintiff is entitled merely to replace its

worn-out pipe with new pipe of the same size as is now laid upon said land and in the same place and in the same grade. We do not think it is necessary, as repeatedly urged by appellants, that the findings and decree should state the exact number of gallons of water which the plaintiff may take each day, in view of the facts found by the court. If the pipe line is replaced in every particular as it has existed for many years, obviously, the city will continue in the future to take the amount of water it has taken in the past, and it was so found by the court. True, if the intake pipes are allowed to fill with gravel and débris, the city will secure less water, and defendants rely upon this condition to increase their own rights; but we have seen from the cases herein cited that the city has a right to clear away these impediments to its water supply as it becomes necessary to do so, and having this right, it follows that the circumstance that at any particular time the gravel may have partially impeded the flow of water into the pipes cannot deprive plaintiff of its right to clean and protect its pipes merely because after the cleaning the flow of water is increased. Obviously, if the gravel did not interfere with the flow of water, and its removal did not increase the water supply, there would be no reason nor necessity for the incidental privilege attached to the easement of removing the same.

There are no other matters which require discussion. The portion of the decree which declared that the plaintiff is the owner of the "right to use gravel in said creek for repairing said dam and pipe line" is reversed; the remainder of the decree is affirmed, the respondent to recover its costs upon appeal.

We concur: NOURSE, J.; STURTEVANT, J.

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67 Cal. App. 631

PEOPLE v. JENKINS. (Cr. 1101.)

(District Court of Appeal, Second District, Division 1, California. June 9, 1924.)

1. Arson ⟹37(3)—Evidence held insufficient to show ownership, as alleged in indictment, of house burned.

Evidence *held* insufficient to prove that defendant burned a house which was property of person named as owner in indictment or of any known person.

2. Criminal law ⟹517(4)—Admission of defendant's confession in prosecution for arson without proof of corpus delicti held error.

In prosecution for arson, admission of defendant's confession was error, where it was not proved that fire was of incendiary origin, or that house burned was property of person named in indictment.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Guy J. Jenkins was convicted of arson, and he appeals. Reversed.

Marcus W. Robbins and Edward H. Whelan, both of San Diego (A. Thomas Whelan, of San Diego, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was tried before a jury and found guilty of arson in the second degree as charged in the information. By the judgment he was sentenced to be confined in the state prison. The defendant appeals from the judgment and from the order denying his motion for a new trial.

[1] The information charged that the defendant on the 5th day of October, 1923, in the county of San Diego, did, with intent to destroy, willfully, etc., set fire to and cause to be burned a certain building, to wit, a dwelling house known as 3290 Wabash avenue, situated in the city of East San Diego, in said county; said building being then and there the property of one Emma R. Jenkins. The evidence shows that the house was located on lot 7 of block H in Montclair addition in East San Diego. The defendant and Mrs. Jenkins were husband and wife. On the 18th day of September, 1923, in an action of divorce between said husband and wife, an interlocutory judgment was entered to the effect that the plaintiff, Mrs. Jenkins, was entitled to a divorce from the defendant; that at the expiration of one year from the entry of the interlocutory judgment a final decree be entered dissolving the marriage, "and that she be awarded the control and custody of * * * their minor child; that she be decreed that part of lot 9, block H, Montclair addition, East San Diego, Cal., belonging to defendant, and the equity belonging to Guy J. Jenkins, the defendant, in Pacific Building Company in lots 7 and 8, block H, Montclair addition, East San Diego, Cal." The evidence shows that at some time prior to the divorce action the defendant and Mrs. Jenkins had lived in said house, which was a one-room shack of the value of about $60. The evidence further shows that after said proceedings in the divorce action the house was occupied by the defendant alone. There is no evidence of the ownership of the house and lot or that, at the time of the entry of the interlocutory judgment, or at any other time, the defendant had any equity or other right or title to said premises. For aught that appears, he may have been a mere squatter on the land or a tenant at will of the owner; or his "equity," if any he had, may have expired before the time of the fire. We are of the opinion that the evidence is insufficient to prove that the defendant burned a house which was the property of

Emma R. Jenkins, or, indeed, of any known person.

A sister of Mrs. Jenkins testified that about the last of September or the first part of October she had a conversation with the defendant, wherein the defendant said that he was going to set fire to the house and burn it down. It appears from the testimony of witnesses that at about noon of October 5th the defendant went with one C. J. Beach, who operated a Ford truck, and took from said house all of the personal property therein, except an old couch and two suit cases. The house did not contain electric wiring or any gas, kerosene, coal oil, or gasoline. Mr. Beach, called as a witness for the state, testified to these facts, and further stated that he remained with the defendant during all of the time while they were at the house, and that the defendant did not light any matches, nor burn any brush, nor start any kind of a fire while they were there. On leaving the premises they took to a second-hand store the furniture that had been put into the truck, and the defendant sold it to the second-hand dealer.

The second-hand dealer testified to the transaction with the defendant and stated that the defendant remained there at his store about three-quarters of an hour.

The time of the fire, as compared with the time when defendant and the drayman left the house, was established by two witnesses for the people. They lived in the neighborhood, and they agreed that it was about one hour after defendant left the premises when they noticed that the house was on fire. It was in flames, and burned down very quickly. There is no evidence that the defendant returned to the premises after he and Beach drove away in the truck.

Other than a so-called confession, to which we will now refer, the foregoing is substantially all of the evidence on which the state relies to prove that the fire was of incendiary origin, or that it was set by the defendant.

On the 12th of December, 1923, one Frank A. Wisler, a detective employed by the district attorney's office, arrested the defendant and took him to the detective's office. According to the testimony of Wisler and others Wisler there obtained from the defendant a statement which was reduced to writing. In that statement, signed by the defendant, it is said that after selling the goods at the second-hand store, the defendant went back to the house and set it on fire. The defendant objected to the use of this alleged statement or confession, and to the testimony that he had made such a confession, on the ground, among others, that there was no proof of the corpus delicti, and that there was no proper foundation laid. Wisler had testified that at the time of obtaining the statement no threats were used and no promises or offers of reward were made in order to secure the statement from the defendant. He admitted, however, that he told the defendant, among other things, that he had certain evidence, and asked the defendant "if he wanted to tell the truth about the matter, or if wanted his word to stand as it was." The defendant had denied that he knew anything of the burning of the house. "I told him if he thought better to lie to use his own judgment, and I showed him what evidence we had." Again: "I kept repeating about using his own judgment, if he thought best to lie, to lie; if he thought better to tell the truth, to tell the truth; that I was in a hurry, I could not wait for him, and I had to go." Thereupon, according to the witness, the defendant made the statement which was reduced to writing.

[2] Assuming, without deciding, that the evidence was sufficient to justify the court in determining that the confession was admissible as against the objection that it was not voluntary, we think that it should have been excluded, because there is no separate and independent evidence tending to establish the corpus delicti. It was not proved that the fire was of incendiary origin or that the house in question was the property of Mrs. Jenkins. People v. Vertrees, 169 Cal. 404, 408, 146 Pac. 890; People v. Simonssen, 107 Cal. 345, 40 Pac. 440; People v. Saunders, 13 Cal. App. 743, 747, 110 Pac. 825. It is true that in some of the cases it has been held that slight evidence is sufficient to overcome the legal presumption that the burning of a building was accidental. Such evidence, however, should be of more substantial character than that produced in this case.

The judgment and order are reversed.

We concur: HOUSER, J.; CURTIS, J.

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68 Cal. App. 13

REARDON v. SPRING VALLEY WATER CO.
(Civ. 4885.)

(District Court of Appeal, First District, Division 2, California. June 28, 1924. Hearing Denied by Supreme Court Aug. 25, 1924.)

1. Courts ⚷91(1) — Limitations by Supreme Court on rule of turntable cases binding on District Court of Appeal.

District Court of Appeal is bound by limitations imposed by prior decisions of Supreme Court on scope of doctrine of "turntable" cases.

2. Negligence ⚷39—Death of child drowned in reservoir held not actionable.

Doctrine of turntable cases *held* not to impose liability on water company for death of 5 year old boy, drowned by falling from unfastened row boat, maintained by company in its unguarded reservoir, on its private property in populous part of city.

Appeal from Superior Court, City and County of San Francisco; Walter C. Herzinger, Judge.

Action by C. W. Reardon against the Spring Valley Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; LAWLOR and SEAWELL, JJ., dissenting.

Edwin V. McKenzie, of San Francisco, for appellant.

H. S. Young, of San Francisco (B. F. Rabinowitz, of San Francisco, of counsel), for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him entered after a demurrer had been sustained to his complaint, without leave to amend. The complaint alleged that on March 8, 1923, the defendant, Spring Valley Water Company, owned and maintained a large and deep body of water contained in a large artificial reservoir in the immediate vicinity of Holly Park, in the city and county of San Francisco, Cal.; that the said reservoir and the sides and embankment thereof were at all of said times visible to passers-by in the street immediately surrounding same, and said reservoir is located in a residential neighborhood; that many hundreds of children reside in said neighborhood; that this reservoir was immediately surrounded by public streets and highways, contiguous and adjacent thereto, where children of tender years were accustomed to resort for play; that said reservoir and grounds were partly protected by a fence, but that said fence was inadequate to prevent children from entering said reservoir grounds, because said fence was dilapidated and contained many large holes and openings of sufficient size to permit ingress to and egress from said grounds of said children; that at said times defendant maintained on this reservoir a small rowboat which floated upon the water along the side of a platform or wharf and was unsecured by any means; that said reservoir, grounds, landing, and boat so floating on the water constituted an attraction of extreme danger to children of tender years; that at all of said times many children of tender years, not knowing or realizing the danger, made use of said holes and openings in the fence, entered the grounds, and played in, on, and about said rowboat; that the defendant well knew all of these facts, but, nevertheless, failed to protect or guard its grounds by a watchman or by any other means; that the defendant, in disregard of its duty, carelessly, negligently, willfully, and wantonly permitted said reservoir and grounds to remain unguarded and said attractive rowboat to remain unsecured and unprotected; that on said 8th day of March 1923, the minor son of plaintiff of the age of five years, by reason of said negligent acts and omissions of defendant, entered said grounds through a large hole and opening in the defective fence, and, being attracted to said unsecured boat, boarded it, floated out on said water, and fell from said boat and was drowned. A demurrer was sustained to the complaint and judgment entered for the defendant.

Appellant opens his argument by stating that the general rule is that the owner of real property owes no duty of ordinary care to a trespasser, but that a well-grounded exception to this rule exists in the doctrine relating to nuisances attractive to young children. This statement is concurred in by the respondent, which admits that the doctrine of the "turntable" cases has been adopted and consistently followed by the courts of this state. It is further agreed between the parties to this appeal that there is a conflict among the decisions of the courts of the different states in this country upon the question of how far this doctrine shall be extended, and as to the nature of the cases which should come within its proper scope.

[1, 2] Appellant maintains that the California cases do not restrict the doctrine of the "turntable" cases to accidents arising out of dangerous machinery. In the case of Barrett v. So. Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186, the court speaks of the doctrine as applying to "dangerous and attractive machinery." In the case of Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, it was held that the rule of the "turntable" cases was not confined to turntables, "but applies to any attractive and dangerous machinery so placed." In the case of Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 56 Am. St. Rep. 106, the court refused to extend the rule of the "turntable" cases to death by drowning, declaring that "the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land had erected on it dangerous machinery." Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379, refused to extend the "turntable" doctrine beyond the limits defined in Peters v. Bowman, supra. George v. Los Angeles Railway Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184, limits the doctrine to injuries caused by "dangerous machinery." Other cases have extended the rule somewhat. Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700; Faylor v. Great Eastern, etc., Mining Co., 45 Cal. App. 194, 187 Pac. 101. However, it may be conceded that recovery may be had in cases where accidents occur to young children through attractive nuisances which are not, technically, "dangerous machinery," without aiding the appellant in the least in the instant case. Able counsel, upon both

sides, have so clearly and exhaustively briefed this case that it is a temptation to discuss the abundance of material upon the subject which they have presented to us. It would seem idle, however, to indulge in a historical treatment of the doctrine involved and its ramifications in the various jurisdictions, or to enter into a discussion of the various situations embraced within the operation of the rule, because there has been, in this state, an express and definite exclusion from the operation of the rule of the case where a child of tender years meets death by drowning in a natural or artificial body of water upon unfenced and unguarded private property, and we are bound by the limitations of the rule in our own state clearly stated in two cases precisely in point. Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 56 Am. St. Rep. 106, and Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 Pac. 414.

In the case of Peters v. Bowman, supra, an artificial pond existed on defendant's land; children played upon it and the defendant had knowledge of these facts. The decedent a boy of 11 years, had frequently played on the pond, and on the particular occasion constructed a raft from which he fell into the water and was drowned. The court said:

> "It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philosophy of the rule *ought* to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing as in ponds and lakes, or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all, and there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall. However, general reasoning on the subject is unnecessary, because adjudicated cases have determined the question adversely to appellant's contention. No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation; while it has been repeatedly held that in such a case no damages can be recovered."

On the direct authority of the case from which the foregoing quotation is taken, the court, in the case of Polk v. Laurel Hill Cemetery Association, supra, which likewise involved a death by drowning in an artificial pond on private property, declared that there was no liability, using the following language, which is pertinent here:

> "A pond of water, it may be conceded, is always attractive to youngsters, but the dangers connected with, and inherent in a lake or pond of water, natural or artificial, are obvious to everybody—even to a child old enough to be permitted by its parents to go about and play unattended upon the streets or in the public parks. It would not conform to the dictates of common reason to say that a child of the age of eight years, or even much younger, does not know and fully realize that a fall into a pond of water or a deep reservoir would result in injury to him, if not in his death. But there is no necessity for abstract reasoning upon the proposition, for we think it thoroughly settled by the decisions that a pond of water, whether natural or artificial, is not to be included in the same class with turntables and other complicated machinery, the inherent dangers of which are not obvious to a child."

The strongest case in his favor cited by appellant is the case of City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114. This case seems to be squarely opposed to the rule in this state, as expressed in the cases cited in this opinion. Not only is it without value here as a precedent, for that reason, but it has been called to the attention of our Supreme Court and rejected as contrary to the view of that tribunal. In the opinion denying a rehearing in the case of Peters v. Bowman, supra, it was said, referring to the case of Pekin v. McMahon, supra:

> "I can only say that the reasoning of the opinion in that case has failed to convince me, and that the decision stands alone and without other support than may be found in the turntable cases from which the Supreme Court of Illinois was unable to distinguish it. I think, however, that there is a distinction which relieves us of the necessity of extending an exceptionally harsh rule of liability to such a case."

Therefore, in the light of the precedents binding upon this court, there is only one possible theory upon which appellant can recover, and that is that the single additional feature of an unsecured floating boat entirely removes the case from the application of the settled rule in California. To take respondent's striking presentation of the matter: If a child of the age of appellant's son, while trespassing on private property, is attracted to an artificial pond and falls in and drowns, there is no liability; if the same child, attracted to the same pond for the purpose of fishing, loses his balance and falls into the water and is drowned, there is no liability; if the child, while swimming in the pond, is drowned, there is no liability; if he constructs a raft and uses it upon said pond and falls from it and is drowned, there is no liability under the authority of the California cases cited therein. Can it be that if he falls from a rowboat left upon the water by the owner of the property and is drowned a different legal principle is involved? We think there is no reason for a different rule in the instance last mentioned and an examination of the following authorities will indicate that there is no change in the principle to be applied, because a child was drowned after falling from a floating object placed in the water by the owner of the property. Blum v. Weatherford, 121 La. 298, 46 So. 317; Rallo v. Heman Construction Co., 291 Mo. 221, 236 S. W. 632; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Bowman v. Omaha, 52 Neb. 293, 72 N. W. 316, 40 L. R. A. 531, 66 Am. St. Rep. 506; Cooper v. Overton, 102 Tenn. 211, 52 S. W. 183, 45 L. R. A. 591, 73 Am. St. Rep. 864; Barnhart v. Chicago, etc., R. R. Co., 89 Wash. 304, 154 Pac. 441, L. R. A. 1916D, 443; Smith v. McGoldrick Lumber Co., 214 Pac. 819; Robbins v. City of Omaha, 100 Neb. 439, 160 N. W. 749.

The cases last cited involved situations where young children fell from rafts or logs into an unfenced body of water upon private property. We think that upon neither reason nor authority can the instant case be differentiated in principle from the cases of Peters v. Bowman, supra, and Polk v. Laurel Hill Cemetery Association, supra.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(67 Cal. App. 640)

COVINA UNION HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. McCLELLAN, Chairman of Board of Supervisors. (Civ. 4706.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1924. Hearing Denied by Supreme Court Aug. 7, 1924.)

1. Schools and school districts 🔑97(4)—Ballots not marked as required not entitled to be counted as "votes" in determining whether bond issue carried; "vote cast."

Under Pol. Code, § 1745, providing that an election to create bonded indebtedness of a high school district shall be according to sections 1596–1601, and that voters shall mark cross after answer they desire to give, and section 1599, as amended by St. 1917, p. 15, and section 1883, relating to the manner of marking ballots, ballots in such an election, void because marked in violation of statute, were not valid for purpose of increasing total number of votes in determining whether the proposition received two-thirds of votes cast under section 1746, and Const. art. 11, § 18; void ballot, although being placed in box, not being "vote cast."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Votes Cast.]

2. "Void acts" defined.

Void, as distinguished from voidable acts are those which are of no legal effect.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Void.]

3. Elections 🔑186(4) — Statutory specifications of manner of expressing choice mandatory.

The specifications in Pol. Code, §§ 1745, 1883, and section 1599, as amended by St. 1917, p. 15, as to manner in which electors shall express their choice, are mandatory.

4. Schools and school districts 🔑97(4) — "Two-thirds of the votes cast" at bond election held to mean two-thirds of votes complying with law.

Provision of Pol. Code, § 1746, relating to elections to create bonded indebtedness in high school districts, and providing that, if "two-thirds of the votes cast at such election" were in favor of issuing bonds, they shall be deemed to have carried, means two-thirds of those votes which comply with law and are potent in expressing choice on subject of election.

Petition by the Covina Union High School District of Los Angeles County for a writ of mandate to be directed to R. F. McClellan as Chairman of the Board of Supervisors of Los Angeles County. Writ granted.

Edward T. Bishop, Co. Counsel, of Los Angeles, and J. H. O'Connor, Asst. Co. Counsel, of Hynes, for petitioner.

Thomas B. Reed, of Los Angeles, for respondent.

CRAIG, J. Petitioner seeks a writ of mandate requiring the respondent as chairman of the board of supervisors of Los Angeles county to execute certain school bonds authorized by the board pursuant to an election held October 11, 1923, in Covina union high school district, for the purpose of determining whether or not an indebtedness of $200,000 should be created, and such bonds issued therefor.

[1] The only question presented is whether or not eleven defective ballots, admittedly not entitled to be counted for or against the bonds, and which were rejected, should be included in the total number of votes cast. Fourteen hundred and ninety-three persons deposited in the boxes ballots furnished them at the election; each ballot was properly printed, and bore the words "Yes" and "No," with a small square space opposite each word, in which electors should "mark a cross with pencil, ink, or rubber stamp after the answer they desire to give," as required by section 1745 of the Political Code. One of the rejected ballots bore a cross in each space, and the other 10 contained no crosses, but the word "Yes" or "No" was written in the space provided for the cross. Nine hundred and ninety-one ballots properly prepared with the cross were cast in favor of the bonded indebtedness and 491 in the negative, amounting to the total number of 1,482 ballots, after excluding the 11 votes which the respondent concedes should not be counted on either side.

Petitioner's contention is that, inasmuch as the 11 ballots in controversy could not be included among the majority or the minority, they were ineffectual for any purpose. The respondent refused to execute the bonds upon the ground that, although 11 ballots were illegal, and did not express a choice either way, yet they were *cast*, and should be added to the 1,482 votes legally cast. Hence it is computed that 1,493 persons voted at the election, and that 998 affirmative votes were required to constitute the necessary two-thirds of the qualified electors voting at such election, as provided by section 18, article 11, of the Constitution.

Section 1745 of the Political Code provides that an election for the creation of a bonded indebtedness in a high school district shall be conducted in conformity with sections 1596 to 1601, inclusive, of that Code, and that "electors voting at such elections shall mark a cross with pencil, ink, or rubber stamp, after the answer they desire to give." Section 1599, as amended by St. 1917, p. 15, requires that "in casting his vote the elector must stamp or write a cross in the square space immediately following the name of the candidate. * * *" Section 1883 also provides that "Persons voting at such bond elections shall put a cross (x) upon their ballots, with pencil, or ink, after the words 'Bonds—Yes' or 'Bonds—No' (as the case may be) to indicate whether they have voted for or against the issuance of bonds." Section 1746, Political Code, provides that, "if it appears that two-thirds of the votes cast at said election were cast in favor of issuing such bonds," they shall be deemed to have carried.

It was expressly held by this court in City of Inglewood v. Kew, 21 Cal. App. 611, 132 Pac. 780, that:

> "The final deposit of a legal ballot in the box is the act of voting. It matters not that one sign the roster, take his ballot, repair to the booth, and formally present to the election officers what purports to be his ballot; nevertheless, if such ballot is not expressive of any wish or preference of the voter, which under the law may be considered and given effect, such person has not voted, and his vote should not be counted, even in the determination of the number of persons who voted at the election."

People v. Sausalito, 106 Cal. 500, 39 Pac. 937, held that ballots without marks to indicate the electors' wish in any particular were not votes in any sense, and should not be counted for any purpose, and in Sweetser v. Pacheco, 172 Cal. 137, 155 Pac. 639, it was said by the Supreme Court that a ballot not marked in compliance with the statute was simply "no vote." Murphy v. San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444, is to the same effect.

[2-4] Respondent attempts to distinguish these cases from the one at bar, in that they involve ballots rejected because of distinguishing marks, or because they were blank, or that the ballots were cast for candidates; but as we have said, section 1745, Political Code, expressly adopts the requirements of sections 1596 to 1601, inclusive, and while the facts of the different cases may be distinguishable, yet this precise point is decided in the language quoted herein. Citation of authority is unnecessary to sustain the rule that void, as distinguished from voidable, acts are of no legal effect. It follows that any number of ballots marked in violation of the statute and void, as affecting the decision of the question presented, would not be valid for the purpose of increasing the total, or for any other purpose. If a void ballot be placed in the box, it cannot be said that it is a "vote cast." The specifications in the Code, as to the manner in which electors shall express their choice, are mandatory. Pleasant Grove Union High School Dist. v. Algeo (Cal. App.) 215 Pac. 726. The logical conclusion is that by the expression "two-thirds of the votes cast at such election" is meant two-thirds of those which comply with the law, and are potent in expressing a choice upon the subject of the election.

The peremptory writ will issue as prayed.

We concur: FINLAYSON, P. J.; WORKS, J.

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67 Cal. App. 710

ALCAMISI et al. v. MARKET ST. RY. CO. et al. (Civ. 4818.)

(District Court of Appeal, First District, Division 2, California. June 18, 1924. Rehearing Denied July 18, 1924. Hearing Denied by Supreme Court Aug. 15, 1924.)

1. Street railroads ⚷103(1)—Instruction on last clear chance doctrine held erroneous.

Instruction on last clear chance doctrine, stating that defendants' motorman and his employer were chargeable with knowledge that motorman should have had if he had been looking to front, when in fact he had his head to one side and was looking over his right shoulder when his car was 35 feet away, and decedent lay prostrate on street car track in front of motorman, *held* erroneous.

2. Trial ⚷243—Giving of two conflicting instructions on last clear chance doctrine held reversible error.

Where court gave two instructions on last clear chance doctrine, one of which was correct and the other, an oral instruction, incorrect, giving of them *held* reversible error, though correct one given first.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary Alcamisi and others, by Mary Lacono, their guardian ad litem, against the Market Street Railway Company and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Hearing denied by Supreme Court; LAWLOR and SEAWELL, JJ., dissenting.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco, for appellants.

Milton Marks and Marks & Cohen, all of San Francisco, for respondents.

STURTEVANT, J. [1, 2] On the 19th day of October, 1921, Gaetano Alcamisi was struck by a street car operated by the defendant, and the injury was so severe that he died soon after. Later his children, through their guardian, commenced an action against the defendants to recover damages. A trial was had, and the jury brought in a verdict in favor of the plaintiffs. Judgment was entered thereon, and from that judgment the defendants have appealed under section 953a of the Code of Civil Procedure.

On the trial of the case it was the theory of the plaintiffs that the accident was the result of the negligence of the defendants, and that such negligence consisted of a failure to sound a gong, the operation of the car at an excessive speed, to wit, 20 or 25 miles per hour, and operating its cars with its fenders so high that the fenders did not function. The defendants controverted all of these charges, and claimed that the accident occurred by reason of the fact that the decedent, while drunk, suddenly stepped or fell in front of the defendants' car, and although the car was stopped almost instantly, nevertheless the accident had happened. Many witnesses were called and examined, and there was some evidence before the jury which tended to support each claim. Moreover, the plaintiffs claimed that the case came within the doctrine of the last clear chance, and they tendered instructions on the applicability of that doctrine, and the trial court gave some of them.

After the jury retired to deliberate on its verdict, it returned into court, and the following proceedings were had:

> "The Foreman: I would like to have this lady, Miss Steinman, ask the court.
>
> "Miss Steinman: If you think that the defendant is guilty, but you think that the plaintiff was guilty of contributory negligence in some degree, how does that influence your verdict?
>
> "The Court: Well, in that case, if you believe that the plaintiff was guilty of negligence, and that the defendant was also guilty of negligence, the plaintiff cannot recover, except, if you also believe that, notwithstanding the negligence of the plaintiff in placing himself in a position of danger, that the defendant, through its servant, the motorman, knew *or should have known, by facts which would ordinarily come within the observation of an ordinarily reasonably careful man*, that he was in a position of danger, and could, by the use of ordinary care, have saved him, notwithstanding his negligence, that is, notwithstanding the negligence of the decedent, then, under those circumstances, and under those circumstances only, can the plaintiff recover. Do I make that clear?
>
> "The Juror: Very clear."

Then, acting upon request of counsel, or the request of a juror, the trial court reread some of the other instructions, and also caused to be read the testimony of the motorman, Mr. Harrison, who was operating the street car. After these proceedings had been had the jury retired, and later it returned into court and announced that it had agreed upon a verdict. That verdict was in the sum of $2,500. Thereafter the defendants moved for a new trial, their motion was denied, and, as stated above, the defendants have appealed from the judgment.

The first point made by the appellants is that the statement made by the trial court in response to the question propounded by Miss Steinman was a misstatement of the law, because it purports to rest the doctrine of last clear chance on what the motorman should have known instead of on what he actually knew. And appellants claim that, because of what the motorman ought to have known, the defendants were not liable under the last clear chance doctrine, and they cite and rely on Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 Pac. 709. In reply the respondents contend that, if it be assumed that the instruction was erroneous, nevertheless it was not harmful, and they cite and rely on Collins v. Marsh, 176 Cal. 639, 169 Pac. 389. That case is not helpful. Marsh testified that he saw the buggy in the street, and drove up to the buggy and collided therewith. In its decision the court said:

> "Nor was it denied that the appellant saw the buggy in ample time to enable him to avoid striking it. His own testimony was that he noticed it when he was still 40 or 50 feet away."

Whereas, in this case, the witness Harrison, the motorman, was called as a witness, and was examined and cross-examined at length. As to when he first actually saw the deceased, the only evidence in the record was given by him. He testified:

> "I noticed a man come staggering out from behind the truck on my left. * * * I immediately began to make my stop, to stop the car, because I thought the man would continue right on across the way he was going, and possibly fall in front of the car, which he did. I began my stop, and first rang the gong."

The other testimony given in the case, which it is necessary for us to consider, was given by a young Italian boy, Tony Vellone. His testimony, pertinent to the matter under consideration, was as follows:

> "Mr. Marks: Q. Did you see the motorman from where you were standing where [when] this man fell down? A. Yes.

> "Q. What was the motorman doing? A. The motorman was looking towards the west.
>
> "Q. Suppose you were the motorman standing there as the motorman was, show the jury just how the motorman was looking. A. He was looking like this way all the time (showing).
>
> "The Court: Q. Looking over his right shoulder, that is true, is it not, Mr. Linforth?
>
> "Mr. Linforth: That is the position the witness took.
>
> "The Court: That is what I meant to ask.
>
> "Mr. Marks: Q. How far away was the car from Mr. Alcamisi at the time the motorman was looking over his right shoulder, how far away was the car when you saw the motorman do that? Just about. You don't have to give me the exact feet and inches. Can you show me in this courtroom? When you say that the motorman had his face that way (indicating), how far away was the car from the man that you saw? Show us in this courtroom about how far, from where to where in this courtroom. A. I don't understand.
>
> "Q. You say you saw the motorman turn with his face over his right shoulder, his head over his right shoulder that way (indicating). When he had his face over his right shoulder, did you also see this man who was killed, was he on the track then? A. He was on the track.
>
> "Q. How far away was the car from the man on the track when you saw the motorman with his head turned over his shoulder? A. About 35 feet."

If one reads the testimony last quoted, and if one then reads the instruction given orally in reply to the question propounded by Miss Steinman, the error is patent. In other words, as addressed to that testimony, the jury could fairly and reasonably assume that the trial court had instructed the jury that the motorman and his employer were chargeable with the knowledge which a motorman should have had if he had been looking to the front when, as testified by Vellone, the motorman had his head to one side and was looking over his right shoulder when his car was 35 feet away, and the decedent lay prostrate on the street car track.

As the record stood when the jury returned to the jury room to deliberate for the second time on their verdict, there were then before them two contradictory instructions, plaintiffs' instruction No. 5, which correctly stated the law defining the last clear chance doctrine, and the oral statement made by the court in reply to the juror, Miss Steinman, which statement, as we have just shown, was an incorrect statement of the law. It is impossible to say which of the two contradictory instructions the jury followed. When that is so, the giving of contradictory instructions is reversible error. In the case of Hesler v. California Hospital Co., 178 Cal. 764, at page 768, 174 Pac. 654, 655, the Supreme Court said:

> "The court below in other instructions stated the rule by which the defendants were bound, accurately and clearly. There is a clear conflict in the instructions. We are unable to determine which set of rules the jury followed. The case of the plaintiff on the merits, at best, is not strong. We cannot say that these instructions were not injurious to the defendant and did not improperly control the deliberations of the jury in rendering a verdict. A number of objections were made to rulings upon evidence which it is unnecessary to discuss."

In the case of Starr v. Los Angeles Ry. Corp., 187 Cal. 270, at page 280, 201 Pac. 599, 603, the same court said:

> "It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

The effect of the error was not lessened because the instruction complained of was oral, nor because it was given at one time, and the instruction with which it conflicted was given first before the jury retired the first time, and again before it retired the second time.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

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GRANT v. GRANT. (Civ. 3952.)

(District Court of Appeal, Second District, Division 2, California. June 28, 1924. Rehearing Denied July 28, 1924.)

1. Divorce 🔑37(19)—Offer of reconciliation by deserting party comes too late, if deserted party's action has ripened.

Under Civ. Code, § 102, providing for curing of desertion, an offer of reconciliation by deserting party comes too late, if made after deserted party's cause of action for divorce has ripened, in that it does not affect right to sue upon such cause of action, nor give deserting party a cause of action for desertion because of refusal of offer.

2. Husband and wife 🔑283(2)—Attempted reconciliation no defense to action for separate maintenance brought after cause of action for divorce for desertion has ripened.

Under Civ. Code, § 137, as amended in 1905 (St. 1905, p. 205), after an act of desertion upon part of husband has ripened into cause of action for divorce, wife has right to sue for separate maintenance which cannot be defeated by subsequent attempted reconciliation by husband.

3. Husband and wife 🔑283(2)—Right of wife to press cause of action for maintenance not affected by husband's ambiguous offer of reconciliation.

Right of wife to press her cause of action for maintenance was not affected by husband's attempted offer of reconciliation, irrespective of Civ. Code, § 137, where because of its ambiguous character and conditions stated therein she did not understand nature of offer.

4. Divorce 🔑37(19)—Offer of reconciliation not complete, unless offeree can comprehend its meaning.

An offer of reconciliation, whatever the spirit in which it is made, is not a completed offer, unless offeree can comprehend its meaning.

5. Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence not set aside by appellate court.

Trial court's findings on conflicting evidence will not be set aside by appellate court.

On Petition for Rehearing.

6. Appeal and error 🔑835(2)—Attack on finding upon petition for rehearing held too late.

An attack on trial court's finding upon a petition for rehearing in appellate court comes too late, where no semblance of an attack has been made prior thereto, and finding has not been quoted or mentioned in brief of either party on appeal.

7. Divorce 🔑133(1)—Evidence held to sustain finding of desertion on certain date.

In an action for divorce, evidence *held* to sustain finding that husband deserted wife on certain date.

8. Divorce 🔑133(3)—Evidence held to sustain finding that letters offering reconciliation were ambiguous.

In action for divorce, evidence *held* to sustain finding that husband's letters offering reconciliation were ambiguous.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by John Grant against Wilhelmina Grant, in which defendant cross-complained for separate maintenance. Judgment for defendant, and plaintiff appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

John H. Miller, of San Francisco, for respondent.

WORKS, J. This is an action for divorce in which defendant cross-complained for separate maintenance. Judgment passed against plaintiff under his complaint and in favor of defendant under her cross-complaint. Plaintiff appeals.

The appeal is prosecuted under what is known as the alternative method but neither of the counsel for the respective parties has complied with the provision of section 953c of the Code of Civil Procedure to the effect that in the conduct of appeals pursuant to that method "the parties must * * * print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Fugitive portions of the record, indeed, are printed in each of the briefs, but they present no intelligible basis upon which to consider the points upon which it is contended that the judgment should be reversed. There are references by page to the typewritten transcript of the evidence, but even these instances of avoidance of the provision of the Code, when followed up, do not exhibit an adequate view of the litigation for the purposes of the appeal. As the cause is of grave importance to the parties, and as the transcript of the evidence consists of but 150 pages, we have concluded to waive in this instance the requirement of the Code, to the end that the parties may not be penalized because of the neglect of their counsel, and have read the transcript in full. We have also found it necessary to peruse the clerk's transcript of the pleadings, findings of fact, and judgment We cannot forbear to mention these circumstances in what we fear, after all, may be a vain attempt to induce the profession to observe more narrowly the rule we have mentioned. Violations of it are so frequent that they increase the labors and therefore impede the work of the courts of review of the state. We indulge the fond but perhaps delusive hope that these remarks may immerse the profession in a waive of reform.

Appellant and respondent separated in Chicago on December 26, 1909, in which city they had theretofore resided as husband and wife. Appellant then withdrew from the family home and his wife remained in it. The husband resided at another place in Chicago for sixteen months after the separation, at the end of which period he removed to California, where he has ever since remained. Some time after he arrived in this state he wrote to the wife a letter in which he invited her to come to him in order that they might take up again their marital duties and obligations, but she ignored the request. During the years intervening between the date of that letter and the commencement of this cause appellant wrote to his wife frequent missives of the same character. She continued, not actually to refuse his requests, but to ignore them, and this action was the result. The complaint consists of two counts. The first of these alleges acts of cruelty occurring at and before the time of the separation of December 26, 1909, while the second avers a desertion on or about January 1, 1912, which was at the time of the first letter in which the husband invited the wife to return to him. The trial court found against the allegation of cruelty. The nature of its finding as to the second count will immediately be stated.

Upon the issue of desertion, tendered by the complaint, the court found that the husband had in good faith endeavored to effect a reconciliation with the wife; that he had endeavored to invite her to resume the marital relation; and that he had provided for her a suitable home in California. To this matter we shall hereafter refer as the first portion of the court's finding. It was further found, however, that the husband's letters of invitation "were so ambiguous and contained so many expressed conditions that the defendant acting in good faith did not understand or believe said letters contained bona fide and good faith invitations" to become reconciled with him. Other facts which we need not mention were also covered by the finding. Appellant's first point is that he was entitled to a decree pursuant to the first portion of the finding, citing McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554, notwithstanding the other facts found. Another point made is that "plaintiff was entitled to a decree of divorce upon the evidence, and there is no foundation in fact for the court's findings that defendant had any ground whatever in rejecting the offer of reconciliation." The third and last point presented is that, under Volkmar v. Volkmar, 147 Cal. 175, 81 Pac. 413, the trial court erred in awarding the wife separate maintenance on the ground that such an award cannot be made "when the wife refuses to live with her husband, unless she is justified by reason of his fault." We are not called upon to decide any of these three questions, although we shall at the close of the opinion consider two points closely related to the third, but a statement of them all is a necessary preface to the determination of a question which we shall now discuss.

[1] As a basis for her cause of action for separate maintenance the wife alleged a desertion by her husband on December 26, 1909. The trial court found upon conflicting evidence that this allegation was true, but the finding is neither quoted nor mentioned in the brief of either party. Under the finding the wife had a ripened and complete cause of action for divorce on December 26, 1910, Civ. Code, § 107. It is provided by section 102 of the Civil Code:

> "If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured."

Under this statute the courts have naturally determined that an offer of reconciliation tendered by the deserting party is too late if made after the deserted party's cause of action for divorce has ripened, in that it does not affect the right to sue upon such cause of action, nor give to the deserting party a cause of action for desertion because of a refusal of the offer. See 9 Cal. Jur. title, "Divorce and Separation," § 43. It is apparent from the mere statement of this rule, in connection with the finding that appellant was guilty of desertion on December 26, 1909, that respondent did not desert him on January 1, 1912; that, obviously, his first and second points disappear; and that, equally obviously, his cause of action based on a desertion falls to the ground. The point arising thus under section 102 of the Code is argued by neither of the parties, but our attention is nevertheless startlingly attracted to it by expressions in the briefs. It is plainly brought into the case by appellant's statement of all three of his points, as we have set them forth above, and the first sentence of respondent's brief is: "The appellant and respondent were married in Chicago, Ill., on February 8, 1890, and lived together as husband and wife until December 26, 1909, when the appellant deserted his wife." Under these circumstances we are unable to avoid a decision of the question.

[2] Not only are appellant's first and second points answered by the finding that he deserted his wife in 1909, but his third point meets the same fate, as that point is stated, especially as the question he presents is based upon Volkmar v. Volkmar, supra, which was a divorce case. We must however, state another point for the benefit of appellant, even if it must come to naught. Although section 102 of the Civil Code has the effect which we have ascribed to it upon questions of divorce, it was once decided that the rule is different as to the wife's suit for separate maintenance. In a suit of the latter character the Supreme Court said:

> "Willful desertion must continue for one year before it is a ground for divorce (Civ. Code, § 107); and it is provided in section 102 preceding, that if, prior to the expiration of such time, the party deserting 'returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured;' and in Benkert v. Benkert, 32 Cal. 467, it was held that an offer to return, made after expiration of the time necessary to give the ground for divorce, will not, if refused, defeat the action of the injured party for divorce. Plaintiff contends, in support of her appeal, that a rule like that in Benkert v. Benkert should obtain in this case, and that the defendant's offer to return came too late. The cases, however, differ materially. See Hardy v. Hardy, 97 Cal. 125, 130. In Benkert v. Benkert, dissolution of the marriage bond was sought; here the plaintiff, as she testified at the trial, and as her suit shows, desires no divorce, but insists that the marriage relation shall continue. Manifestly, to enforce the duty of support against defendant when, as the court finds, he seeks in good faith to fulfill his obligations, and at the

same time to exonerate plaintiff from the correlative duty of living with defendant at some reasonable place of abode (Civ. Code, § 156), would be the granting of a limited divorce, for which our law makes no provision (Hagle v. Hagle, 74 Cal. 608, 612; Peyre v. Peyre, 79 Cal. 336). The cases touching this subject quite uniformly hold or imply that although the husband may have deserted the wife, yet the door for repentance is open for him, and is not necessarily closed by the fact of suit brought for maintenance; so, not because of any tenderness of the law for delinquent husbands, but because of its aversion to separation of the spouses." McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554.

If the opinion from which this quotation is taken is still the law, appellant's attempted offer for reconciliation was not too late, as affecting the wife's cause of action for maintenance. The question whether McMullin v. McMullin is yet authority upon the point covered by the quotation is inspired by a comparison of the language of section 137 of the Civil Code as it has been since 1905 with its text as it stood when that case was decided in 1899 and had stood without material change for more than twenty years. In 1899 the section read, in part:

> "When the husband willfully deserts the wife, she may, without applying for a divorce, maintain * * * an action against him for permanent support and maintenance," etc.

This language was supplanted in the amended section of 1905 (St. 1915, p. 205) by the following:

> "When the wife has any cause of action for divorce as provided in section ninety-two of this Code, she may, without applying for divorce, maintain * * * an action against him for permanent support and maintenance," etc.

There seems little room for argument in considering the effect of this amendment upon the doctrine of McMullin v. McMullin. It is to us obvious that the language imported into the statute in 1905 gave to a wife the right to prosecute successfully her action for separate maintenance whenever an act of desertion upon the part of her spouse had ripened into a cause for divorce, and that his right to seek a reconciliation was cut off in so far as it could affect in any manner the prosecution to a successful issue of such a suit against him after the ripening of the cause of action. Strange to say, this question has never yet been passed on and can be resolved upon reason alone. By an amendment to section 137 adopted in 1907 (St. 1907, p. 82) the Legislature inserted a passage which was in part similar in form to the language which was eliminated by the amendment of 1905. It was, "When the husband willfully deserts the wife or when the husband willfully fails to provide for the wife or," and it was inserted in such a manner as to make the sentence which is of interest here read as follows:

> "When the husband willfully deserts the wife or when the husband willfully fails to provide for the wife or when the wife has any cause of action for divorce as provided in section ninety-two of this Code, she may," etc.

The effect of the amendment of 1907, as engrafted upon the language "when the wife has any cause of action for divorce," etc., can be nothing more than to create a right in the wife to prosecute her suit for maintenance upon a "desertion" less than a year old. That she may now maintain such a suit appears to have been conceded by the opinion in Gray v. Gray, 185 Cal. 598, 197 Pac. 945. It appears to us that the amendment of 1907 had no effect upon the amendment of 1905 as we have determined the latter to operate upon the question before us here and upon the doctrine of McMullin v. McMullin, supra. In short, and in response to a suggestion made in the opinion rendered in that case, it appears that section 137 of the Civil Code, as amended in 1905, provides, in effect, for the granting of a limited divorce.

[3-5] In addition to what we have said as to the effect of section 137 as it has stood since 1905, we now come to a consideration of the finding of the trial court which we have mentioned in connection with the statement of appellant's first point. It will be observed that the court found, substantially, that appellant endeavored in good faith to effect a reconciliation with his wife, but that because of the ambiguous character of his letters and the conditions stated in them she did not understand the nature of the offer. We are satisfied that this latter portion of the finding controls the portion touching upon appellant's good faith in making the offer. It is not too much to say that an offer of reconciliation, whatever the spirit in which it is made, is not really a completed offer, unless it is so couched that the offeree may comprehend its meaning. Suppose such an offer were transmitted to one in a language which he did not understand. Suppose it were spoken to one stone deaf. Under such circumstances could the offer bind the receiver to accept it or suffer the consequences of a refusal? Surely not, and we think the answer must be the same here. We think that, under the finding of the court, irrespective of the effect of section 137, the right of respondent to press her cause of action for maintenance was not affected by the attempted offer. It remains only to remark that the portion of the finding dealing with the ambiguous character of the offer and with respondent's inability to understand it was made upon conflicting evidence. It must therefore stand.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

On Petition for Rehearing.

PER CURIAM. [6, 7] This cause is pending upon petition for rehearing. Before making formal disposition of the petition we deem it advisable to correct certain inaccuracies and misstatements and to meet arguments contained in it. It is said that appellant's "offer of reconciliation did not come too late. In this we have attacked and now attack the finding paragraph 4. * * *" The finding thus alluded to was the finding that appellant deserted respondent on December 26, 1909. No semblance of an attack has heretofore been made upon that finding, and we correctly stated in our opinion that the finding was "neither quoted nor mentioned in the brief of either party." The attack now made in the petition for rehearing comes too late, but we nevertheless shall pay some attention to it. Appellant says that the parties to the cause did not finally separate until December 26, 1911, and that there is no evidence to show a final separation, much less a desertion, on December 26, 1909. This point is made after a quotation of a statement which, strangely enough, appears in respondent's brief, and which was not overlooked by us in the preparation of our opinion. Respondent says in her brief that the parties "continued to live together until, as appellant testifies, * * * 'I left the 27th day of March, 1911,' and 'I left home the 26th day of December, 1911,'" etc., and, in truth, there is a statement to that effect in the record testimony of appellant. However, the insertion of the year as 1911 occurred either through an error of the stenographic reporter who was at the trial or through a slip of appellant's tongue. This is so apparent from the entire record in the cause that we did not deem the circumstance worthy of mention in the opinion. That the statement of the year as 1911 is a palpable error appears from the following, as well as from many other matters in the record: The son of the parties testified:

> "Q. You remember the time that your father left home on December 26, 1911 or 1912— A. December 26, 1909, yes, sir."

Not only does this interruption of counsel show, but the entire tenor of the examination of the witness shows, that he was testifying concerning the final separation of his father and mother. Appellant himself testified:

> "Q. * * * Before you came to California, where did you live? A. In Chicago. * * *
>
> "Q. And when did you leave Chicago? A. I left the 27th day of March, 1911.
>
> "Q. When did you separate from your wife? A. I separated from my wife in—the 26th day of December, 1909. * * *
>
> "Q. And did you write to your wife after coming out here? A. Yes, sir.
>
> "Q. How long had you been here; about what date was it * * * that you wrote the first letter? * * * A. About May or June, 1911."

Appellant on December 20, 1911, six days before his counsel now contends the final separation occurred, wrote respondent the letter upon which appellant bases his charge of desertion as of January 1, 1912. The letter, as set out in the record, is quoted in full in appellant's brief and likewise in his petition for rehearing. It was postmarked, as shown in the petition for rehearing, as well as in the other places in which it appears, "Bell—Dec. 20, 1911—Cal." The letter begins, "As it is now about 2 years sins we have seen each other," etc. We need go no further in discussing the present point of appellant. So far as the factor of time is concerned the trial court could have made no finding other than that appellant deserted respondent on December 26, 1909.

[8] Appellant insists that "there can be no justification for the court's finding that the letter offering reconcilation was ambiguous, for three reasons." The reasons assigned are: First, that the letter of December 20, 1911, containing the offer, was on its face unambiguous; second, that there was no testimony that respondent did not understand the letter, and, third, that respondent testified that her only reason for not accepting the offer was that she did not think it was made in good faith, and that she believed appellant had left her without cause. This point we shall now consider at some length, as we decided it in our opinion by the mere statement at its close that the finding in question must stand for the reason that it was made on conflicting evidence. That the disposition thus made of the question was correct will be shown by a reference to a few circumstances disclosed by the record. In the first place, the court's finding was not alone that the offer was ambiguous, but that "the letters of invitation so written by the plaintiff were so ambiguous and contained so many expressed conditions," etc. Next, we state some features of the evidence. The letter of December 20, 1911, was written to respondent and to the son of the parties as joint addressees. It contained, in part, these statements:

> "* * * i for my part am willing to forgive all you wronged me, and we will forget all the old truble. * * * it is hard to have everything taken from me Home and Family when i am getting old and need you most. * * * My Son George, * * * bee good to your Mother, and help straignten her up—and if there is anything that I can do, please write me I am sending $10 by mail."

Judging from the phraseology of its finding the trial court looked to other letters which passed between the parties as an aid in determining in what light respondent viewed the letter of December 20, 1911, which was evidently delivered to her in due course of mail not far from January 1, 1912, the date of the desertion alleged against her. The consideration of the other letters for such a purpose was surely proper, especially as they were received without objection, and we follow the same course, it being understood that we refer to but a few of the missives which were written by appellant to his wife, many of which, indeed, were not preserved and do not appear in the record. In a letter of February 2, 1915, it is said:

> "Dear Minnie I love you and always did but the Devil stebbed in between and robbed your heart away from me, i stayed long and waited to se if I ever should get piece, but it onley got wurce. So Wife get rigthsainness pray to our Savior, that you have forgotten read does words carefully and think them over."

In a long letter of date December 15, 1919, appellant wrote in a joint missive to his wife and son: "* * * if you sometime want to make an trip to Los you are both welcome. * * *" In a letter undated as to year, but, judging from its context, written to respondent as late as 1919 or 1920 and perhaps as late as 1921, it is said:

> "Ecsept my indvetetion and come to live with me and be happy, but you must sureley keep pease with me no more like when I was with you it was hard blow to me to be acused for wath I never dare think for * * * but ve forget all in the past."

The punctuation and spelling in all the letters was very bad, the former often making it difficult for us to apprehend the meaning of the writer. Some such examples will be found in the excerpts above made. As to spelling we select the following instances, among many others, in addition to what is above set forth: Adtorny, altaugh, bierdday, tiered, cloce, adtencion, glatt, simpaty, fruight, ornameltel and pictuare. Considering now another matter, it is to be observed that the parties are both Danes. Two of the letters from appellant to respondent, in fact, were written in the Danish language. The trial judge had respondent before him, and thus had the opportunity to determine what knowledge of the English language was possessed by her and what ability she had to master letters written in such wretched English as are those now before us. In addition to all these circumstances, respondent gave testimony to the following effect concerning the letters:

> "Q. In no letter or card or communication of any sort that you had from him did he offer to provide money for your trip out here? A. No, sir, not once."

In response to a line of questions concerning her testimony in a cause in Chicago to the effect that appellant had not asked her to return to him, respondent concluded: "Well, he hasn't asked me, only for a visit." She testified later:

> "Q. * * * Now, you never wrote any letters to him at all? A. No, sir.
>
> "Q. You could write both English and Danish, couldn't you? A. Well, I could write Danish, anyway."

The condition of the record being thus exhibited, we are not to determine whether we should have made the same finding which was made by the trial court, but whether the finding actually made was based upon evidence in which there was a substantial conflict. Upon this score we are satisfied with the conclusion reached in our original opinion.

It is said in the petition for rehearing that "an examination of the answer herein discloses that it was in no sense a cross-complaint." Counsel would have done well to examine the cross-complaint, for a pleading of that character, separate and aside from the answer, appears in the record. The pleading is headed "Cross-Complaint for Maintenance," seems upon a cursory examination to state a cause of action, and closes with a prayer for a division of community property and for a permanent allowance for support and maintenance. Not only does a cross-complaint appear in the record, but there is also there shown an "Answer to Cross-Complaint" which is signed by appellant's counsel upon this appeal, the writer of the present petition for rehearing.

Rehearing denied.

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68 Cal. App. 95

PEOPLE v. MATTHEW et al. (Cr. 1085.)

(District Court of Appeal, Second District, Division 2, California. July 8, 1924.)

1. Criminal law 🔑1159(2)—Verdict of guilty supported by sufficient evidence is final.

If the evidence against accused, considered by itself and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law and becomes one of fact, upon which the decision of the jury and the trial court is final.

2. Criminal law 🔑1144(13)—Scope of appellate review in passing on question of sufficiency of evidence to support verdict, stated.

In passing upon the sufficiency of the evidence to support the verdict, the Court of Appeals must consider in its strongest light all evidence tending to support the verdict and disregard the testimony conflicting therewith.

3. Homicide 🔑234(5)—Evidence held to support conviction of homicide committed by others in prosecution of common design to rob.

Evidence *held* to support conviction of codefendants as parties to a homicide committed by others in the prosecution of a common design to rob deceased.

4. Homicide 🔑29—Commission by one conspirator in furtherance of common design to rob makes each coconspirator guilty of murder.

Where a number of persons conspire to perpetrate a robbery, and a homicide is committed by one of the conspirators in furtherance of the common purpose, each is guilty of murder.

5. Criminal law 🔑406(3)—Admissions not amounting to confessions held admissible without proof of voluntary character.

Statements of defendant which were not tantamount to a confession of guilt *held* admissible without proof of their voluntary character, though involving admissions incriminatory in character.

6. Criminal law 🔑427(3)—When acts and declarations of coconspirator are admissible before sufficient proof of conspiracy is given, stated.

Evidence of acts and declarations of a coconspirator is admissible before sufficient proof of the conspiracy is given, when convenience requires such method, as where the facts from which the conspiracy is to be inferred are so blended with other facts going to constitute the crime that it is difficult to separate them.

7. Criminal law 🔑824(5)—Failure to give instruction not requested held not error in view of instructions given.

Failure to instruct jury to disregard acts and declarations of a coconspirator unless they believed that a conspiracy was sufficiently proved *held* not error, where no request therefor was made and the court carefully instructed upon the law bearing upon the issues and correctly defined a conspiracy.

8. Criminal law 🔑406(1)—Extrajudicial admission admissible against party making it.

Any extrajudicial admission of a coconspirator was admissible against him.

9. Criminal law 🔑1036(1)—Accused could not object on appeal to admission of evidence not objected to below.

Accused could not object for the first time on appeal to the admission of declaration of conspirator after crime was committed, the admission of which was not objected to at the trial.

10. Witnesses 🔑282½—Restriction of further cross-examination on objection held proper, question asked having been answered.

Where a witness on cross-examination testified her car was not a "rent car" and that defendant had never used it to carry passengers for hire, and accused's counsel endeavored further to pursue that line of cross-examination, *held*, that the court properly sustained prosecution's objection that the question had been asked and answered.

11. Criminal law 🔑1186(4)—Improper questions and statements of attorneys held not ground for reversal unless they result in miscarriage of justice.

Judgments cannot be reversed for inadvertence of attorneys in asking improper questions and for unintentionally mistaking facts in the heat and zeal of a trial, unless such questions and statements cause a miscarriage of justice within Const. art. 6, § 4½.

12. Criminal law 🔑656(3), 1144(10)—Judge's expression in ruling upon objections to evidence held not error, jury being presumed uninfluenced.

In ruling upon objections to offered evidence, it is not improper for the judge to mention the fact to which the evidence relates or to state the reasons for his ruling; such remarks, though made in the presence of the jury, not being addressed to them who will not be presumed to have been influenced by such remarks.

13. Criminal law 🔑1166½(12)—Improper remarks of judge made when ruling on offered evidence held cured by instructions given.

If remarks of judge made when ruling upon offered evidence tended to indicate that he formed an opinion as to what the evidence showed and respecting the veracity of a witness, their prejudicial effect *held* entirely removed by the instruction given.

14. Homicide 🔑286(3)—Use of word in instruction defining murder held not to mislead jury.

Use of word "here," in instruction that, "where the killing is done in the perpetration of * * * some one of the felonies enumerated in the statute, here the occasion is made conclusive evidence of premeditation," *held* not to mislead jury as applying to instant case.

15. Criminal law 🔑824(1)—Omission to give charge not requested held not error.

If appellants deemed it essential to have jury particularly charged upon the question as to when a conspiracy terminates and the effect thereof upon the admissibility of the subsequent acts and declarations of a coconspirator, it was their duty to ask for such instruction, and the omission to give it was not error in the absence of a request.

16. Criminal law 🔑824(2)—Failure to give definition of robbery held not error, no request therefor having been made.

In a homicide prosecution based on theory that crime was committed in furtherance of a common design to rob deceased, failure of court to give definition of robbery *held* not error; no request therefor having been made.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Murphy Williams and Colonel Pope, charged with murder jointly with Robert Matthew and others, were convicted of murder in the second degree, and they appeal from the judgment of conviction and from an order denying a new trial. Affirmed.

Samuel Rosenthal, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for the People.

FINLAYSON, P. J. This appeal is by the defendants Williams and Pope, who, with the defendants Matthew, Warmley, and Sinuel, were jointly charged with the murder of one Coleman Stone, the proprietor of a grocery at Bell station, near the city of Los Angeles. The defendant Warmley, it would seem, was not apprehended. The remaining four defendants were tried jointly. Matthew and Sinuel were convicted of murder in the first degree, the death penalty was imposd upon them, and they have taken an appeal to the Supreme Court. The defendants Pope and Williams were convicted of murder in the second degree, and now appeal to this court from the judgment of conviction and from the order denying their motion for a new trial.

The appeal to this court is based upon the alleged insufficiency of the evidence to support the verdict against Pope and Williams, upon asserted errors of law in admitting and in excluding evidence and in giving and refusing certain instructions, and upon alleged misconduct of the district attorney.

[1, 2] It is, of course, well settled that if the evidence which bears against the accused, considered by itself and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive. People v. Emerson, 130 Cal. 562, 62 Pac. 1069. Accordingly, as a reviewing court it is our duty, in passing upon the question whether the evidence is sufficient to support the verdict, to consider in its strongest light all evidence which tends to support the verdict, to disregard such testimony as conflicts therewith, and to affirm the judgment if there be any substantial showing which tends to establish the guilt of the accused.

[3] The facts, as shown by the testimony which bears most strongly against the accused, are substantially these: At about 6:30 o'clock on the evening of October 30, 1923, the accused, all of whom are negroes, drove in a Winton automobile to a spot on Becker avenue, about half a block west of Stone's grocery. There the machine, with Pope at the wheel, was brought to a stop. The defendant Sinuel alighted from the car and proceeded to the grocery, presently followed by the defendant Matthew. After entering the store Sinuel asked Stone for a package of cigarettes, tendering a dollar bill in payment. About this time Stone's son-in-law, standing in the doorway and peering into the store, saw his father-in-law apparently looking down at his hand "making change," while Sinuel was seen to walk around the end of the counter, "pull a gun" from his overcoat, and walk behind the counter toward the unsuspecting grocer. At about the same instant Matthew was seen to "poke an automatic over the counter at Stone." Thereupon the son-in-law left the spot where he had been standing watching these proceedings. He left to get his "gun." An instant later Stone was heard to cry out, and then there came the muffled report of a pistol. The evidence shows that it was Sinuel who fired the shot. Stone was mortally wounded and died the next day. Sinuel and Matthew made admissions to the effect that they entered the grocery with the intention of committing robbery. The evidence for the prosecution discloses beyond all question that the killing was committed in the perpetration of or attempt to perpetrate robbery, and that it was a brutal murder. The real question, so far as the appellants Pope and Williams are concerned, is this: Was there sufficient evidence to justify their conviction upon the theory either that they were aiders and abettors of the homicide, or that they, together with Sinuel and Matthew, had entered into a conspiracy to commit robbery and that Stone's life was taken in the course of the prosecution of the common design?

The facts tending to establish that such a conspiracy was entered into are these: The Winton automobile in which the men were riding on the evening of the homicide belonged to a colored woman, a Mrs. Braxton, who lived at 620 Ceres avenue in the city of Los Angeles. She, it appears, had entered into some sort of an arrangement with Sinuel and with an agent of the concern from which she had purchased the car on credit, whereby Sinuel was given an opportunity to become the purchaser of the car if he so desired. It would seem, however, that notwithstanding this arrangement, whatever its nature may have been, Mrs. Braxton continued to treat the car as her own and to exercise all the rights of proprietorship. Pope was hired by her as her chauffeur, receiving as compensation for his services his board and lodging. Pope, Sinuel, and Matthew occupied rooms in Mrs. Braxton's house. At about 5 o'clock on the afternoon of the day of the homicide Mrs. Braxton, who had been using her car that afternoon, returned home, told Pope to put the machine in the garage, and strictly enjoined him not to take it out. It seems that on the preceding night Pope had taken the car without Mrs. Braxton's permission and had not returned with it until 3 o'clock in the morning. Late in the afternoon of the day on which the murder was committed, Sinuel, Matthew, and Williams went to a resort at Twenty-Sixth street and Boyle avenue, in the city of Los Angeles, where they procured and drank a quantity of intoxicating liquor. At about 6 o'clock in the evening Pope, disobeying his employer's order not to take the car out of the garage, drove up to the house on Twenty-Sixth street where the three other defendants were drinking. He was accompanied by Warmley. Upon the arrival of Pope and Warmley at this place with Mrs. Braxton's automobile, Sinuel, Matthew, and Williams entered the car and were driven by Pope in an easterly direction beyond the outskirts of Los Angeles. On their way back the five men passed through Bell station, where, as we have stated, the car was brought to a stop about half a block west of the grocery, when Sinuel and Matthew got out and the killing of Stone occurred. After alighting from the machine, Sinuel "snatched" from Warmley, who remained in the car, the revolver with which Stone was shot. When the shot was fired, Warmley exclaimed, "Those niggers [referring to Sinuel and Matthew] done shot somebody," and ordered Pope to drive back to town. Thereupon Pope put the transmission in gear—the engine had been left running while Sinuel and Matthew were in the grocery—and accompanied by Warmley and Williams drove back to the house at 620 Ceres avenue. Meanwhile Sinuel and Matthew made their escape from the scene of the shooting, walked some distance to a street car, and arrived at the Ceres avenue house some time after Pope and his two companions reached the same destination. During the comparatively short interval that the automobile was standing on Becker avenue about half a block from the grocery, and while Sinuel and Matthew were carrying out their plan to rob the proprietor, Pope got out of the car, and seeing another machine approaching from the east, stepped in front of it and raised his hand. Thereupon the driver of that vehicle, a woman, stopped her car. Pope looked at her but said nothing, and she then drove on. The driver of that machine, after she had driven about a quarter of a mile from the spot where she had been stopped, heard the report of the pistol.

After Pope, Sinuel, and Matthew had returned to the house at 620 Ceres avenue, they, with two other men—neither of the latter had any connection with the crime—entered the Winton machine at about 9 o'clock that evening and drove to Santa Ana, in Orange county, where Sinuel endeavored to find accommodations at some hotel. There Sinuel and Matthew left the machine, and the next day those two took a bus to San Diego. Pope and the other two men returned in the automobile to Los Angeles, arriving there at about 3 o'clock in the morning. While in Santa Ana, after Sinuel and Matthew had left the machine, Pope, who had gotten out of the car at a gasoline station, stood for a moment with drooping head, in an attitude of absorbed contemplation. Presently one of his companions said something to him, when he straightened up, got back into the car, and drove to Los Angeles.

The defendant Williams, who occupied a room at 1520 East Fourteenth street in the city of Los Angeles, returned to his quarters shortly after 9 o'clock on the evening of the day in question. Upon his return he engaged in conversation with a woman who also lived at the same place, in the course of which he said:

> "That fellow shot a man out to the store. I heard the report of a gun and we drove off and left them. I will bet it will be in the papers."

Williams took a blackjack from his pocket, showed it to the woman, and said that he took it from "one of the fellows who was out there"—referring to those who were his companions at the scene of the homicide. Williams told the officers, when questioned a few days subsequent to the shooting, that Matthew had the blackjack when he got out of the machine to follow Sinuel to the store, and that he (Williams) found it after the party had returned to Los Angeles.

We think the foregoing circumstances are sufficient to justify the inference that all of the defendants, Pope and Williams as well as Matthew and Sinuel, conspired to rob Stone, and that the latter's life was taken in the prosecution of the common design. As was said in People v. Lawrence, 143 Cal. 153, 76 Pac. 896, 68 L. R. A. 193:

> "It was not necessary to support proof of the conspiracy to show that the parties met and actually agreed to jointly undertake the perpetration of the robbery. From the secrecy with which unlawful undertakings of that character are adopted it would, in almost all instances, be impossible to make such proof, so that in prosecutions which involve proof of a conspiracy it may be proved by facts and circumstances sufficient to satisfy the jury of its existence, and the weight and sufficiency of that evidence to prove such a conspiracy is a matter for the jury."

Testimony was introduced on behalf of both appellants to show that they were without knowledge of the purpose of Sinuel and Matthew to rob. Indeed, there is throughout the case a sharp conflict in the evidence, as is usual in actions of this character. Pope claimed that he was acting as Sinuel's chauffeur, that he drove as he was directed by Sinuel, that he stopped the car near the scene of the attempted robbery because Sinuel ordered him to stop there, and that he was without guilty knowledge of Sinuel's unlawful intentions. But the circumstances strongly tend to refute any such claim of innocence. Pope was hired by Mrs. Braxton, who testified that she owned the car. In spite of her orders not to take the machine out of the garage, Pope, who is conceded to have been Mrs. Braxton's employee, stole away and joined his guilty companions. When Sinuel and Matthew left the machine to go to the grocery, Pope did not turn off the ignition, but allowed the motor to continue running in readiness for a quick escape. The fact that he stepped out of the car, held up his hand, stopped a passing motorist, and scanned her face tends to indicate that he was determined to chance no possible frustration of the plan to rob. Sinuel, as he was alighting from the car to make his way toward the grocery, scuffled with Warmley and "snatched" a pistol from him. It may well be inferred that this act was observed by Pope, and if so he must have had an inkling of Sinuel's sinister designs. Pope drove from the scene when the shot was fired and upon hearing Warmley exclaim, "Those niggers done shot somebody." It is not probable that had he believed Sinuel and Matthew went to the store for an innocent purpose, he would have hurriedly deserted those two companions, particularly if it were true, as he claimed, that he was hired by Sinuel to drive the car on this evening. On the contrary, it is more than likely that had he possessed no guilty knowledge of the evil intentions of Sinuel and Matthew he would have waited to see if either of them had been waylaid and shot by some malefactor—that he would have stayed to render such assistance, if any, as his comrades might require—instead of hurrying from the scene as though impelled by a guilty conscience. If he, Sinuel, and Matthew were not inseparably linked by the firm ties that bind conspirators, why should he have helped his fellows to escape by driving them with all haste to Santa Ana? Certainly he had every reason to know before that trip was undertaken that Warmley was not mistaken when he exclaimed, "Those niggers done shot somebody." While no single circumstance might be sufficient to create more than a suspicion of guilt, all of them, taken collectively, are of a sufficiently incriminating character to warrant the inference, as a reasonable conclusion, that Pope was a party to a conspiracy to rob the grocer.

Nor do the incriminating circumstances point any the less unerringly to the guilt of Williams. He admitted that he saw Matthew take with him the blackjack when the latter left the Winton automobile to join Sinuel in his mission to rob. He also must have seen Sinuel snatch the pistol from Warmley. Seeing these things and making no protest, the natural inference is that Williams knew what enterprise was on foot and acquiesced therein because he also had entered into the conspiracy to rob. Pope and Williams doubtless realized that if the machine had been stopped immediately in front of the grocery, and if all of the five men had entered the establishment at once, the proprietor, suspecting the possibility of foul play, would probably have been put upon his guard and so would have exercised greater vigilance. This consideration affords an explanation of why it was that but two of the men left the car to carry out the common design.

[4] If, as we hold, the testimony is sufficient to justify the conclusion that all of the defendants conspired to rob Stone, then the evidence is sufficient to support the verdict against these two appellants. The general rule is well settled that where a number of persons conspire together to perpetrate a robbery, and a homicide is committed by one of the conspirators in furtherance of the common purpose to rob, each is as accountable as though his own hand had intentionally fired the fatal shot or given the fatal blow, and each is guilty of murder. People v. Vasquez, 49 Cal. 560; People v. Lawrence, supra; People v. Raber, 168 Cal. 316, 143 Pac. 317.

[5] We come now to appellants' assignments of error in the admission of evidence. The prosecution introduced in evidence certain admissions made by Sinuel, Matthew, Williams, and Pope in the office of the district attorney. The learned trial judge was at considerable pains to instruct the jurors, at the time when this evidence was offered, that a statement by one defendant not made in the presence and hearing of the others was admissible only as against the defendant making it; also, that a statement by one defendant, though made in the presence and hearing of the others, was not to be considered as evidence against any of the other defendants who challenged the truthfulness of the statement at the time when it was made. But it is claimed that it was not shown that the statements were made freely and voluntarily. The point is destitute of merit. Williams waived the objection that his statement was not given freely and voluntarily. As to Pope, it is sufficient to say that his admissions were not tantamount to a confession of guilt, and therefore it was not necessary to lay a foundation before they could be received in evidence. In giving the officers his version of the facts Pope stoutly maintained that he was innocent of all wrong doing. In no part of his narrative did he state or admit that he had done any wrongful or unlawful act. None of the facts admitted by him imported guilt or involved a crime. True, his statement involves certain admissions of fact which, when taken in connection with other proved facts in the case, are circumstances of an incriminatory nature; but it is by no means a confession of guilt. His statement, therefore, was admissible without any preliminary proof that it was given freely and voluntarily. People v. Peete, 54 Cal. App. 333, 202 Pac. 51. Moreover, it was shown by the testimony of the deputy district attorney who was present when the admissions were made that each of the accused gave his statement freely and voluntarily, without duress, intimidation, or threat, or previous inducement, promise, or offer of leniency.

[6] It is claimed that, as to Pope and Williams, the court erred in admitting evidence of the acts of Matthew and Sinuel in the grocery before the prosecution had made out a prima facie case of conspiracy. It unques-

tionably is the general rule that proof of the existence of the conspiracy ordinarily should precede proof of the acts or declarations of a coconspirator made pending the conspiracy and in aid and furtherance of the common design. But the rule in this respect is not absolute and unyielding; and sometimes, for the sake of convenience, evidence of the acts and declarations of an alleged conspirator is admitted before sufficient proof of the conspiracy is given. Thus where, as here, the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish prima facie, in the opinion of the court, the fact of conspiracy. People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678; People v. Sing, 42 Cal. App. 397, 183 Pac. 865.

[7] Appellants complain that the court failed to instruct the jury to disregard the acts and declarations of a coconspirator unless they believed that a conspiracy was sufficiently proved. It is true that it would have been proper to give such an instruction, but since no instruction of that character was requested by any of the defendants, nor any intimation made that it should be given, appellants are not in a position to complain of its omission. The court carefully instructed the jury generally upon the law bearing upon the issues in the case, and gave a full and correct definition of conspiracy. The rule is that where the court has instructed generally as to the issues, if the defendant desires a particular instruction, or an instruction upon a particular phase of the case, he should submit it with a proper request that it be given; otherwise a failure to give it is not error. People v. Fowler, 178 Cal. 657, 663, 174 Pac. 892; People v. Rogers, 163 Cal. 476, 484, 126 Pac. 143; People v. Williams, 184 Cal. 590, 594, 194 Pac. 1019; People v. Fultz, 109 Cal. 258, 262, 41 Pac. 1040; People v. Findley, 132 Cal. 301, 306, 64 Pac. 472. In Allen v. Commonwealth, 82 S. W. 589, 26 Ky. Law Rep. 807, it was held that where a conspiracy to murder and the connection of each defendant therewith was shown, a failure to instruct as to the extent and circumstances under which evidence of the acts and declarations of coconspirators, not made in the presence of the others, were to be received by the jury was not error. There the court says:

> "We do not think such an instruction was necessary in this case, because the conspiracy was fully proved by the testimony of the commonwealth, and the connection of each of the appellants with that conspiracy also shown by competent evidence, and no act or declaration was proven for which the appellants were not each liable. The instruction defining a conspiracy that was given by the court contained all the law that was necessary for the guidance of the jury on that subject."

In the present case proof of the conspiracy was in point of fact supplied by the prosecution before it rested. It is evident, therefore, that upon the whole case the jury was not misled to the injury of appellants. See People v. Brotherton, 47 Cal. 388, 400, 401.

[8, 9] It is claimed that the court erred in admitting in evidence a statement of Williams, made after the commission of the crime, to the effect that all of the defendants were at the scene of the homicide, that somebody was shot, and that he (Williams) took a blackjack from one of his companions. Appellants invoke the well-established rule that statements made by one conspirator after the completion of the offense, and which are simply narratives of the events concerning the accomplished crime, are not admissible against a coconspirator unless made in his presence. A complete answer to this objection is that any extrajudicial admission which Williams may have made was unquestionably admissible against him, and that Pope cannot now complain of this evidence, since he did not object to it in the court below at the time when it was received. For reasons already indicated, no error was committed when the prosecution put in evidence the statements made by the four men in the district attorney's office. As we have pointed out, so much of Matthew's statement as was not made in the presence and hearing of his codefendants was admitted as evidence against Matthew only; and any statement made by one defendant in the presence and hearing of the others which was denied by any other defendant was not received as evidence against the defendant or defendants by whom it was denied.

[10] It is claimed by counsel for Pope that the court improperly restricted him in his cross-examination of Mrs. Braxton. That witness had testified on her cross-examination that her car was not a "rent car," and that so far as she knew Pope had never used it to carry passengers for hire. Counsel for Pope endeavored further to pursue this line of cross-examination, but the court very properly sustained the prosecution's objection that the question had been asked and answered.

[11] Appellants complain of alleged misconduct on the part of the prosecuting attorney in that, so it is claimed, he propounded improper questions and made statements of facts not in evidence. The record does not show that the prosecuting attorney willfully attempted to place before the jury any improper matter, either by questions asked or statements made. In the heat and zeal of a trial attorneys will sometimes ask improper questions and sometimes unintentionally mistake facts; but judgments cannot be revers-

ed for inadvertences of this character unless upon an examination of the record, including the evidence, we reach the conclusion that they caused a miscarriage of justice. Const. art. 6, § 4½; People v. Loomis, 170 Cal. 347, 149 Pac. 581. The record in this case shows that appellants had a fair trial, and no miscarriage of justice appears.

[12, 13] What we have said respecting the alleged misconduct of the district attorney applies with equal force to the claim that the learned trial judge, when ruling upon certain objections, dropped expressions in the hearing of the jury which tended to indicate that he thought the evidence showed there was an attempt to commit robbery and that he entertained an opinion respecting the veracity of a witness whom it was sought to impeach. In ruling upon objections to offered evidence, it is not improper for the judge to mention the fact to which the evidence relates, or to state the reasons for his ruling. Such remarks, although made in the presence of the jury, are not addressed to them and will not be presumed to influence their conduct. 8 Cal. Jur. p. 252. Moreover, upon the final submission of the case the court instructed the jurors to the effect that they were the exclusive judges of the evidence and of the credibility of the witnesses, that it was their function to determine all questions of fact, that the court had nothing to do with the facts, and that if it had said anything during the trial which might seem to indicate that it had an opinion upon any of the facts, such expressions should be entirely disregarded by them. This was sufficient to remove all apprehension that the remarks of the court, would have any prejudicial effect upon the minds of the jurors. People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; People v. Mayes, 113 Cal. 618, 623, 45 Pac. 860.

[14] It next is claimed that the court erred in giving certain instructions and in omitting to give others. In a lengthy instruction defining murder and its degrees, the court gave the customary and time-honered definition of "murder in the first degree," in the course of what it is said:

> "There are certain kinds of murder which carry with them conclusive evidence of premeditation; these the Legislature has enumerated in the code definition already given you, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder in the first degree. These cases are of two classes: First: Where the killing is perpetrated by means of poison, etc. Here the means used is held to be conclusive evidence of premeditation. Second: Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute, here the occasion is made conclusive evidence of premeditation."

It is argued by counsel for appellants, with all seeming seriousness, that the use of the word "here" in the part of the instruction just quoted was calculated to mislead the jury and to convey the impression that the reference was to the case at bar. It is not possible to believe that the jury could have been so misled. We do not see how a juror of ordinary mentality—and jurors must be presumed to possess at least the average of intelligence—could have placed upon the instruction the interpretation of which appellants claim it is susceptible. It is as plain as a pikestaff that the word "here" was not intended as a reference to the case at bar, but to those circumstances which the statute makes conclusive evidence of premeditation.

[15, 16] It is claimed that the court erred in not instructing the jury as to what constitutes the termination of a conspiracy and the effect of its termination upon the admissibility of subsequent acts and declarations of a coconspirator. While it was the duty of the court to so instruct if requested by any of the defendants, the record discloses that no such request was made. The court's entire charge to the jury fills many pages of the record, and seems to have covered almost every conceivable phase of the case. If appellants deemed it essential to their protection to have the jury particularly charged upon the question as to when a conspiracy terminates, and the effect thereof upon the admissibility of subsequent acts and declarations of a coconspirator, it was their duty to ask it. In the absence of such request, they will be deemed to have been satisfied with the charge as given, and the omission will not be held error. For the same reason the failure to give a definition of the crime of robbery was not error. See People v. Rogers, supra.

A consideration of the record convinces us that the trial of these appellants was in all respects fair and free from any substantial error, and that as to them the verdict was fully justified by the evidence.

As to the two defendants who have appealed to this court, Pope and Williams, the judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

(194 Cal. 273)

PEOPLE v. MATTHEW et al. (Cr. 2650.)

(Supreme Court of California. Aug. 4, 1924.)

1. Criminal law 🔑1130(3)—Practice of making single brief serve in both the Court of Appeals and the Supreme Court held improper.

The practice of respective counsel for one set of defendants appealing to the Court of Appeals, and another set appealing to the Supreme Court, of making the same brief serve in both courts, *held* improper.

2. Homicide 🔑234(5)—Evidence held to sustain conviction of codefendants.

Evidence *held* sufficient to sustain conviction of codefendants.

3. Criminal law 🔑528—Statement of one defendant not made in presence of other defendants held admissible against him.

Where a proper foundation was first made, a statement made by one defendant *held* admissible against him, though it was not made in the presence of the other defendants.

4. Criminal law 🔑673(4)—Conversation witness had with one coconspirator after commission of crime held properly admitted when limited.

Admitting conversation witness had with coconspirator the day after the crime *held* not error, where the court ruled and charged that such evidence was admissible only against such coconspirator.

5. Criminal law 🔑427(5)—Existence of conspiracy need not be established by direct evidence.

It was not necessary that the existence of a conspiracy should be established by direct evidence to render acts and declarations of conspirators admissible.

6. Criminal law 🔑427(5) — Circumstantial evidence held to suffice as foundation for evidence as to acts and declarations of one conspirator against another.

Evidence, though in a measure circumstantial, but which was sufficient to warrant the inference a conspiracy to commit a robbery existed, *held* to suffice as a foundation for the admission of evidence as to the acts and declarations of one conspirator against another.

7. Criminal law 🔑1036(1)—Objection to testimony cannot be made for first time on appeal.

Whether or not testimony as to acts and declarations of conspirators was objectionable for lack of prima facie showing of conspiracy or because conspiracy had ended, its admission could not be objected to on appeal in the absence of an objection at the trial.

8. Criminal law 🔑1169(8)—Restricting admission of evidence of codefendant's statements to such statements as were not denied held not error.

In a homicide prosecution of four codefendants one of whom was W., defendants could not complain that court restricted a reading of W.'s statements to those matters which were not denied by each defendant when such statements were made in their presence.

9. Criminal law 🔑407(2)—Admission of statements of one defendant against another defendant, not denied by either, held not error.

Admission of evidence of statements made by one defendant against another defendant which were not denied by either of them *held* not error.

10. Criminal law 🔑824(5)—Failure to instruct on particular matter held not error in absence of request for such instruction.

Where no request was made for an instruction that statements made by one defendant in the presence of another defendant and not denied by the latter were admissible only to show that particular defendant's attitude and demeanor when the statements were made, failure to give such instruction *held* not error.

11. Criminal law 🔑1166½(12), 1171(1)—Question by district attorney and remark of trial judge intimating evidence showed robbery held not prejudicial.

In prosecution of four codefendants for a homicide committed in attempted robbery, question by district attorney whether codefendants had said anything to her about any robbery, objected to on ground that defendants were not charged with robbery, and trial court's remark, "the district attorney stated what he expected to prove and there is already proof in here as to what occurred at the time. That is before the jury," *held* not prejudicial, where the evidence already adduced warranted but one conclusion, that deceased was murdered in the attempted robbery.

12. Criminal law 🔑656(5)—Court's remark in ruling on objection held not to intimate witness was unworthy of belief.

Court's remark, when ruling upon objection to impeaching evidence, that "she has made statements somewhere else. They are not bound only by what she testified before the grand jury. Statements made anywhere may be referred to," *held* not to intimate belief that witness was unworthy of belief.

13. Homicide 🔑286(3) — Instruction defining acts raising conclusive proof of premeditation held not to mislead jury as applying to instant case.

An instruction that "where the killing is perpetrated by means of poison, * * * here the means used is held to be conclusive evidence of premeditation. Where the killing is done in the perpetration, * * * here the occasion is made conclusive evidence of premeditation," *held* not calculated to mislead the jury into believing that in instant case conclusive evidence of premeditation existed.

14. Criminal law 🔑824(2, 5)—Failure to give instructions not requested held not error.

Failure to instruct statements of several defendants not made in presence of one another should be disregarded if jury found a conspiracy to commit the robbery did not exist, or to instruct as to what constituted a termination of the conspiracy, or to give definition of robbery, *held* not error, in absence of a request for such instructions.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Robert Matthew and another were convicted of murder in the first degree, and they appeal. Affirmed.

Samuel Rosenthal, Wm. Posey, and L. K. Beeks, all of Los Angeles, M. Carne, and C. W. Conlin and Franklin Padan, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and H. H. Linney, of San Francisco, for the People.

LENNON, J. [1] The four defendants in this case were jointly indicted and jointly tried for the crime of murder. The defendants Matthew and Sinuel were convicted of murder in the first degree and sentenced to suffer the death penalty. The other two defendants, Pope and Williams, were convicted of murder in the second degree and sentenced to imprisonment for life in the state penitentiary. The appeal to this court is by the defendants Matthew and Sinuel. The other two defendants, Pope and Williams, appealed to the District Court of Appeal. 228 Pac. 417. Included and intermingled in the brief presented in support of the appeal to this court of the defendants Matthew and Sinuel are the points made in support of the appeal of the other two defendants which is now pending in the District Court of Appeal. Apparently it was the purpose of the respective counsel for all of the defendants to make the same brief serve a single purpose in both courts. This is a practice which is not to be commended and should not be resorted to again. Whatever may have been the necessity for a resort to such procedure, the confusion which results in the consideration of the law and facts applicable to the points presented in support of the appeal of one set of defendants, as distinguished from the points made in support of the appeal of the other set of defendants is an evil which more than counterbalances any necessity which may have prompted the procedure.

[2] As gleaned from the evidence, adduced upon the entire case, and succinctly stated, the salient facts of the prosecution's case upon which it relied for and secured a conviction of the defendants Matthew and Sinuel are these:

The four defendants on October 30, 1923, rode in an automobile owned by the defendant Sinuel, and driven by the defendant Pope, to Bell station in the county of Los Angeles. Pope was employed as the driver of the automobile by the defendant Sinuel. Upon arriving at Bell station some time about 6:30 o'clock of the evening in question, the defendant Sinuel directed the defendant Pope to halt the car. Sinuel then alighted. He went immediately and directly into the nearby grocery store conducted by the deceased, Coleman Stone. After the defendant Sinuel left the car the defendant Matthew got out of the car and followed the defendant Sinuel into the store.

Just prior to the time and at the time the defendant Sinuel entered the store, the deceased and his wife were seated in the kitchen adjoining the store counting the receipts for the day. Hearing the slamming of a screen door which opened from the street into the store, the deceased proceeded into the store to wait upon the ostensible customers, and he found the defendant Sinuel and the defendant Matthew there. Sinuel asked for a package of Camel cigarettes and tendered a one dollar bill in payment thereof to the deceased. Upon receiving the dollar bill, the deceased turned around and went to the cash register, which contained but a dollar and 50 cents, to make the required change. Shortly thereafter the wife of the deceased heard the report of a revolver. She ran to the door leading from the kitchen into the store. Upon opening the door she saw two negroes standing in the store. The one nearest to her, whom she identified as the defendant Sinuel, pointed a revolver at her. She slammed the door shut, ran into the kitchen and out onto the porch of her home, all the while screaming. Within a few moments she returned to the store which was well lighted, and found her husband, the deceased, lying on his side on the floor. Shortly thereafter the deceased was taken to the hospital, where he died a day later as the result of a gunshot wound inflicted upon him by the defendant Sinuel on the evening in question. While at the hospital the deceased in a statement, during the making of which he expressed the belief that he was about to die, declared that "one of the darkies had a slug in one hand and a revolver in the other," and that while he was in the act of making change one of the negroes said to him, "Give me your money," to which the deceased replied, "I will give you all I have got." Shortly after the shooting a daughter of the deceased ran to a door opening from a side room into the store and while standing there she saw one of the defendants, Sinuel, lean over and kick the deceased in the head and then proceed to search the deceased. The defendant Sinuel testified that the defendant Matthew stepped around the end of one of the store's counters and examined the cash drawer, saying, "There is only ten cents in this drawer." The two defendants Matthew and Sinuel then left the store. They did not walk out, "but sneaked out, just as low to the ground as they could run and run as fast as they could run." The automobile in which they had driven to the store was gone, the defendants Pope and Williams having driven it to a house at No. 620 Ceres street in the city of Los Angeles. The defendants Matthew and Sinuel after walking some distance boarded a street car and went to the same house where they resided. Sinuel, upon arriving at the house, directed Pope to drive him and Matthew to Santa Ana, which Pope did. Pope then returned with the automobile to Los Angeles. Matthew and Sinuel went to San Diego, and after two days started back to Los Angeles and were apprehended on the road.

It was the theory of the prosecution's case that the four defendants had come to the scene of the homicide for the purpose of committing the crime of robbery and that they were therefore guilty of the crime of murder committed in the execution of that common design and purpose. The evidence previously outlined was amply sufficient to justify the verdict as to the guilt of the defendant Sinuel. It was also sufficient to justify the verdict as to the defendant Matthew predicated upon the theory, as it evidently was, that he was engaged with the defendant Sinuel in the crime of robbery and was therefore equally guilty with Sinuel of the crime of murder, even though he did not fire the fatal shot.

[3] Subsequent to the apprehension of the four defendants, and while they were in custody, each of them made statements concerning the facts of the killing. These statements were read to the jury at the trial, it being stipulated by counsel representing Sinuel and Matthew that the statements were voluntarily made. The prosecution, while accepting the stipulation referred to, elected to and did make a sufficient showing that the statements in question were freely and voluntarily made, and, therefore, aside from any question of the right of counsel to enter into the stipulation, the statements in question, subject to the limitation which was put upon them by the court, were properly received in evidence. At the time the statement of Matthew was made, it seems he was questioned alone, and the trial court ruled and charged the jury, in response to objection, that the parts of his statement which were made in the absence of the other defendants and tended to incriminate them could not be made to apply to them. The trial court did not err in admitting this statement of Matthew, which related only to himself. A proper foundation for the statement was laid, and it was admissible against the defendant Matthew even though it was not made in the presence of the other defendants.

[4] There was no error in the ruling of the trial court in permitting in evidence the testimony of the witness Rachael Braxton, called to testify upon behalf of the prosecution, relating to a conversation which she had the day following the crime with the defendant Pope. While the conversation was admissible only as against the defendant Pope, the court so ruled and so charged the jury expressly and affirmatively.

[5, 6] There is no merit in the contention that the trial court erred in its ruling in admitting against each of the defendants the testimony of the prosecution's witness, Alphonso Riley, concerning the acts and declarations of some of the defendants made during the course of the journey which all of the defendants, together with Riley, made to Santa Ana in Orange county, after the killing. In this behalf it is argued that inasmuch as some of the acts and declarations were not committed or made in the presence of all of the defendants, the testimony complained of was inadmissible unless it was first shown prima facie that a conspiracy existed between all of the defendants who committed the crime of robbery which ultimately resulted in the crime of murder. And it is also contended that the court erred in admitting, without a prima facie case of conspiracy having been established, evidence against the defendants Matthew and Sinuel of acts and declarations of the other defendants not occurring or made in the presence of these particular defendants against whom the evidence was admitted.

[7] It is not necessary that the existence of a conspiracy should be established by direct evidence, and even though the evidence tending to show a common conspiracy on the part of the four defendants to commit robbery was in a measure circumstantial in its character, nevertheless it was sufficient to warrant the inference that a conspiracy to commit such crime did in fact exist and therefore sufficed as a foundation for evidence as to the acts and declarations of one conspirator against another. Moreover, no objection to the testimony complained of was made upon the ground that a prima facie showing of a conspiracy had not been made, and, therefore, even if it be conceded that such testimony was objectionable, objection thereto cannot be made for the first time upon appeal.

Complaint is made that the trial court erred in admitting in evidence against the defendants Sinuel and Matthew testimony concerning statements made by the other codefendants after the termination of the alleged conspiracy relative to what transpired during the progress and before the termination of the alleged conspiracy. The record does not show that any objection upon that ground was made to such testimony. In the absence of objection, the trial court was not called upon to rule upon the admissibility of the testimony, and, the same having been received without objection, its admissibility cannot now be questioned.

[8, 9] The record does not support the contention that the trial court admitted incriminatory statements of one defendant made in the presence of another defendant, the truth of which statements was denied by the lat-

ter. In making the statement to the district attorney concerning the killing and the circumstances attending it, the defendant Sinuel said that the defendant Matthew did the shooting. Matthew was present at the making of this statement, but he did not deny the accusation at the time it was made. Later, when he himself was questioned about the murder, Matthew denied doing the shooting and said that Sinuel was the man who fired the fatal shot. The defendant Sinuel, being present, did not deny this accusation. Later on, during the course of the trial of the case when the statement of Williams was read to the jury, all of the statements made by him which had been denied by Sinuel at the time they were made were stricken out, and the jury, upon the request of counsel, instructed to disregard these statements. Surely no complaint can be made of the ruling of the trial court restricting the reading of the statement to those matters which were not denied by each defendant, and clearly no error was committed in the admission in evidence of the statements made by one defendant against another defendant which were not denied by either of them.

[10] No request was made of the trial court that the jury be instructed that statements made by one defendant in the presence of another defendant and not denied by the latter were admissible only to show that particular defendant's attitude and demeanor when the statements were made and therefore the contention that the trial court failed to so instruct will not be considered now.

There was no misconduct on the part of the district attorney in asking the questions which elicited the testimony complained of from these witnesses concerning the statements made by them. Nor are we able to perceive any misconduct on the part of the district attorney appearing elsewhere in the record. On the contrary, the record shows that throughout the trial no attempt was made by the district attorney to place before the jury any improper matter either by questions asked or statements made, and that whenever objection was made to questions propounded by the district attorney the court, whenever the objections were well taken, sustained them and promptly instructed the jury to disregard whatever may have been said by way of answer to the questions. In short, the record of this case is particularly free of objectionable conduct, inadvertent or otherwise, on the part of the district attorney.

[11] Certain comments of the trial judge made when ruling upon objections are claimed to be misconduct, in this, that they amounted to an intimation by the court that the evidence showed an attempted commission of the crime of robbery. The comments complained of occurred in a colloquy between court and counsel concerning the sufficiency of an objection and were made at a point in the trial of the case when there had been admitted in evidence testimony of three different witnesses as to what took place at the store when the deceased was killed. The sum and substance of that evidence warrants but one reasonable conclusion, and that is that the deceased was murdered during an attempted robbery. The district attorney had asked Mrs. Lewis, a witness for the prosecution, if the defendant Murphy Williams had said anything to her about any robbery and counsel for defendants' objection was made upon the ground that none of the defendants were charged with robbery. The court, in reply to the objection, remarked:

> "The district attorney stated what he expected to prove and there is already proof in here as to what occurred at the time. That is before the jury."

It is evident that there was nothing in what was said either by the district attorney or the court which could have prejudiced the defendants in view of the state of the evidence as it existed at the time the question was propounded and the ruling upon the objection was made.

[12] The same may be said as to the remarks of the court made during an objection to the question propounded by the district attorney to the witness Alma Brown. This witness had testified to a conversation between herself and the defendant Sinuel. The district attorney attempted to lay a foundation for the impeachment of this witness by showing that she had made contradictory statements on a previous occasion, she having already testified before the grand jury. And when ruling upon an objection the court remarked:

> "She has made statements somewhere else. They are not bound only by what she testified before the grand jury. Statements made anywhere may be referred to."

Clearly this remark of the trial court did not intimate any belief in the mind of the trial court that this particular witness was unworthy of belief.

[13] In its instruction to the jury the trial court charged, among other things, as follows:

> "Where the killing is perpetrated by means of poison, etc., * * * here the means used is held to be conclusive evidence of premeditation. Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute, here the occasion is made conclusive evidence of premeditation."

Counsel for defendants criticize this instruction because it is asserted the use of the word "here" in the instruction was calculated to mislead the jury and convey to them the impression that it referred to the case at bar and that in the case at bar there was conclusive evidence of premeditation. Obviously, the instruction complained of had to do and was dealing only with an abstract proposition of law, and presuming, as we must, that the jury were men of ordinary intelligence and fairly familiar with the English language, it cannot be said that they understood the instruction to mean that the trial court was expressing its opinion that in the instant case there was conclusive evidence of premeditation.

[14] If counsel for the defendants had desired an instruction to the effect that statements of the several defendants not made in the presence of one another should be disregarded if they found that a conspiracy to commit the crime of robbery did not exist, they should have made a request for such an instruction. And if counsel for the defendants deemed that the evidence adduced upon the entire case required an instruction to the jury as to what constituted a termination of the conspiracy or needed a definition of the crime of robbery, a request for such instructions should have been made, and in the absence of such a request the trial court did not err in failing to cover those subject-matters in its charge to the jury. See People v. Winthrop, 118 Cal. 85, 91, 50 Pac. 390; People v. Rogers, 163 Cal. 476, 126 Pac. 143.

The verdict and the judgment are not contrary to the law and the evidence. In so far as the defendants Matthew and Sinuel are concerned, the evidence sufficiently shows that they were guilty of murder in the first degree. They were accorded a fair and an impartial trial and were properly convicted. There being no error in the record, prejudicial or otherwise, the judgment must be and is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; WASTE, J.; TYLER, Justice pro tem.; HOUSER, Justice pro tem.

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194 Cal. 159

GINOCHIO et al. v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 10522.)

(Supreme Court of California. July 25, 1924. Rehearing Denied Aug. 21, 1924.)

1. Carriers 🔑318(8)—Evidence held insufficient to sustain judgment for death of intending passenger attempting to board moving car.

In action for death of intending passenger attempting to board moving street car, in which it was claimed that car slowed down to an almost imperceptible speed, and, as decedent stepped on platform, speeded up suddenly, loosening decedent's grasp on stanchion, evidence *held* insufficient to sustain a judgment for plaintiff.

2. Death 🔑31(5)—Adult sister of decedent not "heir," entitled to recover damages for death.

Under Code Civ. Proc. § 377, giving right of action for death to heirs or personal representatives, adult sister of decedent was not an "heir" or pecuniarily interested in result of action, where decedent left two minor children, and instruction permitting recovery of her damages was erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heir.]

3. Death 🔑77—Decedent's sister held not to sustain burden of showing damages.

In an action for death, decedent's adult sister *held* not to sustain burden of showing that she sustained any pecuniary damages by reason of her brother's death.

4. Carriers 🔑348(4)—Instruction denying plaintiff recovery, if decedent negligently attempted to board moving car, held required.

In an action for death, defendants were entitled to an instruction that plaintiffs could not recover, if decedent's death was caused because he negligently and carelessly attempted to board a moving street car, but instruction should not have exculpated operators of car from any negligence properly attributable to them.

In Bank.

Appeal from Superior Court, City and County of San Francisco; D. A. Cashin, Judge.

Action by Ida M. Ginochio and others against the City and County of San Francisco. Judgment for plaintiffs, and defendant appeals. Reversed.

George Lull, City Atty., and Charles S. Peery, Asst. City Atty., both of San Francisco, for appellant.

Daniel A. Ryan and Vincent W. Hallinan, both of San Francisco, for respondents.

SEAWELL, J. This is an appeal from a judgment awarding plaintiffs $20,000 as damages for the death of Angelo J. Ginochio, caused by injuries received while attempting to board a moving street car operated by defendant city. The case has been twice tried, and each time a jury found for plaintiffs. The judgment entered upon the first verdict was reversed by the District Court of Appeal, First District, Second Division, because of erroneous instructions given as to the duty a carrier owes to a passenger transferring from one line to another. Ginochio v. City and County of San Francisco, 206 Pac. 763. Upon a retrial the judgment here complained of was entered. This latest appeal was taken to this court, and was again transferred to the District Court of Appeal, First District, Second Division. The judgment was reversed upon this appeal, on the ground that the undisputed facts did not show negligence on the part of the defendant or its agents. 42 Cal. App. Dec. 395. A hearing was granted by this court, for the reason that we deemed it advisable to consider two assignments of error, neither of which was noticed by the District Court of Appeal, for the reason, doubtless, that it considered the ground upon which it placed its order amply sufficient to justify a reversal. The two assignments of error which we will notice consist in giving instruction No. XVII at the request of respondent, and the court's refusal to give instruction No. II, requested by appellant.

We feel entirely satisfied that the trial court committed prejudicial error in giving instruction No. XVII, and also that the defendant was entitled to have the jury instructed substantially in the language of instruction No. 11. The decedent, who was entitled to be carried on a Market street car by right of a transfer issued to him, received the injuries from which he died while attempting to board a westerly or out-bound car operated by defendant city on Market street, at about 2 o'clock Sunday afternoon, April 18, 1920.

At the time of the injury he was of the age of about 39 years, in good health, and the father of two motherless children, aged 14 and 16 years, respectively. He was a worker in leather, and was earning $30 per week. On the afternoon in question he boarded a Van Ness avenue car, southerly bound, and obtained a transfer to the Market street line with the intention of visiting friends. Market street runs in an easterly and westerly direction, and Van Ness avenue and Eleventh street each run in a northerly and southerly direction. Van Ness avenue has its southerly terminus in Market street, and Eleventh street has its northerly terminus in said Market street. Neither crosses Market street. The distance on Market street between the points of entrance of said respective streets into Market street, measured from the westerly boundary line of Eleventh street, if projected, and the easterly boundary of Van Ness avenue, is proximately 140 feet. A large bronze monument erected to the memory of the Spanish-American War veterans stands near the center of Van Ness avenue as it debouches into Market street. Paralleling the northerly boundary of Market street, and adjacent to the monument which affords a physical barrier of protection, a safety zone of considerable length is delineated upon the street for the protection of transfer passengers alighting from the Van Ness avenue street cars, and also for initial passengers intending to take passage on out-bound cars. A broad line painted white, commonly called a "check stop," extends across the bed of defendant's Market street track at a point about 160 feet east from said safety station and on a line with the easterly property line of Eleventh street if extended. Check stops are marked on the streets primarily for the guidance of the employees of the railway system. There is nothing upon the ground to indicate that it is intended as a safety zone, or that it is a regular stopping place to receive or discharge passengers. Cars moving northerly over Eleventh street cross Market street near this point and continue in a diagonal direction into Van Ness avenue. It is the rule of the street car system that all cars crossing intersecting lines must slow down, and, if the traffic or situation requires it, stop, before crossing. It is true that passengers are discharged from and received into the cars at the check stop line, if they manifest such a desire. The properly appointed safety zone, however, is adjacent to said monument, and approximately 160 feet from the point above described.

On the afternoon in question a fire in lower Market street had caused a blockade of traffic on Market street. The car which decedent attempted to board was the first to move westerly after the blockade had been raised. It was crowded with passengers, a number of whom were standing on the platform, and it is the claim of the motorman that the sign, "Take next car," was displayed. A large number of persons were assembled at the monument safety zone awaiting transportation. Decedent, upon alighting from the Van Ness avenue car, immediately walked away from the safety zone, and took a position on the sidewalk of Market street at a point not definitely fixed, where he waited the arrival of said car. His purpose in making this change was doubtless to avoid the throng which had gathered at the monument and to gain an advantage in boarding the car. He had formerly been a conductor in the service of the United Railways system. The conductor testified that, at the time his car was approaching and passing the check stop mark, five or six persons were standing in the street, which is made quite narrow by reason of four tracks being laid upon it, near the car track. The speed of the car had been reduced from 20 or 25 miles an hour to 8 or 10 miles before it reached the point in question. Both the conductor and motorman testified that the car was not to be stopped at this point, but it was the intention to pass by and stop at the regular safety zone. The conductor testified that he leaned away from his car and signaled to the five or six persons standing near the check stop mark by a motion of the hand to cross over to the safety zone. No other person than the decedent attempted to board the car. The motorman testified that he saw no one standing near the railway track, but that a small group of people were standing at the edge of the sidewalk. A passing automobile commanded his attention No one testified that the decedent was among the small group standing in the street near the car track. It is the testimony of the conductor that he first saw the decedent when he beckoned the passengers to cross to the safety zone. The decedent was then running towards the car, coming from behind, and making rather a diagonal course to the rear of said car.

When first seen he was 6 or 8 feet from the car. He succeeded in getting his feet upon the steps, but whether he was successful in grasping the stanchion no one was able to definitely state. At any rate he fell backward, striking the back part of his head upon the hard street pavement, was picked up unconscious, taken to a hospital, and died the second day thereafter. Respondents claim that the car slowed down to an almost imperceptible speed, and as the decedent stepped upon the platform it speeded up suddenly or moved forward with a jerk sufficiently violent to unloose decedent's grasp from the stanchion, and that this constituted the proximate cause of the death of decedent. This, of course, is the vital question in the case. On the other hand, it is the claim of appellant that deceased had not been accepted as a passenger, and the circumstances of the situation were not sufficient to justify a reasonable person to believe that the slowing down of the speed of the car to 8 or 10 miles per hour was to be regarded as an invitation to persons to board a car moving at such a rate of speed; further, that a positive warning had been given that the car would not come to a stop; and, finally, that the car was not operated in a negligent manner in any respect.

Notwithstanding the fact that the car contained more than 100 passengers, some of whom were riding upon the platform, and there were a number of persons within close proximity of the decedent at the time of his injury, not one of such number appeared as a witness at either trial. But two witnesses to the accident were called on behalf of the respondents, and a like number on behalf of appellant. The principal witness called by respondents had been a fellow passenger with the decedent on the Van Ness avenue car. Upon alighting from the car this witness stopped at the safety zone station with the intention of boarding the same car which decedent attempted to board. He was therefore directly in front of the approaching car, 160 feet from it, and was not in as good a position to judge of its speed as were those who viewed it as a passing car or who were actually passengers thereon. This witness fixed the speed of the car at the rate of 2 miles per hour at the time decedent stepped upon the platform, and testified that at that instant the car moved forward with a jerk. He was contradicted in this respect by the testimony given by him at the coroner's inquest shortly after the accident. His testimony upon cross-examination was left in an unsatisfactory state, and is in confusion with respect to important particulars, and does not appear to accord with the physical situation. The other witness called for respondents was standing on the outer edge of the sidewalk near the check stop mark at the time of the accident, intending to take the car next following. He testified that the decedent left the sidewalk and went in the direction of the approaching car as though to board it, and succeeded in placing his feet upon the step; but he was unable to say whether or not decedent secured a hold upon the stanchion, or to otherwise describe his position upon the step. While he testified that the car had slowed down very considerably, he would not say that its speed was increased with a jerk, but he thought it was sent forward with sudden and quickened speed. At the inquest he testified that there was nothing unusual in the movement of the car.

[1] Upon the state of the testimony as presented by the record, which we have carefully examined, we feel that the judgment should not be allowed to stand, and certainly not in the face of an erroneous instruction, which could have had none other effect than to have augmented the damages assessed by the jury.

[2] Instruction XVII reads as follows:

> "If your verdict be in favor of the plaintiffs in this case, it must be for such a sum as will compensate them for all the damages proximately caused them by the negligence, if any, of the defendant. In arriving at this sum you are entitled to take into consideration any damage that may be shown by the evidence to have been suffered by the plaintiffs by reason of the death of Angelo Ginochio. In estimating this damage, you have the right to take into consideration the loss of the society, comfort, support, services, and protection suffered by the plaintiffs through the loss of their father and brother, the probable pecuniary benefits to be derived by them, the expense to which they have been put for medical and funeral services for him, and any other evidence that may show pecuniary loss suffered by them through his death. You may take into consideration the expectancy of life of Angelo Ginochio at the time of his death, and his habits of life, whether industrious or otherwise, as may be shown by the evidence. The amount of your verdict, however, if you render one in favor of the plaintiffs, must be reasonable under all the circumstances of the case."

The action could only have been maintained under section 377, Code of Civil Procedure. The above instruction had no applicability to section 377, and could be relevant only to an action brought under the authority of section 1970, Civil Code, which provides for the allowance of indemnity to an employee from an employer for injuries received in consequence of the ordinary risk of the business in which he is employed under the circumstances therein described. In such cases it is provided that "the personal representatives of such employee shall have a right of action therefor against such employer, and may recover damages in respect therefor, for and on behalf, and for the benefit of the widow, children, dependent parents and dependent brothers and sisters, in order of precedence as herein stated, but not more than one action shall be brought for such recovery." No claim is here made that the relation of employer and employee existed between the decedent and appellant. Therefore the action cannot be maintained under section 1970, Civil Code. The action must be relegated, therefore, to the provisions of section 377, Code of Civil Procedure, which provides that—

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Under the foregoing section, supported by authority from this and many other states, it is quite clear that the adult sister of the decedent (who left surviving him two minor children of his body) is not an heir in the sense that she is pecuniarily interested in the result of the action. In the Estate of Watts, 179 Cal. 20, 175 Pac. 415, this court, in defining the word "heirs" said:

> "The word 'heirs' is a technical term, and is used to designate 'the persons who would by the statute succeed to the real estate (or, in California, estate of any kind) in case of intestacy.' Clarke v. Cordis, 4 Allen (Mass.) 466, 480. 'The "heirs" of a person,' said this court in Hochstein v. Berghauser, 123 Cal. 681, 687 (56 Pac. 547, 549), 'are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will.' This is the ordinary meaning of the word, used in an instrument of any kind. Where a will makes a gift to the 'heirs' of a person, section 1334 adds the sanction of statutory definition to the interpretation."
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> "The word 'heirs' * * * means the persons who would be entitled to succeed at his death to his estate in case of intestacy, by virtue of our statutes relative to succession." Estate of Wilson, 184 Cal. 63, 193 Pac. 581.

The rule of law which refutes the claim that the sister suffered a pecuniary loss by the death of her brother is thus stated in Estate of Riccomi, 185 Cal. 458, 461, 197 Pac. 97, 98 (14 A. L. R. 509):

> "It is the pecuniary loss to an heir by reason of the death that is recoverable, and that only. See generally on this subject, Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 505, 509 (115 Pac. 320). It follows, inevitably, that there can be no substantial recovery on account of any heir who has not suffered substantial pecuniary injury. This was in effect decided by this court in Burk v. Arcata, etc., R. R. Co., 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065, where the syllabi correctly state the questions decided as follows:
>
> " 'In an action for a death brought by the adult collateral heirs of the deceased, the mere fact that they are such heirs does not tend to show pecuniary damage; and in the absence of other proof tending to show actual damages or at least, probable loss, resulting to them from the death, the jury should be instructed that their recovery must be limited to nominal damages.'
>
> " 'Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from a death.'
>
> "In the light afforded by the views expressed in our decisions, it is obvious that the distribution among 'heirs' of damages recovered by the statutory trustee must be upon the basis of the pecuniary loss of each, rather than upon his rights under our succession statutes with regard to property constituting the estate left by the decedent. How perfectly absurd it would appear to be to hold that where the whole amount of a recovery is given solely on account of the pecuniary injury to the surviving wife, one-half thereof must go to a surviving father or mother or brother or sister of decedent who has suffered no pecuniary injury whatever. Yet such would be the effect of appellant's construction of the section. Her contention is based almost solely on the use of the word 'heirs,' and the meaning of that word as used in the law of this state. Appellant is undoubtedly right in her claim as to the meaning of the word 'heirs.' It denotes, as said in Redfield v. Oakland, etc., Co., 110 Cal. 277, 290, 42 Pac. 822, 825, all 'those who are capable of inheriting from the deceased person' under our statutes of succession, or, as said in Estate of Watts, 179 Cal. 20, 22, 175 Pac. 415, 'the persons who would by the statute succeed to the real estate [or in California estate of any kind] in case of intestacy.' But, as said in the Redfield Case, supra, 'The recovery is for the injury inflicted upon the plaintiffs personally, and not for injuries inflicted upon her [the deceased]; and the word "heirs" in the statute is intended to *limit the right of recovery* to a class of persons who, because of their relations to the deceased, are supposed to be injured by her death.' (Italics are ours.) In other words, the plain design of the statute is to give solely to the members of a certain class the opportunity to recover damages for such pecuniary loss as they had suffered by reason of the death of the decedent, and to recompense, in so far as the law can do so, each of such class who has suffered pecuniary loss."

See Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 Pac. 330; Gonsalves v. Petaluma & Santa Rosa Ry. Co., 173 Cal. 264, 159 Pac. 724; Taylor v. Albion Lumber Co., 176 Cal. 347, 168 Pac. 348, L. R. A. 1918B, 185.

It is the claim of respondents that, inasmuch as the appellant demurred generally to the complaint, but failed to demur specially on the ground that there was a defect or misjoinder of parties plaintiff, such defect or misjoinder appearing upon the face of the complaint, it should be estopped from raising the point for the first time in this court, citing O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Kippen v. Ollasson, 136 Cal. 640;[1] Bailey v. Prime Western

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[1] 69 Pac. 293.

Co., 83 Kan. 230, 109 Pac. 791; El Paso & N. E. Ry. Co. v. Gutierrez (Tex. Civ. App.) 111 S. W. 159; St. Louis S. W. Ry. Co. v. Henson, 58 Fed. 531, 7 C. C. A. 349.

[3] We do not understand why the complaint was not demurred to on the ground of defect or misjoinder of parties plaintiff. No cause of action is stated in favor of the sister, Ida M. Ginochio. The allegations of the complaint show that she was not an heir. The defect was permitted to go through two trials without attack by demurrer and without any objection being made at the trial. The only allegation of the compaint, however, attempting to bring the sister into the action was met with denials by the answer. The complaint alleges:

> "That the said Angelo J. Ginochio was the sole support of the plaintiff, Ida M. Ginochio, and that she was dependent upon him for her support. * * *"

No other facts are pleaded showing what her pecuniary relations were with decedent or to what extent she was dependent upon him. The answer denies on information and belief:

> "That the said Angelo J. Ginochio was the sole or only support of the plaintiff, Ida M. Ginochio, and denies that she was dependent upon him for her support, or otherwise. * * *"

This denial raised an issue of fact, and, if the issue was necessary to her cause of action, she failed to sustain the burden cast upon her by showing what pecuniary damages she had sustained by the death of her brother, if any. The only evidence found in the record is the following:

> "Q. What relation did he [Angelo J. Ginochio] bear to you, other than a sister at that time? A. His wife died and left two little children, the youngest one a baby two months old, and I was working, and he asked me if I would give up my work and keep house for him and his children, and he would keep me, because he wanted the children to be raised with him and not put away in a home. Q. When was that? A. That was about 12 years age."

She further stated that she had kept house for him about 10 years. He brought his money home to her every Saturday, and she gave him change for his needs, and presumably the balance would go for household expenses. She received no wages, and had been formerly employed in some capacity not stated, but very commendably quit it to take the place, so far as she could, of a mother. Whatever change that was wrought in her life was brought about many years prior to the death of the brother. The children, being the recognized heirs of the decedent, are the only persons legally or compensably injured. Therefore, whatever sum the jury awarded to the sister is not only without warrant of law, but also without evidentiary support. The instruction complained of was given at the request of respondents, and of course appellant had no opportunity to object to it until after the damage had been done. It is clearly a misstatement of the law on an important issue, and it cannot be said that it did not influence the jury to assess a greater sum than it would have assessed had it not been given.

[4] The refused instruction was as follows:

> "If the decedent attempted to board a moving car, he may or may not be guilty of contributory negligence according to all the circumstances of the case, but I instruct you that a person attempting to board a moving car assumes all the risk arising from the fact that the car was moving, and, if decedent was injured and died from injuries he received solely by reason of the fact that he negligently and carelessly attempted to board a moving car, then and in that case plaintiff cannot recover, and your verdict must be for the defendant."

Appellant was entitled to have the jury instructed upon the principle of law contained in the proposed instruction. While this is so, the proposed instruction is open to criticism. It does not set forth the principle of law which it was offered to illustrate either as elaborately or as clearly as it should be stated. No doubt all that was intended thereby was to tell the jury, that, if the car was moving so rapidly that it would have constituted negligence to have attempted to board it, or if the circumstances were such that a person of ordinary caution would have been deterred from attempting to board it, in such case the plaintiff would have been guilty of negligence in making the attempt. The instruction should not exculpate the operators of the car from any negligence properly attributable to them. Graff v. United Railroads, 178 Cal. 171, 172 Pac. 603, is not an authority in conflict with anything we have said here.

Judgment reversed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; SHENK, J.; LAWLOR, J.; LENNON, J.

194 Cal. 298

CITY OF OAKLAND v. GARRISON, as Auditor of Alameda County. (S. F. 11097.)

(Supreme Court of California. Aug. 5, 1924.)

1. States 🔑119—Rule for determining whether use of public funds constitutes gift.

Where question arises as to whether or not a proposed application of public funds is to be deemed a gift within Const. art. 4, § 31, fundamental subject of inquiry is as to whether money is to be used for a public or private purpose.

2. States 🔑114—Appropriation for a public purpose not generally regarded as a gift.

If an appropriation is for a public purpose within jurisdiction of appropriating body, it is not generally speaking to be regarded as a gift.

3. Counties 🔑153½—Appropriation by county for public street in city of Oakland held not a gift.

Appropriation by the county of Alameda for paving a public street in city of Oakland *held* not a gift; such improvement constituting a public purpose.

4. Counties 🔑153½—Appropriation by county in improving a city street held not unconstitutional, as authorizing gift.

Appropriation by county of Alameda for paving a public street in city of Oakland, under St. 1923, p. 123, *held* not unconstitutional under Const. art. 4, § 31, forbidding Legislature to authorize making of a gift to any municipal corporation, such improvement being a matter of general county interest.

5. Evidence 🔑5(2)—Common knowledge that improvement of city street is of more than local interest.

It is a matter of common knowledge that improvement of a city street may well be of much more than local interest in benefit.

6. Appeal and error 🔑909(6)—Supreme Court will assume that finding of board of supervisors that improvement of particular street is of general county interest is correct.

In absence of a showing to contrary, Supreme Court will assume that determination of board of supervisors that improvement of a particular city street is of general county interest is in accordance with facts.

7. Constitutional law 🔑63(2)—County appropriation for improving municipal street held not unconstitutional as a delegation of power.

Appropriation by county of Alameda, under St. 1923, p. 123, for paving a public street in city of Oakland, *held* not to involve a delegation of power in violation of Const. art. 11, § 13, such section not including a "municipal corporation."

In Bank.

Application by the City of Oakland for a writ of mandate to compel E. F. Garrison, as Auditor of the County of Alameda, to draw a warrant upon county good roads fund in favor of petitioner for certain street work. Writ granted.

Leon E. Gray and Robt. M. Ford, both of Oakland, for petitioner.

Ezra W. Decoto and Earl Warren, both of Oakland, for respondent.

MYERS, C. J. This is an application for a writ of mandate to compel the respondent as county auditor to draw his warrant in favor of the petitioner, pursuant to a resolution adopted by unanimous vote of the board of supervisors of Alameda county, declaring that the improvement by paving same with oil macadam of a described portion of Skyline boulevard, a public street of the city of Oakland, in which said city has the usual easement for street purposes, is of general county interest, and appropriating to the city of Oakland for such improvement the sum of $5,000 from the funds received by the county from the vehicle act and constituting the county good roads fund, and directing the respondent as auditor to draw his warrant in favor of petitioner for said sum. A demand was duly made by petitioner upon respondent, who refuses to draw such warrant. The respondent admits the truth of all the facts alleged in the petition and files as his return thereto a general demurrer. He does not contend that the form of the complaint herein is insufficient or that the resolution of the board of supervisors or any other act preliminary to the issuance of the warrant fails in any respect to conform to the provisions of the statute under which these proceedings were taken, to wit: "An act authorizing counties to improve or assist in the improvement of streets lying in municipalities." Stats. 1923, p. 123. His sole contention is that said act, and particularly section 1 thereof, under which these proceedings were had, is in violation of section 31 of article 4 and section 13 of article 11 of our Constitution. Said section 1 provides as follows:

> "The board of supervisors of any county may by a four-fifths vote determine by resolution that the proposed improvement of a street or portion of street within an incorporated city is of general county interest and that county aid should be extended therefor. Such resolution must refer to the street or portion of street, the general nature of the improvement proposed and the nature of the aid to be furnished by the county and the fund from which it is to be paid.
>
> "Thereafter and in accordance with such resolution the county may give aid in one or more of the following ways; viz. it may contribute money, acquire material and deliver the same, furnish engineering services or labor, or loan its road building machinery. The expense of such aid may be paid from the general fund, the general road fund or the fund composed of moneys received from the state pursuant to the vehicle act.

> "All moneys, materials and other aid so received by the city must be used by it in the improvement described in the resolution and any portion thereof not used shall be returned to the county."

Respondent's contention is that the foregoing section, in so far as it purports to authorize the county of Alameda to appropriate to the city of Oakland any of its funds to be expended by and under the supervision of said city, violates the constitutional provision prohibiting a county from making a gift of public money or thing of value to a municipal corporation (article 4, § 31), and also the provision which, according to respondent's construction thereof, prohibits counties from delegating the spending of or supervision over public money to any commission, corporation, or person other than the county itself and the regular county officers elected or appointed for that purpose (article 11, § 13).

[1-3] Respondent, in support of the first contention, relies upon and quotes from the case of Conlin v. Board of Supervisors, 99 Cal. 17, 21, 33 Pac. 753, 754 (21 L. R. A. 474, 37 Am. St. Rep. 17), wherein it is said that—

> "The 'gift' which the Legislature is prohibited from making is not limited to a mere voluntary transfer of personal property without consideration, which Civil Code, § 1146, gives as the definition of a gift; but the term, as used in the Constitution, includes all appropriations of public money for which there is no authority or enforceable claim. * * *"

That statement of the law was sufficiently accurate and comprehensive for all the purposes of the case which was in before the court for consideration, but it is not to be regarded as necessarily determinative of the question here presented. That case involved the single question of the power of the Legislature to authorize and direct a municipality to make a payment of public moneys from the city treasury to a private individual who had no valid or enforceable claim against the city therefor. There was no claim or suggestion that the moneys so directed to be paid were to be devoted to any public purpose. On the contrary, it was contemplated and intended that they should be paid to the private individual for his sole use and benefit. There was not and could not be in that case any question whether the proposed appropriation of public funds was for a private or public purpose. The purpose thereof was necessarily and admittedly private and this court held that such a use of public funds would constitute a gift such as is prohibited by the Constitution. In other decisions, both prior and subsequent to the Conlin Case, supra, this court has pointed out that, where the question arises as to whether or not a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the Constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift. The case of Sinton v. Ashbury, 41 Cal. 525, involved the validity of an act of the Legislature directing the auditor of the city and county of San Francisco to draw his warrant against the general fund in the treasury of the city for the payment to certain commissioners of compensation for preliminary work performed by them incident to the opening and extension of certain streets within the city. This court, having first determined that the Legislature had power to direct and control the affairs and property of a municipal corporation for municipal purposes, then said:

> "It remains only to inquire whether the appropriation in this case was for a municipal or for a purely private purpose."

The court then pointed out that the opening and extension of a principal street through a city was a matter of concern to the people of the entire municipality and concluded that the act in question was clearly valid. In Conlin v. Board of Supervisors, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752, the first Conlin Case, supra, was reviewed and construed as holding that "the Legislature holds the public moneys in trust for public purposes, and under this limitation of the Constitution can make no disposal of these funds except in accordance with such purposes," and it was further pointed out that, "even if it be conceded that the Legislature has any control over municipal funds, the only circumstances under which it could direct their payment would be for some municipal purpose, or in satisfaction of some valid claim against a municipality." In Veterans' Welfare Board v. Riley, 188 Cal. 607, 206 Pac. 631, it was said that "the fundamental question involved * * * is the question as to whether or not such moneys are expended for a public purpose." A like conclusion was reached and expressed in varying terms in Ingram v. Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221, (payment of bounties for the destruction of coyotes); O'Dea v. Cook, 176 Cal. 659, 169 Pac. 366 (payment of police pensions); Macmillan Co. v. Clark, 184 Cal. 491, 194 Pac. 1030, 17 A. L. R. 288 (furnishing free textbooks), and Allied Architects' Ass'n v. Payne (Cal. Sup.) 221 Pac. 209 (expenditure for a memorial hall for the use of veteran soldiers and sailors). It cannot be doubted that the proper improvement of a public street is a public purpose, and in the light of the foregoing decisions we have no difficulty in arriving at the conclusion that the appropriation here in question is not to be regarded as a gift in the sense that it is to be devoted to a private purpose as distinguished from a public one.

[4-6] But this conclusion does not entirely dispose of the question raised by respondent's first contention. Section 31 of article 4 of the Constitution provides in effect that the Legislature shall have no power to authorize the making of any gift of any public money to any municipal corporation. It may reasonably be concluded, and we shall assume for the purposes hereof, that this provision would prevent the appropriation of county funds to a municipal corporation even for a public purpose, if that purpose were purely municipal and of no interest or benefit to the county as a political subdivision. As was said in the second Conlin Case, supra:

> "While the funds in a municipal treasury are in a certain sense public, they are so only for the limited public which has contributed them. * * *"

It is not sufficient, therefore, that the appropriation here in question be for a public purpose. It must also be for a purpose which is of interest and benefit generally to the people of the county of Alameda. The question, then, is whether the improvement of this particular street within the city of Oakland is a matter of such general county interest that the county funds may properly be expended therein. We think this question must be answered in the affirmative. To begin with, we have the express finding, determination, and declaration by the board of supervisors that the proposed improvement "is of general interest to the said county of Alameda and that aid of the said county of Alameda should be extended therefor. * * *" We need not pause to inquire whether this finding and determination is conclusive upon us in the absence of fraud or mistake, for the reason that its verity is in no way attacked or questioned by respondent herein. In Sinton v. Ashbury, supra, it was taken for granted that the opening of a single street within the city of San Francisco was a matter of interest and concern to the entire municipality. In Reclamation Board v. Chambers, 46 Cal. App. 476, 189 Pac. 479, it was held that the reclamation of certain lands within the Sacramento and San Joaquin reclamation district was of statewide interest and benefit such as to justify the appropriation of state funds in aid thereof, notwithstanding the fact that an assessment had been levied upon the lands benefited thereby to pay the cost thereof. In these days of the almost universal use of motor vehicles for the transportation of passengers and freight, it is a matter of common knowledge that the improvement of a street within a city may well be of much more than local interest and benefit. This is particularly noticeable in those cases where such a street connects with a county boulevard or state highway. It is not alleged that such is the situation here, but neither is the contrary alleged, and in the absence of any showing or suggestion to the contrary we must assume that the finding and determination of the board of supervisors that the improvement of this particular street is of general interest to the county of Alameda is in accordance with the facts.

[7] We find no merit in respondent's contention to the effect that the appropriation herein involved a delegation of power in violation of section 13 of article 11 of the Constitution. That section prohibits the Legislature from delegating such power "to any special commission, private corporation, company, association or individual. * * *" Petitioner does not come within any of the classes enumerated therein, and no reason has been suggested to us why we should read into that section by implication the words "municipal corporation" which seem to have been purposely omitted therefrom.

The foregoing conclusions render it unnecessary to consider other contentions made by petitioner in support of its application.

It is ordered that a peremptory writ of mandate issue as prayed for herein.

We concur: LAWLOR, J.; LENNON, J.; WASTE, J.; SEAWELL, J.; HOUSER, Justice pro tem.; TYLER, Justice pro tem.

(194 Cal. 284)

PARKE et al. v. FRANCISCUS.
(L. A. No. 7196.)

(Supreme Court of California. Aug. 5, 1924.)

1. Statutes ⚷115(3)—Section of Motor Vehicle Act, making transfer invalid unless certain conditions complied with, held not void as being beyond declared purposes of act.

Title to Motor Vehicle Act (St. 1919, p. 191), amending 1915 act (St. 1915, p. 397) to provide for regulation of use and occupation of public highways by vehicles, and for their registration and identification, does not violate Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, and section 7 of the act, making a transfer of a motor vehicle invalid unless certain conditions are complied with, is not void as being beyond declared purposes of the act.

2. Records ⚷2—Motor Vehicle Act held not beyond power of Legislature.

Motor Vehicle Act (St. 1919, p. 191), requiring registration and indorsement of certificate as an essential to complete title, is not beyond power of Legislature, in view of fact that enforcement of act is dependent on fact of title and ownership.

3. Records 🔑9½, New, vol. 12A Key-No. Series—Failure of transferee of ownership in car to procure registration certificate renders sale incomplete.

Under Motor Vehicle Act (St. 1919, p. 191), declaring that, until transferee of ownership in a car has received original certificate of registration and properly indorsed it, such transfer will be deemed incomplete and invalid for any purpose, failure of transferee to procure registration certificate properly indorsed does not make sale void ab initio, but renders it incomplete.

4. Records 🔑9½, New, vol. 12A Key-No. Series—Failure of transferees to obtain certificate of registration properly indorsed, held to render their title invalid as against purchaser.

Where owner of motor vehicle assigned a conditional contract of sale, assignees became transferees of "ownership" thereof, within Motor Vehicle Act (St. 1919, p. 199) § 8, par. 3, and their failure to obtain a certificate of registration properly indorsed, and to forward it with an application for re-registration within 10 days, rendered their title invalid as against subsequent purchaser in good faith from conditional vendor and vendee.

5. Replevin 🔑8(3)—Claimant not required to establish ownership in action of claim and delivery.

In an action of claim and delivery, claimant is not required to establish ownership; a right to possession of the thing being sufficient.

6. Estoppel 🔑119—Existence is a question of fact.

Existence of an estoppel is a question of fact.

7. Estoppel 🔑52—Fraud is one of the essential elements of estoppel.

One of the four essential elements of estoppel is fraudulent intent; that is, there must be circumstances and conduct which would render it a fraud for party to deny what he had previously induced or suffered another to believe and take action upon.

8. Estoppel 🔑52—Negligence will satisfy element of fraud necessary to an estoppel.

Negligence is as a matter of law equivalent to intent to deceive, and will satisfy element of fraud necessary to an estoppel.

9. Estoppel 🔑96—Neglect must be in respect to same duty.

Neglect to operate as an estoppel must be in respect to some duty owing to party asserting it.

10. Estoppel 🔑75—Transferees of conditional auto sales contract held estopped to deny innocent purchaser had obtained title and could not recover possession.

Transferees of a conditional auto sales contract, by allowing conditional vendor and vendee to keep certificate of registration, indorsed alone by original owner, thus enabling them to dispose of property to an innocent purchaser, were estopped to deny that such innocent purchaser had obtained title, and could not recover possession thereof in claim and delivery.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by H. M. Parke and A. J. Browne, copartners doing business as Parke & Browne, against F. G. Franciscus. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. W. Hindman, of Los Angeles, for appellants.

Woodruff & Shoemaker, of Los Angeles, for respondent.

LAWLOR, J. This is an action in claim and delivery for the possession of one Buick automobile, motor No. 179804.

In April, 1920, Robert J. McNabb purchased and received possession of the Buick automobile from John Waterfield. A bill of sale was executed by Waterfield, and with a registration certificate required by the Motor Vehicle Act (Stats. 1919, p. 191) was delivered to McNabb, who drew a draft in favor of Waterfield on the Coast Securities Company for the amount of the purchase price of the automobile. On May 10, 1920, McNabb sold this same automobile to J. D. Green, his employee, upon a conditional sale contract for $1,050. No money was paid down, but an offset of $350 was allowed Green, in consideration of the cancellation of an indebtedness of that amount due him from McNabb. A registration certificate was not delivered to Green. Possession of the automobile was delivered to him and he agreed to pay the balance of $700 in monthly installments of $58 each. The contract was in writing and provided that:

> "The title to the said property, and parts and accessories added thereto, shall be and remain in the first party until all of said payments are made, and all of the conditions herein contained fully complied with. * * * But it is expressly agreed that this contract is a conditional contract of sale and does not transfer to the party of the second part any right or title in or to said automobile until the full performance of all payments and conditions named herein by the party of the second part. This agreement shall inure to the benefit of, and be binding upon, the heirs, executors, administrators, and successors of the respective parties hereto, and the assigns of said first party."

It was also provided that upon any default in payment of any installment when due the conditional vendor might at his option, without previous demand or notice, retake possession of the machine, with or without process of law. Parke & Browne, plaintiffs, through an independent broker, L. L. Baxter, purchased this contract from McNabb on May 11, 1920, for $644.15. No bill of sale was delivered to Parke & Browne, nor was the registration certificate indorsed over or delivered to them. Green filled out a blank attached to the conditional sale contract, giving his name, address, and two references, and reciting that the automobile was to be used by him privately and for business; also stating that it would be stored at 26 Virginia street, the address of McNabb's place of business in Lamanda Park, Los Angeles. Parke & Browne wrote Green that they had purchased said contract from McNabb; that all payments should thereafter be made directly to their office, advising him that within a short time before each payment became due he would be given notice thereof; that the car had been insured against fire and theft, and that they would like to insure him against collision. The notices were sent to Green for the installments due on the 10th days of June, July, and August. On July 8th and August 20th, respectively, Parke & Browne received the stipulated installments of principal and interest. Green testified that he kept the car at McNabb's place of business and used it for demonstration purposes, and occasionally when he went home to lunch.

About May 20, 1920, Green sold the car to defendant F. G. Franciscus. The price was $1,000; $550 of the purchase price was paid by check, and a Ford automobile was "turned in at $450." A bill of sale was not given to Franciscus. He took possession of the car and retained it until the commencement of this action, November 19, 1920. Franciscus asked both Green and McNabb for the registration certificate, but he was not permitted to testify as to what response was made. However, L. D. Nolan, another salesman for McNabb, sent it to the motor vehicle department, together with an application blank for re-registration and $1 in payment for such transfer. The certificate was indorsed at the time on the reverse side by Franciscus. Green testified that he cashed the $550 check he received from Franciscus and delivered the money to McNabb, and that he never took possession of the Ford automobile. About three weeks after the delivery of the Buick to Franciscus, he received by mail the new certificate of registration.

Parke & Browne instituted these proceedings in claim and delivery against Franciscus, alleging that they were the owners, and entitled to immediate and exclusive possession of the automobile in question; that Franciscus had without their consent come into possession of the automobile unlawfully; that they made demand for possession of the car, but that Franciscus refused to deliver it to them, and still unlawfully withholds possession thereof. A supplemental complaint was filed by Parke & Browne, alleging that since the commencement of said action Franciscus had executed a redelivery bond and taken possession of the car. Franciscus, in his answer, denied these allegations, and further alleged that prior to May 20, 1920. Green and McNabb were in possession of said automobile, with the right to dispose thereof, and that Franciscus was a buyer in good faith for value in the ordinary course of business, without notice of ownership or any claim of Parke & Browne; that he was the owner and entitled to possession of the machine, and that if Parke & Browne ever had any right or title in the car they conferred upon McNabb and Green apparent title and power to sell, and are now estopped from asserting any title to or right of possession in it as against Franciscus; that he was an innocent third party and purchaser for value, who dealt with the apparent owner without knowledge of any alleged claim on the part of Parke & Browne and that they negligently allowed the sale to be made to him.

The case was tried by the court sitting without a jury, and judgment went for defendant. Parke & Browne appeal from the judgment. The court found that Parke & Browne were not, and that they had not been, the owners or entitled to possession of the automobile in controversy, and that Franciscus was the owner and entitled to possession thereof. The findings continue:

> "That on and prior to the 20th day of May, 1920, one Robert J. McNabb and Jack Green were in possession of the said automobile at their place of business as used car dealers at Lamanda Park, Los Angeles county, Cal.; that at said time and place the said Robert J. McNabb was the owner of and conducting said business, and the said Jack Green was employed by said Robert J. McNabb as a salesman in selling and disposing of secondhand or used automobiles; that at said time and place the said Robert J. McNabb and Jack Green were possessed of the power to dispose of the automobile above described; and that the defendant bought the said automobile on the 20th day of May, 1920, at said place * * * in the ordinary course of business."

It is further found that Parke & Browne neglected to take any precautions in having the automobile registered in their name or in showing any transfer of record in their favor, and that they negligently permitted the certificate of registration, indorsed in blank by McNabb and Green, to be where it was available to inspection by innocent purchasers, and that they carelessly put it in the power of McNabb and Green to dispose of said automobile to an innocent purchaser, in the belief that he obtained valid title thereto.

The first question presented is whether the failure to comply with the requirements of section 8 of the Motor Vehicle Act (Stats. 1919, p. 191), as to the transfer of ownership in motor vehicles which are registered under the act, precludes the passage of the title to such vehicle. The said provision of the Motor Vehicle Act reads as follows:

> "Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose: Provided, that where such transfer is made to a manufacturer or dealer to whom has been assigned a general distinguishing number and who intends to resell or otherwise retransfer said vehicle the provisions of this act relative to the joint statement of transferor and transferee indorsed thereon, shall be complied with upon such sale or transfer." Section 8.

Appellants contend that this requirement of the statute creates merely a duty of owners and operators of motor vehicles towards the state; that registration under the act is not proof of ownership, but simply prima facie a claim of right or representation which a person in actual physical possession cannot successfully assert to divest the legal title of rightful owners of personal property. In support of their position, appellants mention other provisions of the act such as that:

> "The department shall also furnish with each number plate for motorcycles and with each pair of number plates for automobiles, and on each annual renewal of registration, a certificate of registration which shall contain upon the face thereof the following data: The name of the registered owner of the motor vehicle, his post office address, the name and address of the legal owner, and the make of the vehicle, the year model denoted by the manufacturer, the model or letter denoted by the manufacturer, if any: * * * Provided, however, the name and address of the legal owner shall appear on the bottom line of the certificate of registration. * * * Such certificate shall contain a blank space for the signature of the registered owner and shall be signed by such owner. The reverse side of said certificate shall contain forms (a) for notice of transfer of ownership, as hereinafter required, and (b) for application to the department by the transferee, in case of transfer of said motor vehicle, for registration thereof in his name, said application to be in the form of a joint statement to be signed by both transferor and transferee, and the legal owner, and to contain in addition to such other particulars as may be required by said department, a statement of the post office address of the transferee so applying for registration."

It is argued from this that the Legislature was not concerned with the transfer of legal title; that the term "registered owner" has reference to the person registering the vehicle, and that "transferee" is the designation used only by such party, but that the "legal owner" takes no part in the transfer until asked to sign the certificate, permitting transfer by the registered owner.

Respondent contends that, since the court found it was not true that appellants were or had been the owners of the vehicle in question, they are concluded, and that in any event respondent is protected as an innocent purchaser from Green, who had possession and control of the property, as against previous transfers which are pronounced fraudulent by section 3440 of the Civil Code. Appellants insist that any attempt by the Legislature to curtail the powers of purchase and sale of personal property would be unconstitutional, and that this was not the intention of the Motor Vehicle Act, since the registration of vehicles is not required, unless they are to be operated on public highways. Furthermore, it is pointed out that the title of the act does not purport to affect rights in personal property, that it aims only to regulate the operation of motor vehicles and to provide a revenue.

[1, 2] The title to the act of 1919 provides that it is to amend the 1915 act, "said amendments to provide for the regulation of the use and occupation of the public highways by vehicles and otherwise and for the regulation of traffic and travel over such highways for the registration and identification of motor and other vehicles. * * *" There is no doubt that the constitutional provision (article 4, § 24) that "every act shall embrace but one subject, which subject shall be expressed in its title" is not violated, and section 8 of the Motor Vehicle Act, which purports to make a transfer invalid for any purpose unless certain conditions in the act are complied with, is not therefore void, as being beyond the declared purpose of the act. The nature of motor vehicle traffic requires that there be a more certain indicia of ownership than mere possession, for the protection of the general public in case of accidents or violations of the law and to prevent fraud upon innocent purchasers. In order to effectuate this purpose, registration and identification of motor vehicles is required. the "legal owner" and the "registered owner" upon the face of the certificate identify the vehicle. Upon the sale and transfer of "ownership" in a vehicle already registered, the act requires the transferor and transferee to enter into a joint statement of the transfer, indorsed upon the reverse side of the certificate of registration. It is also provided that the legal owner sign such statement which shall be forwarded to the department, and upon the payment of a fee the vehicle shall be registered in the name of the transferee. This provision is evidently for the purpose of identifying the vehicle in the hands of transferees. The identity and ownership of cars operated upon the public ways is of concern to the state. It cannot be said to be beyond the power of the Legislature to require such registration and indorsement as an essential to complete title in a motor vehicle, when the enforcement of the police

regulations contained in the act and the revenue measures therein is dependent upon the fact of title and ownership. We quote from Huddy on Automobiles (5th Ed.) 113:

> "The reason assigned for the necessity of registration and licensing is that the vehicle should be readily identified in order to debar operators from violating the law and the rights of others, and to enforce the laws regulating the speed, and to hold the operator responsible in cases of accident. The Legislatures have deemed that the best method of identification, both as to the vehicle and the owner or operator, is by a number or a tag conspicuously attached to the vehicle. In case of any violation of law this furnishes means of identification, for, from the number, the name of the owner may be readily ascertained and through him the operator. Such acts are not passed merely for the purpose of revenue but have for their object the protection of the public."

[3] The provision in question declares that, until the transferee of the "ownership" in the car has received the original certificate of registration and has written his name upon the face thereof in the blank space provided for that purpose by the department, the delivery of said motor vehicle shall be deemed not to have been made and title not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. The provision does not make compliance therewith prima facie evidence of the ownership of the property in a car so registered and transferred, that is, the certificate of registration does not so declare in terms. However, the words of the act are clear, plain, and unambiguous, and the meaning is not open to question. The failure of the transferee of the "ownership" in the car to procure the registration certificate properly indorsed does not make the sale void ab initio, but in the terms of the statute it is incomplete. This interpretation of the intent of the Legislature would seem to find support in the Motor Vehicle Act of 1923 (Stats. 1923, p. 517). This act provides for both a certificate of ownership and a certificate of registration. It is declared that both shall contain upon the face thereof the date issued, the registration number assigned to the owner and to the vehicle, the name and address of the owner and legal owner in typewriting, and the description of the vehicle. The reverse side of the certificate of ownership *only* shall contain forms for notice to the division of a transfer of the title or interest of the owner or legal owner and application for registration by the transferee. Section 45 of the act provides for the transfer of title or interest in the vehicle:

> "(a) Upon a transfer of the title or interest of a legal owner or owners in or to a vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred and the transferee shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, together with the address of the transferee, in the appropriate spaces provided upon the reverse of said certificate.
>
> "(b) Within ten days thereafter, the transferee shall forward both the certificate of ownership so indorsed and the certificate of registration to the division, which shall file the same upon receipt thereof."

It is declared in subdivision (c) that the provisions of (b) shall not apply to a transferee who does not intend to drive the vehicle upon the public highways, "but every such transferee shall upon transferring his interest or title to another give notice of such transfer to the division and indorse the certificate of ownership as herein provided and deliver the certificate of ownership to the new legal owner and the certificate of registration to the new owner." Subdivision (d) provides for the issuance of the new certificate of ownership and registration, respectively, and subdivision (e) declares that until such certificates are issued "delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." Subdivision (g) declares that the legal owner may assign his title or interest without the consent of the holder of the certificate of registration, but that the indorsed certificate of ownership must be filed with the division and a new one issued to the legal owner, and that the division send a notice of such action to the registered owner. It will be noted that the only change made in the act of 1923 is to require separate certificates of registration and ownership. By the act of 1919 the certificate of registration contained all the information required in the two certificates by the act of 1923 and served the purposes of both. This was done apparently to facilitate transfers of title or interest which, in cases where the legal owner and the registered owner are not identical, do not affect the registered owner. It is clear that the term "transfer of ownership" in the 1919 act means the same thing as transfer of title or interest in the 1923 act.

[4] In the case at bar it is clear that the certificate of registration, which serves the purpose of the certificate of ownership and the certificate of registration provided for in the act of 1923, must have been properly indorsed upon the reverse side thereof by the transferee of the "ownership" or title or interest in the car, filed with the motor vehicle department, and a new certificate of registration issued in the name of appellants before title was completely vested in them, and before the transfer could be effective or valid for any purpose.

When McNabb purchased the automobile in question from Waterfield, he received possession thereof and obtained the registration certificate. He did not apply for the reregistration of the vehicle. It was not required by the proviso in section 7 of the Act of 1919 that he do so, but he was required to join with Waterfield in a statement of the transfer upon the reverse side of the certificate of registration. While the requirement of such a statement by a "dealer" is mandatory, a failure to comply therewith does not make the sale incomplete or invalid. So far as the certified copy of the original certificate of registration issued to Waterfield shows, the "ownership" or title and interest in the automobile appears to have passed to respondent directly from Waterfield, the original legal and registered owner. Green, the vendee under the conditional sale contract, did not acquire ownership, that is to say, title to the car; therefore he was not required to make application for re-registration in his own name. McNabb still retained the ownership of the car; that is, the legal title which he transferred to appellants by the assignment of the conditional sale contract. Appellants are the transferees of the "ownership" of the automobile within the meaning of the third paragraph of section 8. Therefore the failure of appellants to obtain the certificate of registration properly indorsed by themselves and McNabb and to forward it, together with an application for re-registration, to the department within 10 days renders their title invalid as against the respondent.

We have shown in answer to the first proposition that compliance with section 8 is essential to the transfer of title. This leads to a second proposition—whether in this action of claim and delivery appellants have shown a right of possession, in spite of their failure to comply with the requirements of the above section.

[5] In an action of claim and delivery the claimant is not called upon to establish ownership, merely a right to the possession of the thing, and since the transfer to appellants was not void ab initio, in an action of claim and delivery, they might be entitled to recover. An Oregon statute of 1919, in section 9 (Oregon Laws, p. 2074), provides that no sale or transfer of any motor vehicle registered in accordance with the act shall be valid without compliance with the provisions of the section concerning the report of a sale of a registered vehicle. The authorities in that state hold that the effect of the statute is to attach to every sale a contingent condition subsequent under which the sale may become abortive on failure to comply with the statutory requirement with reference to registration. Swank v. Moisan, 85 Or. 662, 166 Pac. 962. In Briedwell v. Henderson, 99 Or. 506, 195 Pac. 575, the court said:

> "The court properly held that plaintiffs were bound by the terms of the statute, in this: That the sale of the vehicle was invalid. Nevertheless, they had such a special interest in the car that the law authorizes them to maintain an action for its possession. The vehicle was not cast out from the protection of the law by reason of the plaintiffs' failure to observe the statute. The car was property when it was sold; property when the action was instituted; it is property now. Although plaintiffs' title became defective, they came into possession of the car by lawful means. In acquiring its possession, they committed no act of omission or commission that suggests crime or wrong. In an action of claim and delivery under an allegation of general ownership, the plaintiff may prove a special property entitling him to possession."

In Wiedeman v. Campbell, 108 Or. 55, 215 Pac. 885, it was held that the failure to comply with the statute in that state does not bar the purchaser of an automobile from recovering possession of the automobile, after default on a conditional sale contract with a third party. The Oregon statute does not declare the sale shall be invalid for any purpose, which are the words in the provision here involved. There is no authority in this jurisdiction on the point whether a claimant in an action for claim and delivery must show compliance with the provisions of the Motor Vehicle Act. The cases in which the section is involved assume that the effect of the provision is to preclude the passage of title, but refuse to allow it to be invoked where the facts justify the application of estoppel. Boles v. Stiles, 188 Cal. 304, 204 Pac. 848; Chucovich v. San Francisco Securities Corp., 60 Cal. App. 700, 214 Pac. 263. In the former case the court held that, although one of the partners of a dissolved partnership failed to obtain a new registration certificate in his own name, the original certificate having been in the partnership name, he had shown sufficient property, coupled with a right to the immediate possession, to enable him to maintain an action for the recovery of the possession of the automobile from the other partner, who had unlawfully obtained possession thereof. It was said:

> "The appellant, by his own act and agreement having placed the plaintiff in the immediate and exclusive possession of the automobile, is not in position to invoke the provision of the statute referred to."

In the latter case a conditional sale contract was assigned to the securities corporation, and the conditional vendee having defaulted, the conditional vendor, under instructions of the securities corporation, repossessed itself of the truck and sold it to an innocent purchaser. The decision was put upon the ground that the assignee of the conditional sale contract was estopped to deny the authority of the conditional vendor to convey a valid title to an innocent purchaser. An argument was made, however, that the innocent purchaser had not received title, because he had not complied with the provisions of the Motor Vehicle Act. The court held that the assignee of the conditional sale contract was in no position to raise such a question, having by his own act placed the automobile in the possession of the conditional vendor. Under the authorities in this jurisdiction and elsewhere, it would seem that the appellants have shown sufficient property in the automobile to prevail in an action of claim and delivery, where the rights of innocent third persons are not involved.

[6-10] This brings us to a consideration of the rights of respondent. The trial court based its judgment on the issue raised by the defense set up by respondent, that is, that he had acquired title by estoppel. The existence of an estoppel is a question of fact. Di Nola v. Allison, 43 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84. And assuming that the trial court followed the correct rule of law, the next question is whether the evidence establishes all the elements of estoppel. One of the four essential elements of estoppel is fraudulent intent, that is, there must be circumstances and conduct which would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. 10 Cal. Jur. 634. It is well settled that negligence, that is, careless and culpable conduct, is as matter of law equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. Venice v. Short Line Land Co., 180 Cal. 447, 181 Pac. 658. Of course, the neglect to operate as an estoppel must be in respect to some duty owing to the party asserting it. The question is whether the appellants, by allowing the conditional vendor and vendee to keep the certificate of registration, indorsed alone by the original owner, thus enabling them to dispose of the property to an innocent purchaser in the belief that he was obtaining valid title thereto, are estopped to deny that such innocent purchaser has obtained such title. This is such a failure to perform the requirements imposed by law as to constitute culpable negligence upon which an estoppel may be founded. It follows that, as the registration certificate is a prerequisite to the passing of title, and that appellants failed to obtain such certificate and negligently allowed it to remain outstanding, they cannot recover possession of the automobile in an action of claim and delivery, since respondent as an innocent purchaser acquired lawful possession thereof. We are not, however, passing on the relative rights of appellants, or of McNabb and Green, in the automobile.

Judgment affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

(194 Cal. 195)

ARENA v. BANK OF ITALY et al.

(S. F. 10332.)

(Supreme Court of California. July 30, 1924. Rehearing Denied Aug. 29, 1924.)

1. Attachment 🔑299—Third party must present verified claim setting out his right to possession before attaching officer can demand indemnity bond.

Under Code Civ. Proc. § 689, as amended in 1891 and 1907, made applicable to attachment proceedings by section 549, a third party claimant must present to the officer a verified claim showing on its face that he claims the property and setting out a right to its possession before the officer is entitled to demand an indemnity bond of plaintiff.

2. Attachment 🔑299—Third party's claim to attached property held defective and not to give attaching officer right to demand indemnity bond.

Under Civ. Code, §§ 2888, 2913, 2924, 2927, 2957, 2989, 3440, a third party claim to attached goods under Code Civ. Proc. § 689, alleging that claimant became owner by an assignment to secure payment of a note, showed upon its face that the claimant was not the owner of the property, and gave the attaching officer no ground for demanding an indemnity bond or releasing the property when it was not given.

3. Chattel mortgages 🔑1—Pledges 🔑1—Only liens created by assignment of personal property as security for a debt are pledge and mortgage.

The only forms of lien which can be created by an assignment of personal property as security for a debt are a pledge and a mortgage.

4. Attachment 🔑299—Claim of third party to attached property failing to set up right of possession furnished no basis for demanding indemnity bond.

Where a claim of a third party to attached goods omitted to expressly assert any right of possession, as required by Code Civ. Proc. § 689, it furnished no basis entitling the attaching officer to demand an indemnifying bond from the plaintiff or justifying him in releasing the attached property when such bond was not given.

5. Attachment 🔑299 — Amendment of claim of third party to attached property held not to validate demand for indemnity.

Where a claim of a third party to attached property, under Code Civ. Proc. § 689, was so defective as to furnish no basis for the sheriff's demand for an indemnifying bond, and so ineffectual as to give him no right to release the property for failure to give such bond, an attempted amendment could not give validity to the sheriff's void act in making the demand.

6. Sheriffs and constables 🔑137(1)—Allegation of ownership of attached property held sufficient as against general demurrer.

In an action for wrongful release of an attachment, a complaint alleging that pursuant to a writ of attachment defendant attached goods belonging to a certain person, describing the property so taken, was sufficient, as against a general demurrer, in its allegation of ownership.

7. Appeal and error 🔑1040(10)—Overruling special demurrer to allegations of ownership of attached property not prejudicial.

In an action for wrongful release of an attachment, where the complaint alleged that the goods attached belonged to a certain defendant, overruling a special demurrer, *held* not prejudicial error, where defendants were not misled, but knew at all times the rights of the defendant in the property, and the court found that the goods belonged to the named defendant and were in his exclusive possession and control.

8. Sheriffs and constables 🔑137(1)—Complaint held to show trial of issue whether sheriff made demand for indemnity bond.

In an action for wrongful release of an attachment, complaint, evidence, and findings *held* to show that the issue whether the sheriff made a renewed demand for an indemnifying bond after service of the amended claim by a third party was tendered and tried, and found in plaintiff's favor.

9. Judgment 🔑200—Findings held sufficient to entitle attachment plaintiff to judgment for release of attached property.

In an action for wrongful release of an attachment, findings *held* sufficient to justify a judgment for plaintiff.

On Petition for Rehearing.

10. Chattel mortgages 🔑187—Claim under trust receipt held void on face as against creditors.

Under Civ. Code, § 3440, where owner assigned and delivered goods to third party, who restored possession of the goods to such owner, and took from him trust receipts, the third party's claim of ownership was void as against creditors.

11. Chattel mortgages 🔑187—Trust receipts resting on no prior ownership are void as against creditors.

Where a person takes trust receipts for property resting on no prior ownership of the property by the creditor for whose benefit the so-called trust is created, and leaves the property in possession of the one giving the receipt, such arrangement is void as against creditors.

12. Attachment 🔑313—Third party claimant securing release of an attachment liable to attaching creditor.

Where a third party claimant secured a release of attached goods by a sheriff by a claim on trust receipts which were void as against creditors, under Civ. Code, § 3440, he is liable to the attaching creditor for damages sustained by the unlawful release of the attachment.

Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Joseph Arena against the Bank of Italy and others. From judgment for defendants, plaintiff appeals. Reversed.

A. P. Dessouslavy, of San Francisco, for appellant.

Louis Ferrari, of San Francisco, for respondents.

RICHARDS, J. This appeal is from a judgment in the defendants' favor in an action instituted by the plaintiff to recover damages arising from the alleged wrongful release of an attachment. The facts, as shown upon the trial and found by the trial court, in so far as they are necessary to a decision of this cause, are the following: For some time prior to July 22, 1919, one Luigi Dellaira had been doing business under the name of "California Grape Association," and under that name had come into the possession of certain merchandise consisting of 204 barrels of olives, 11 crates of empty half-gallon cans, 349 cases of tomato purée, and 72 cases of Grinola oil, which said merchandise was of the value of about $8,000, and was on said above date situate in certain premises on Front street in San Francisco, which prior to and at said date were rented and occupied by said Luigi Dellaira and constituted his store and salesroom while doing business under said name; that on July 22, 1919, the plaintiff in this action commenced an action against said Luigi Dellaira, under both names, to recover upon an alleged indebtedness of $3,328.83, and on said date procured a writ of attachment proper in form to be issued directing the sheriff of the city and county of San Francisco to attach the said property of said Dellaira to cover and secure said claim; that pursuant to said writ the said sheriff did duly levy upon, attach, and take into his possession the aforesaid merchandise; that on said July 22, 1919, and while the said sheriff so held the said property and the whole thereof under said attachment, the Bank of Italy presented to and served upon the said sheriff its third party claim to the whole of said property, together with its demand for the release thereof, supported by the affidavit of one of its officers, wherein was set forth the corporate character of said bank, the authority of its said official to make said affidavit, the fact of the levy of said attachment, the description of said property and its location, and which affidavit then proceeded to state:

"That the following goods in said store are the property of the Bank of Italy, viz.: 204 barrels of olives; 11 crates of empty half-gallon cans; 349 cases of tomato purée; 26 cases of tomato oil; 46 cases of Grinola oil. * * * That said goods hereinabove described are of the value of about $30,000. That the Bank of Italy became owner of said goods by an assignment given by the defendant L. Dellaira and the defendant California Grape Association to the said Bank of Italy to secure the payment of a promissory note in the sum of $30,000."

That upon receiving said third party claim the said sheriff notified the plaintiff thereof and demanded that said plaintiff indemnify the said sheriff against said claim. That upon receiving such notice and demand the plaintiff did not file or appear to file any indemnifying bond, but did immediately notify said sheriff in writing that said claim was invalid and insufficient for the reason that it affirmatively showed upon its face that said Bank of Italy had no ownership of or right to the possession of said attached property, and in so doing directed the attention of the sheriff to certain sections of the codes and to certain decisions of this court which were cited as sustaining the plaintiff's contention as to the invalidity on its face of said claim. Thereupon, and on July 24, 1919, the Bank of Italy filed with the said sheriff an amended affidavit in support of its said claim, wherein it undertook to set forth as the source and foundation of its title and claim to said property certain transactions between itself and said Dellaira antedating said attachment, and which may be briefly stated as follows: That on and prior to June 4, 1919, the said merchandise had been pledged by said Dellaira to said bank to secure a certain indebtedness due by him to it, but that on said June 4, 1919, the said bank, pursuant to certain agreements then entered into between himself and it, had permitted the said Dellaira to take and have the possession of said merchandise, and to remove the same from the warehouse wherein said merchandise had been stored pursuant to said pledge, and to take the same to his said premises on Front street in order to sell and dispose of the same; that the arrangement under which the said Dellaira was thus given possession of said merchandise was embodied in certain so-called "trust receipts," which were set forth in full in said amended affidavit, and which, in substance, provided that said merchandise was the property of said Bank of Italy, and that said Dellaira agreed to take and hold said goods in trust for said bank and as its property and with liberty to sell the same for its account, but with the right in the Bank of Italy at any time to cancel the trust and take possession of the goods and of the proceeds thereof. Upon receiving this amended affidavit and claim the sheriff released said goods without any further demand upon the said plaintiff for an indemnifying bond, and without any further notification other than a telephone message to the attorney for the plaintiff to the effect that the said sheriff had received said amended affidavit and was on his way to release said property, which he immediately proceeded to do. Thereupon the plaintiff, after demanding of the Bank of Italy and of the sheriff redelivery of said property to said sheriff, and after their refusal to comply with such demand, and after prosecuting his action against said Dellaira to judgment, and vainly attempting to satisfy an execution issued thereon, commenced the present action. The trial court upon its findings of the foregoing facts gave its judgment in the defendants' favor, whereupon the plaintiff took and prosecutes this appeal.

[1] The primary question presented for our determination relates to the sufficiency of the third party claim presented to the attaching officer in its original form by the bank of Italy as forming a basis for the demand made by such officer upon the plaintiff for an indemnifying bond under the provisions of section 689 of the Code of Civil Procedure. Said section reads as follows:

> "If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking by at least two good and sufficient sureties in a sum equal to double the value of the property levied on; and the sheriff is not liable for damages for the taking or keeping of such property to any such third person, unless such a claim is made."

By virtue of the provisions of section 549 of the Code of Civil Procedure this section is made applicable to attachment proceedings. It would appear from the language of the above-quoted section, and from the fact of its insertion in the Code of Civil Procedure in the title in which it appears, that the right of an officer levying a writ of attachment or execution in an action at law to demand and receive an indemnifying undertaking from the plaintiff in such action as a condition of retaining the property levied upon by virtue of such writ depends upon and can only be set in motion by the presentation of a written and verified claim by the third party claiming such property as his property and setting out his right to the possession thereof. Prior to the adoption of the Code of Civil Procedure the Practice Act provided that, when property levied upon was claimed by a third person as his property, the sheriff should summon a jury to try the validity of the claim, and, if such jury decided in favor of the claimant, the sheriff was entitled to relinquish the levy, unless the attaching or judgment creditor gave him sufficient indemnity for proceeding thereon. This provision of the Practice Act was carried into section 689 of the Code of Civil Procedure upon its original adoption, and was continued therein in substantially that form until the year 1891, when the said section was amended so as to read substantially as the section now reads, except that it contained the requirement that the third party claimant, in addition to claiming the property levied upon as his property and setting out his right to the possession thereof, should also in his verified claim set out "his title thereto" and state "the grounds of such title." These latter requisites to the sufficiency of a third party claim under this section of the Code were omitted from it by the amendment thereto adopted in 1907, enacting the section in its present form, wherein, however, the requirements that the claimant must claim the property "as his property" and must set out "his right to the possession thereof," were retained. While it is true that under the English procedure, and also under the procedure of the older states which fell heirs to that procedure, the courts were disposed to protect public officers required to seize property under writs of attachment or execution of the extent that when it was brought to the attention of such officer even before making the levy that the title to or right of possession of the property was disputed, such officer might, before proceeding further with such levy, demand an indemnifying bond. Robey v. State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 403. The notes to said citation show that in some jurisdictions the rule was even extended so far as to hold that, if the attaching officer entertained a reasonable doubt as to the title to the property, he would have a right to demand indemnity before levying upon or retaining the property under the writ. See supra, page 415 et seq. In the early case of Long v. Neville, 36 Cal. 455, 95 Am. Dec. 199, it was declared to be the rule that, when an attachment or execution was placed in the hands of an officer to be executed upon property in the possession of third parties claiming to be the owners thereof, he could not be required to seize such property until upon demand he was indemnified by the plaintiff seeking the execution of the writ, and the court in that case indicated that whenever the case afforded reasonable grounds for the sheriff to entertain doubts as to the lawfulness of his levy he would be entitled to demand indemnity before making or continuing the same. In that case, however, the question did not arise in an action involving the levy of a writ of attachment or execution, but arose upon the levy of a writ of possession as against third parties already in possession of the property claiming to be the owners thereof, and hence cannot be held to be controlling upon the court. But, even if it be conceded that the rule as approved in other jurisdictions and as expressed in the case last above referred to was to be held persuasive as to the proper attitude of the courts toward public officers charged with the duty of executing writs of attachment or execution, it must be held that the Legislature of this state, in its amendment to section 689 of the Code of Civil Procedure, made in 1891, intended to adopt and apply to officers making levies of writs of execution or attachment a more rigid rule than that prevailing in other jurisdictions as to the right of such officers to demand and be given indemnifying bonds in order to insure the retention of property levied upon by them. The section in its amended form, as enacted in 1891, sets forth as the necessary basis of the right of such an officer to demand indemnity the service upon him of a verified claim by any third party claiming the property, setting forth not only his claim thereto but also his right to the possession thereof and his title thereto, stating the grounds of such title. It would be idle to argue that the Legislature in thus stating the specific requirements of a third party claim, the service of which upon the officer should supply the basis for his demand for indemnity, did not intend a substantial compliance with its terms as a prerequisite to such demand; and while it may be still held to be true that the policy of the courts should be to protect public officers in the exercise in good faith of their function in relation to the levy of process upon the property of litigants, it must also be held that the courts in so doing must have some reasonable regard for the express provisions of the statute regulating and limiting their powers and duties in respect to such levies.

In other words, we interpret the intention of the Legislature in the adoption of section 689 of the Code of Civil Procedure in the form of its enactment in 1891 and of its later modification in 1907 to have been that of requiring that a third party claimant shall have presented to the officer a verified claim showing on its face substantially that he claimed the property subjected to the levy to be his property, and setting out his right to the possession thereof before such officer would become entitled to demand of the plaintiff in the action an indemnifying bond. The absence of either or both of the foregoing requirements from such verified third party claim as might be presented would have the result of failing to furnish the officer any basis for a demand upon the plaintiff for an indemnifying bond.

[2] Having in mind these conclusions, let us look to the substance of the third party claim presented to the sheriff as shown by the pleadings and findings in the instant case. It sets forth, it is true, that the goods in question "are the property of the Bank of Italy," describing the same; but it immediately thereafter proceeds to set forth as the basis for its claim of ownership thereof the fact that it "became owner of said goods by an assignment given by the defendant * * * to the said Bank of Italy to secure the payment of a promissory note." This statement shows upon its face that the Bank of Italy was not the owner of the property in question, and had no other right of property in

it than that which would arise from the alleged assignment thereof to it as security for a debt. Section 2924 of the Civil Code provides that:

"Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge."

Section 2888 of the Civil Code provides:

"Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

From these provisions of the Civil Code it follows that the utmost right of property which the Bank of Italy could have had or asserted with respect to the merchandise in question by virtue of the alleged assignment thereof from Dellaira to it would have been a lien of some sort upon said property.

[3] There are only two forms of lien which under our law can be created by an assignment of personal property as security for a debt. These are (1) a pledge and (2) a mortgage. As to the lien of a pledge, it is dependent on possession (Civ. Code, § 2989), and in case such possession has been taken by the creditor under such form of transfer it is provided in section 2913 of the Civil Code that—

"The voluntary restoration of property to its owner by the holder of a lien thereon dependent upon possession extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith, and for value."

The only other form of lien which can be created by an assignment of personal property to secure a debt is that of a mortgage, and a mortgage, of personal property not only does not entitle the mortgagee to possession, unless so authorized by the express terms of the mortgage (Civ. Code, § 2927), but a mortgage of personal property is void as against creditors of the mortgagor, unless executed with the formalities required by the terms of section 2957 of the Civil Code. In addition to the foregoing provisions of the Civil Code bearing directly upon whatever right of property the Bank of Italy could have had or asserted in the property in question by virtue of its alleged assignment thereof of it from Dellaira there is also section 3440 of the Civil Code, which declares that—

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession. * * *"

[4] It would appear beyond question that the third party claim of the Bank of Italy was in its original form fatally defective in so far as it attempted to assert any right of property in the said bank which would give it a superior right thereto as against the right of the attaching creditor. But it was fatally defective for still another reason. Section 689 of the Code of Civil Procedure provides that the third party claim required by that section to be served upon the officer must also set out the claimant's "right of possession thereof." The claim of the Bank of Italy as originally set forth and served upon the sheriff in this case entirely omits to expressly assert any right of possession in it or to set out anything from the statement of which any implication or reference of a right of possession in the Bank of Italy could arise. It follows necessarily that said third party claim in its original form and content furnished no basis whatever which would entitle the attaching officer to demand an indemnifying undertaking from the plaintiff or which by any process of reasoning could be held sufficient to justify such officer in releasing the attached property when such bond was not given.

[5] It is contended, however, by the respondents herein that the service upon the attaching officer by the Bank of Italy of its amended and verified claim, which they assert to have been sufficient in form and substance to satisfy the terms of the statute, was such as to entitle the bank to a release of said property and as to entitle the sheriff to give such release without any further or renewed demand upon the plaintiff for an indemnifying bond and without any such delay as would have enabled the latter to have procured and tendered such bond. We discover no merit in this contention, since, if, as we have held, the original claim of the bank was so fatally defective as to furnish no basis for the sheriff's demand for an indemnifying bond, and if his said demand therefor was so utterly ineffectual as to give him no right whatever to release such property on account of the failure or refusal of the plaintiff to give such bond, it must follow that no attempted amendment of such original claim could be held to give any validity to the sheriff's void act in making such demand. Conceding, though not deciding, that the amended claim of the bank would have been sufficient in form and substance to have justified the attaching officer in the making of a new demand of the plaintiff for an indemnifying bond, the undisputed evidence in the case discloses, and the findings

of the trial court show, that without the making of any such renewed demand, and, so say the findings, "without notice to the plaintiff of the filing of said amended affidavit," the sheriff at once released said attached property, and delivered the same to the Bank of Italy; and thereafter, and upon the protest of the plaintiff against such unauthorized release of said property and his demand that the said sheriff retake possession of the same, refused and neglected so to do. We have not thus far decided the question as to whether or not the amended and verified claim of the said bank would have been sufficient to have justified the sheriff in demanding an indemnifying undertaking under the provisions of section 689 of the Code of Civil Procedure, nor do we, for the reasons above set forth, find it necessary to so decide.

[6-8] The respondents herein make certain other contentions which may be briefly noted: It is insisted by the respondents that the plaintiff's complaint is insufficient in its averments of ownership of the attached property in Dellaira at the time of such attachment. The averments of the complaint are that the writ of attachment directed to the said sheriff required him to attach and safely keep all the property of the defendant Luigi Dellaira; and that "pursuant to said writ of attachment defendant Thomas Finn, as such sheriff, duly levied upon, attached, and took into his custody certain goods, wares, and merchandise belonging to the defendant Luigi Dellaira," describing the property so taken. We think a complaint in this form, though inartificial in its recital of the ownership of the attached property by Dellaira, would be sufficient as against a general demurrer. The defendants, however, also presented a special demurrer to the effect that the complaint was uncertain, in that it did not appear therefrom "how or in what manner the goods attached belonged to the defendant Luigi Dellaira." This special demurrer might as a matter of strict pleading be held to furnish sufficient basis for the claim of prejudicial error on the part of the trial court in overruling the same were it not for the fact, as fully shown by the record, that the defendants were in no wise misled thereby, but were at all times fully advised as to what the rights of ownership of the said Dellaira were in said property; and for the further fact that upon the trial of the cause upon its merits the trial court found that at the time of the levy of said attachment the said Dellaira "was the owner and was in the exclusive possession and control" of said property. Under these conditions we think that the complaint formed a sufficient basis for the issuance of the writ of attachment, and that the defendants were not prejudicially injured by the overruling of their special demurrer to said complaint. The respondents further contend that the complaint does not sufficiently aver that no demand was made upon the plaintiff by the sheriff for an indemnity undertaking after the presentation to him of the Bank of Italy's amended claim. The complaint in that behalf avers that the sheriff released the said property without giving any notice to the plaintiff as to the filing of said amended claim. The evidence in the case sufficiently shows that no such second demand was ever made. The trial court follows the averment of the complaint in its express finding that the sheriff released the property in question "without any notice to plaintiff of the filing of said amended affidavit." We think the pleadings, the evidence, and the findings are sufficient to show that the issue as to whether the sheriff ever made a renewed demand upon the plaintiff for an indemnifying bond after the service upon him of the amended claim of the Bank of Italy was tendered and tried, and that upon that subject the findings of fact of the trial court were in the plaintiff's favor.

[9] The appellant herein urges that this is a proper case for this court in reversing the judgment of the trial court to order that court to enter judgment in favor of the plaintiff herein upon the findings. The trial court found that the attachment was duly issued and levied by the defendant Thomas F. Finn, as sheriff, etc., and as attaching officer, and that the defendant Hartford Accident & Indemnity Company was the surety upon the said sheriff's official bond; that the property taken under said attachment was the property of Luigi Dellaira, doing business as "California Grape Association," and that at the time of such levy he was the owner and in the exclusive possession, custody, and control thereof; that upon the levy of said attachment and to procure its release the defendant Bank of Italy presented to and filed with the defendant Thomas F. Finn, the attaching officer, its third party claim, a copy of which is set forth in said findings; that thereupon the said attaching officer made demand upon the plaintiff to indemnify him against said original third party claim; that thereupon said plaintiff notified said attaching officer that said third party claim was invalid and insufficient, and that it affirmatively showed upon its face that said Bank of Italy had no right to the possession of said attached property; that thereupon the said Bank of Italy filed with said attaching officer its amended affidavit in support of its said claim; that upon the filing of said amended affidavit in support of its original third party claim the said attaching officer, without notice to the plaintiff of the filing of said amended affidavit, released said attached property and delivered the same to the defendant Bank of Italy; that at the time of levy of said attachment, and at all times subsequent thereto, said attached property was of the value of more than $8,000; that the allegations of the plaintiff's complaint as to

the amount of the plaintiff's claim and demand against said Luigi Dellaira and that the same amounted to the sum of $4,923.84, for which judgment was prayed for in this action, are true, and also that the plaintiff's judgment for the same against said Luigi Dellaira remains and is wholly unsatisfied. The aforesaid findings of fact were, and under our interpretation as to their legal effect as above set forth are, sufficient to have entitled the plaintiff to a judgment in his favor against the defendants herein for the sum demanded in his said complaint, with legal interest thereon from November 22, 1920, and for his costs of suit. In view of these facts we can see no reason for a retrial of this action.

It is therefore ordered that the judgment herein be and the same is hereby reversed, with direction to the trial court to enter judgment for the plaintiff in accordance with the foregoing opinion.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; LENNON, J.; HOUSER, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [10, 11] The petition for rehearing is denied. It is urged upon petition for rehearing herein that the court should have also considered and disposed of the question of the validity of the claim of title asserted by the Bank of Italy in its amended third party claim in determining the latter's liability for damages for the conversion of the property through its wrongful release from attachment, based upon its assertion of a third party claim and through the delivery to it of such property upon such claim of ownership thereof by it. The trial court found "that on July 22, 1919, and at the time of the levy of the writ of attachment referred to in the complaint, Luigi Dellaira, doing business as California Grape Association, was the owner and in the exclusive possession, custody and control of certain merchandise," describing the property in question. Whatever claim of ownership the Bank of Italy at any time asserted to said property had its origin in transactions between itself and Dellaira antedating said date. These transactions as shown by the evidence thereof deduced by the Bank itself in connection with its original and amended third party claim sufficiently show Dellaira to have been, prior to June 4, 1919, the owner and in possession of the property in question; that he made an assignment of the same to the defendant Bank of Italy as security for an indebtedness to it, and delivered the same to the bank as a pledge with said assignment; that thereafter the bank restored the possession of said goods to Dellaira, and thus destroyed said pledge; that it then took from Dellaira the trust receipts in question, leaving the latter in full possession and control over said property; that its claim of ownership of said property, as set forth in its original and amended third party claim, rests wholly upon the aforesaid state of facts. The conclusion is irresistible that such a claim of ownership is void upon its face as against creditors, for the reason that it is violative of the provisions of section 3440 of the Civil Code. George v. Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; People v. Martin, 53 Cal. App. 671, 200 Pac. 808. Trust receipts of this character, resting upon no prior ownership of the property by the creditor for whose benefit the so-called trust is created, have quite uniformly been held to be void as against creditors. In re Fountain (C. C. A.) 282 Fed. 816, 25 A. L. R. 319; Jordan v. Fed. Tr. Co. (D. C.) 296 Fed. 738, and cases cited. Both of these recent cases refer with approval to an instructive article upon "Trust Receipts" in volume 22, Columbia Law Review, p. 395 et seq. After quoting copiously from said article and commenting upon the decisions of the Supreme Court of the United States upholding its views, the court, in the case of In re Fountain, supra, sums the whole matter up as follows:

> "Every trust receipt decision cited by the Supreme Court in connection with the remarks we have quoted falls within the foregoing limitation. See Commercial Bank v. Canal Bank, 239 U. S. at page 524, 36 Sup. Ct. 194, 60 L. Ed. 417, Ann. Cas. 1917E, 25. Any such extension of the rights of the holders of trust receipts as is sought to be established here would, if consistently applied, enable every money lender, by employing a trust receipt, to preserve a secret lien, and would virtually destroy the efficacy of the Chattel Mortgage Act. We regard the contention as untenable and unsupported by authority. The only cases where the holders of trust receipts have been allowed by this court to prevail against the ultimate purchaser or his trustee in bankruptcy have been those where the title of the holder of the trust receipt was derived from some one other than the debtor. In re Cattus, 183 Fed. 733, 106 C. C. A. 171; In re Coe, 183 Fed. 745, 106 C. C. A. 121; In re Marks & Co., 222 Fed. 52, 137 C. C. A. 590. The same is true of the decision of the Supreme Court in Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214, a case which arose in the Southern District of New York. The federal courts in the Third Circuit have adopted the same view. Century Throwing Co. v. Muller, 197 Fed. 252, 116 C. C. A. 614; Assets Realization Co. v. Bank, 210 Fed. 156, 126 C. C. A. 662; Roth v. Smith, 215 Fed. 82, 131 C. C. A. 390; In re Dunlap Carpet Co. (D. C.) 206 Fed. 726; and In re Killian Mfg. Co. (D. C.) 209 Fed. 498. We have discovered no decision of any court extending the above doctrine, and this court has refused to extend it to a case like the present. In re Gerstman, 157 Fed. 549, 85 C. C. A. 211. See, also, American & British Sec. Co. v. Am. & British Mfg. Co. (D. C.) 275 Fed. 121."

[12] In the case of In re Fountain, supra, the court had also before it another matter entitled "In re Carl Dernburg & Sons, Inc.," wherein the identical situation was presented which is present in this case, and wherein the court held that the trust receipts taken by the preferred creditor in that case were void as against creditors of the putative trustee or their representative, the trustee in bankruptcy. The reasoning of these cases has exact application to the facts of the case at bar, and leave no doubt in our minds as to the insufficiency of the trust receipt taken by the Bank of Italy in the instant case to support its claim of ownership of the attached property. This being so, and said bank having been a co-actor with its codefendant, the sheriff, in procuring an unlawful release of the property in question from the lien of said attachment and the delivery thereof to itself, it must be held liable for whatever damages the plaintiff sustained from the conversion of said property accomplished thereby.

SHENK, J., dissenting.

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194 Cal. 212

PEOPLE v. BOGGESS. (Cr. 2642.)

(Supreme Court of California. July 30, 1924.)

1. Licenses ⚷42(3)—Information in prosecution for violation of Corporate Securities Act held to charge public offense.

Information in a prosecution for violation of Corporate Securities Act, § 14, charging that defendant, in filing an application for a permit to issue securities of a corporation, falsely represented its earnings, *held* to state public offense, though alleged act was not within letter of section 3; such statement being material, and section 14 making it public offense for applicant to include any false statement in application for permit.

2. Criminal law ⚷112(1)—Prosecution for violation of Corporate Securities Act held brought in proper county.

Under Pen. Code, § 781, defendant was properly prosecuted in Sacramento county for violation of Corporate Securities Act, § 14, in filing false statement with commissioner of corporations to secure permit to sell securities, though application was filed in branch office of commissioner of corporations in San Francisco, and filing fee paid there, where it was subsequently and in due course forwarded to principal office in Sacramento, and finally filed there.

3. Licenses ⚷42(5) — Whether false statements in application for permit to sell securities result of typographical errors held for jury.

In prosecution for violation of Corporate Securities Act, § 14, in filing false statement in an application to sell securities, whether misstatements in application were result of typographical errors *held* for jury.

4. Criminal law ⚷1159(2)—Conviction sustained if any substantial evidence in record tending to support it.

If there be any substantial evidence in the record tending to support a verdict, a judgment based thereon should be sustained.

5. Licenses ⚷42(4)—Evidence held not to so overwhelmingly support conviction as to enable appellate court to disregard errors occurring during trial.

In a prosecution for violation of Corporate Securities Act, § 14, for filing a false statement as to earnings in application to sell securities, evidence *held* not to so overwhelmingly support conviction as to compel conclusion that jury's verdict would have been the same, regardless of errors and irregularities occurring during trial.

6. Criminal law ⚷449(1)—Opinions of nonexpert witnesses admissible on great variety of unscientific questions.

Opinions of nonexpert witnesses are admissible on many unscientific questions arising every day and in every judicial inquiry.

7. Criminal law ⚷452(1)—"Opinion evidence" defined.

"Opinion evidence" is that which is given by a person of ordinary capacity, who has by opportunity acquired a particular knowledge, which is outside limits of common observation, and which may be of value in elucidating matter under consideration.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Opinion Evidence.]

8. Criminal law ⚷452(1)—When opinions of nonexpert witnesses are admissible stated.

Opinions of nonexpert witnesses are admissible, when they have by their experience gained an acquaintance with a particular subject-matter not common to others, and which may aid jury in coming to a conclusion, and are not to be rejected because witness may be engaged in other occupations than particular business to which testimony relates, and though they are based on experience acquired in operation generally of a business, rather than in detailed operation thereof.

9. Criminal law ⚷452(1)—Refusal to permit nonexpert to testify as to relative costs of treating low-grade ore and high-grade ore held erroneous.

In prosecution for violation of Corporate Securities Act, § 14, refusal to permit a witness possessing knowledge based on observation and experience to testify whether it would cost any more per ton to treat low-grade ore or high-grade ore, unless he had some knowledge of cost of production at mine in question, *held* error.

10. Criminal law ⚷450—Difference in cost of treating high and low grade ore not matter of common knowledge.

The difference in cost of treating high and low grade of ore is not a matter of such common knowledge that jury may be assumed to know what difference is without receiving evidence thereon.

11. Criminal law 🔑1169(9)—Error in rejecting opinion evidence as to certain matter held prejudicial, notwithstanding similar evidence by defendant.

Error in refusing to permit nonexpert, having knowledge based on experience and observation, to testify as to relative cost of treating high-grade and low-grade ores, *held* prejudicial, though defendant testified on same subject; his testimony having been radically discredited by personal interposition of trial judge.

12. Licenses 🔑42(4)—Admission in evidence of minutes of organization meeting, not showing falsity of statement on which defendant was informed against, held erroneous.

In prosecution for violation of Corporate Securities Act, § 14, for filing false statement in application to sell stock in a mine, admission in evidence of minutes of organization meeting of company operating mine was erroneous, where they had no tendency to show falsity of defendant's statement, or that he knew or had reason to believe that such statement was false.

13. Criminal law 🔑695(2)—Documentary evidence held improperly admitted over general objection, though containing some relevant matters.

In prosecution for violation of Corporate Securities Act, § 14, for filing false statement in application to sell stock in mine, that minutes of organization meeting of company operating mine showed relevant fact that defendant was officer of such company did not render them admissible as against objection which went to their irrelevancy and immateriality; such fact not being in dispute, and objection being plainly directed to exclusion of immaterial matters, which might be used in argument to defendant's prejudice.

14. Criminal law 🔑695(2)—General objection to evidence will not fail, where all parties, including court, understand its purpose.

While ordinarily an objection to evidence must be sufficiently specific to inform court of its scope, where records show that all parties, including court, must have understood its purpose, it will not be said that objection failed of its purpose.

15. Licenses 🔑42(4)—Report filed by defendant as receiver held not to show knowledge of falsity of application to sell stock.

In prosecution for violation of Corporate Securities Act, § 14, for filing false statement in application to sell stock in mine, admission in evidence of report filed with superior court by defendant as receiver of mine *held* not to show knowledge of falsity of statement, so as to be admissible to show such knowledge.

16. Criminal law 🔑384—Ordinarily objection to remoteness of evidence goes to its weight.

Ordinarily an objection to remoteness of evidence goes to its weight.

17. Criminal law 🔑384—Admission of evidence in face of objection for remoteness ordinarily left to trial court's discretion.

Admissibility of evidence in face of an objection on the ground of its remoteness is ordinarily left to sound discretion of trial court.

18. Licenses 🔑42(4)—Admission of certain evidence over objection of remoteness held abuse of court's discretion.

In prosecution for violation of Corporate Securities Act, § 14, for filing a false statement in application to sell stock in a mine, court abused its discretion in permitting witness to testify as to low quality of quicksilver taken from mine, where such testimony related to a situation existing some 16 years subsequent to time mentioned in alleged false statement, and no showing was made that existing conditions on which evidence was based were identical or substantially similar to conditions existing 16 years before.

19. Criminal law 🔑656(9)—Remarks of trial court, constituting comment on particular piece of evidence, held erroneous.

In prosecution for violation of Corporate Securities Act, § 14, for filing false statement in application to sell stock in a mine, trial court's remarks on report of mine submitted by defendant, which constituted a comment on that particular piece of evidence, and which doubtless tended to lead jury to believe that court was suspicious of defendant, *held* erroneous.

20. Witnesses 🔑246(1)—Court may facilitate direct and cross examination of a witness.

It is trial court's duty, if exigencies of occasion require it, to facilitate, by one or more interrogatories, direct and cross examination of a witness.

21. Witnesses 🔑246(1)—Court's conduct in taking defendant as witness from his counsel held improper.

Court's conduct in repeatedly taking defendant as a witness from the hands of his counsel, who was competent and conscientious in conduct of his case, and proceeding along independent and extensive line of examination and cross-examination, *held* improper.

Myers, C. J., and Waste, J., dissenting

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

R. A. Boggess was convicted of making a false statement to secure a permit to sell stock, and he appeals. Reversed.

George E. Foote, of Sacramento, and E. S. Bell, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LENNON, J. The defendant was convicted of an alleged violation of section 14 of the Corporate Securities Act, which provides that:

"Every officer, agent, or employee of any company, * * * who, with knowledge of its falsity, files or causes to be filed in the office of the commissioner any false statement or representation concerning such company or the property which it then holds or proposes to acquire, or concerning its officers or its financial condition or other affairs, * * * is guilty of a public offense and shall be punished by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment." Stats. 1917, § 14, p. 680.

The charging part of the information filed against the defendant is that:

"The said R. A. Boggess on the —— day of April A. D. 1920, in the said county of Sacramento, in the said state of California, and before the filing of this amended information, did then and there willfully and unlawfully and feloniously file and cause to be filed in the office of the commissioner of corporations of the state of California, an application of Alpha Quicksilver Company, a corporation, for a permit to issue securities; that in said application was contained and embodied the following statement concerning the property held by such company, 'During the time Boggess had absolute charge of the operations at the mine in 1900, 1901, and 1902, he made it pay net over $7,000.00 per month, net over all mine operating expenses, quicksilver selling at an average of $45.00 per flask;' that said statement so contained and embodied in said application as aforesaid, is and was false, and that said defendant so made said statement in said application with knowledge of its falsity; that at the time said statement was filed or caused to be filed as aforesaid the said R. A. Boggess was an officer, agent, and employee, of said Alpha Quicksilver Company—contrary to the form, force and effect of the statutes in such case made and provided, and against the peace and dignity of the people of the state of California."

Upon behalf of the defendant it is contended at the outset that the amended information does not state a public offense in this; that the alleged false statement was a matter that was entirely immaterial because it was not required by the provisions of the Corporate Securities Act, which provides that:

"Such application shall be in writing, shall be verified as provided in the Code of Civil Procedure for the verification of pleadings, and shall be filed in the office of the commissioner. In such application the applicant shall set forth the names and addresses of its officers, the location of its office, an itemized account of its financial condition, the amount and character of its assets and liabilities, a detailed statement of the plan upon which it proposes to transact business, a copy of any security it proposes to issue, a copy of any contract it proposes to make concerning the same, a copy of any prospectus or advertisement, or other description of such securities, then prepared by or for it for distribution or publication, and such additional information concerning the company, its condition, and affairs as the commissioner may require." Stats. 1917, § 3, p. 675.

It is argued that the amended information does not state an offense because there is nothing within the requirements of the section of the statute just above quoted, which calls for any statement of the past resources and past production of any mine or any other property upon which an application is made for the issuance of securities. It is insisted that the fact that the mine in the instant case may or may not have produced $7,000 per month net at a period 20 years or more before the filing of the application in the instant case was a matter entirely immaterial to the application, and, therefore, foreign to any consideration required to be given to the application, and consequently did not in any way tend to affect or influence the corporation commissioner in his judgment, based upon such application, as to whether or not the permit to issue securities should be granted.

[1] Although the alleged act was not within the letter of the provisions of section 3 of the Corporate Securities Act by reason of the fact that such statement of past production is not specifically required by said section, still section 14 of the Corporate Securities Act, which defines the crime and declares the penalty, is very broad in its scope, in that it declares the filing of *any* false statement to be a public offense. The fact that the alleged false statement was not required by section 3 of the Corporate Securities Act does not relieve the defendant from the penalty prescribed by section 14 thereof. The conclusion to be reached by the commissioner of corporations as to the propriety of granting or refusing the permit to issue securities would, of course, be based upon *all* of the facts contained in the application for the permit. The false statement charged against the defendant was obviously included in the application to influence the commissioner of corporations in his action upon the application. True, it was a statement of past conditions, but it was evidently included in the application, in order that, from such past condition, the future performance of the mine might be favorably inferred, and therefore be made the basis for a favorable consideration of the application. That it was material cannot be doubted, for it tended to show that under proper management, and particularly under the management of the defendant Boggess, the mine could still be made to pay net $7,000 per month. That it had done so once, and that it could be made to do so again was the effect of the statement. This statement would undoubtedly tend to influence the corporation commissioner in passing upon the application. Clearly it was the purpose of section 14 of the statute to prevent the inclusion in the application of *any* false statement by reason of which an erroneous conclusion as to the granting of a permit might be reached by the commissioner. Both the language and the evident purpose of the statute indicate that it was intended by the provisions of section 14 to make it a public offense for an applicant to include any material false statement in the applica-

tion for a permit. The amended information in the instant case therefore stated a public offense.

[2] It is also urged by defendant as a ground for the reversal of the judgment rendered that the offense of filing the false statement with the commissioner of corporations was committed in the city and county of San Francisco, and therefore the superior court in and for Sacramento county had no jurisdiction to try the case. It is an undisputed fact in the case that the application was taken by an attorney for the mining company, at the request of the defendant, to the branch office of the commissioner of corporations in San Francisco on the 3d day of April, 1920, and delivered by him to the party in charge of the branch office, and that the filing fee was paid by said attorney at the same time at the branch office of the commissioner of corporations in San Francisco. The evidence also shows, however, that the application was subsequently and in due course forwarded by the deputy in charge of the branch office in San Francisco to the principal office in Sacramento, and finally filed there.

Whether or not the court had jurisdiction to try the instant case depends upon a determination of the question of whether or not the act of filing or causing to be filed a false statement in the office of the commissioner of corporations was completed, when the application was left at the branch office of the commissioner of corporations at San Francisco. The fact that the application was left at the branch office at San Francisco in charge of a deputy, and the filing fee paid there, coupled with the fact that, at the time the application was filed, it was customary for applications to be acted upon, and permits granted either by the principal office at Sacramento or the branch office at San Francisco does not compel the conclusion that the application, as a matter of law, was finally filed in the San Francisco office.

A final filing may consist of the mere physical act of the person leaving a paper at the proper office with the person in charge thereof to be filed. This is the character of the filing referred to by those cases fixing the time of the accrual of certain rights in civil matters dependent upon the filing of certain papers. In such cases it is of course but proper that the right arising from the filing of certain papers should accrue as soon as the person filing the papers has done all in his power to perfect the filing; that is to say, as soon as he has left the papers with the proper officer for filing. Estate of Carroll, 190 Cal. 105, 210 Pac. 817. Obviously, a filing, however, is not fully completed as a foundation for a right, where the paper filed, before it is acted upon, must or may be forwarded for filing and consideration to another office of the same or some other governmental or ministerial department of the state or a political subdivision thereof.

The main office of the commissioner of corporations, as provided by law, was in Sacramento, and the application in the instant case, relating as it did to mining matters, required the attention and approval of a Mr. Miller, the special mining deputy, whose duty it was to make a special investigation of the mine before the permit could be issued. Stats. 1917, p. 682.

Mr. Miller, at the time the application was presented to the branch office in San Francisco, was in Sacramento, and therefore the application was forwarded by the deputy commissioner in San Francisco to Sacramento for filing in the main office, and it was so marked as having been finally filed in the main office at Sacramento. We need not decide what the legal situation would be if Mr. Miller had been present in the San Francisco office when the application was presented, and had considered the matter of the application then and there, and thereupon had made and issued his approval without the application having been filed in the Sacramento office. Suffice it to say, for the purpose of a discussion and a decision of this case, that the application was ultimately caused to be filed in the Sacramento office. In other words, even though the application may be treated as having been filed first in the San Francisco office, nevertheless the fact remains that it was ultimately and properly filed and caused to be filed by the defendant in the Sacramento office, at which office it was examined and considered. Section 781 of the Penal Code provides that—

> "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof, constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county."

This section, we think, governs and controls the situation presented in the instant case. The filing of the application in question, although initiated in the branch office at San Francisco, not having been completed until it was filed in the main office at Sacramento, there is no escape from the conclusion, it seems to us, that when the defendant presented the application to the deputy in the branch office at San Francisco for filing his liability in the matter did not stop there, for the reason that by his act of presenting the application to the deputy in control of the branch office in San Francisco he caused the deputy in the course of the performance of his duty to forward the application for filing to the general office at Sacramento. This being so, the defendant was properly prosecuted in Sacramento county where the crime was in part committed and ultimately consummated.

It is the claim of the defendant here, and it was his defense in the court below, that the application in question, when read and considered in its entirety, was not intended to be understood as containing a representation that the defendant had made the mine pay $7,000 net per month for the entire period of the three years, "1900, 1901, and 1902." The alleged false statement was contained in a letter written by the defendant, addressed to an attorney for the Alpha Quicksilver Company, which letter was incorporated by the defendant in, and made a part of, the application for the desired permit. The letter contained a general history of the mine, including a history of the various transfers of title and a general history of the production of said mine for a period of 20 years prior to the filing of the application. It also set forth a description of all of the land, which would be bound by the issuance of the securities, for which application was made. The following are the paragraphs containing specific reference to the profits of the mine, and which bear on the alleged false statement:

> "In the winter of 1898–99, this mine was acquired by R. A. Boggess, and associates, and over $200,000 spent in equipping and developing it. Boggess had sole charge of all the construction and development, and in 1900 put it on a net paying basis of over $7,000 per month. This mine sold for $1,000,000 in 1901; $200,000 being paid on account. It was then clearing seven thousand dollars ($7,000) net per month over all operating expenses. (Supreme Court Records of California prove this fact.) During this period quicksilver averaged $45 per flask. The ores at that time were treated in a Scott furnace of a daily capacity of 40 tons."

The final paragraph of the letter, which contains the statement charged in the amended information to be a false statement, is as follows:

> "*During the time Boggess had absolute charge of the operations at the mine in* 1900–1 *and* 2, *he made it pay net over* $7,000.00 *per month—net over all mine operating expenses, quicksilver selling at an average of* $45.00 *per flask.* He is so absolutely confident with the proper funds required, as indicated herein, and at prevailing prices for quicksilver, and without interference with his management at the mine, he can make it pay from $12,000.00 to $15,000.00 net per month for 10 to 15 years."

It was the defendant's defense that the only period of time intended to be covered by the statement alleged to be false was that particular period of time in which he was in absolute charge of the mine. In this behalf it is argued that, while the particular statement alleged to be false, standing alone, is perhaps susceptible to the construction that the defendant was in absolute charge of the mine during the entire period of the years "1900, 1901, and 1902," nevertheless, in determining the scope and effect of the statement alleged to be false, resort may not be had only to the language of the particular statement, separated from, and without regard to the context of the entire application in which said statement was embodied. The meaning of the alleged false statement, it is argued, can be ascertained only by construing it in conjunction with other statements and declarations contained in the application, which may be properly said to be related to, and connected with, the particular alleged false statement. So construed, it is insisted that the application as a whole shows, not that the defendant was in absolute charge of the mine throughout the entire time of the specified years, but that he was in such absolute charge only during a portion of those years. In this behalf attention is directed to a consideration of those other portions of the application wherein the defendant stated that "in" the year 1898–99, when the mine was acquired by him, he had sole charge of the "construction and development" work, and "in 1900" he put it on a net paying basis of $7,000 net per month. Of course, the words and phrases employed in the statement, in its entirety, must be taken in their ordinary meaning, and so taken the word "in," as used in the application with reference to the operation of the mine in the year 1900, may be said to indicate "inclusion within the limits of the time expressed. * * * 'In' is * * * common in the sense of 'during the course of.'" Webster's New International Dictionary. Therefore that portion of the application may be read and understood as meaning that he put the mine on a net paying basis of $7,000 per month some time during the course of the year 1900, rather than during the entire period of that year.

In support of the contention immediately under consideration, reference is also made to another statement contained in the application that the mine was sold in 1901 to a New York syndicate. From this it is argued that the application shows that the defendant was not in absolute charge of the mine at any time in the year 1902, nor after the sale of the mine to the syndicate in 1901, until the year 1916, "when," as the application reads, "the present owners acquired it."' It is insisted that the two statements last above referred to, preceding, as they do, and being closely connected with the subject-matter of the alleged false statement, tended to clarify the ambiguity, if any, of said statement, and therefore may be rightly resorted to as a mark and measure of the particular time when the defendant was in absolute charge of the mine.

[3] Incidentally it may not be amiss to say at this point that the defendant testified at the trial that he was in absolute charge of the mine only from September, 1900, to May, 1901, and that he did not have "absolute charge" in any part of the year 1902, and that the reference in the alleged false state-

ment to the year 1902 was a typographical error, which was the result of a misunderstanding of the stenographer to whom the application was dictated amid the noise and confusion of a hotel lobby. This, of course, was a question for the jury to determine, but it should be noted that the application itself shows other admitted typographical errors in the statement of material dates which escaped correction. Thus it appears that the real date of the application was January 20, 1920, but the typist typed it 1919. Another obvious typographical error appears elsewhere in the application, where "1919" was typed instead of the year 1917.

We are not to be understood in this discussion of the defendant's defense as holding that his construction of the application, as above outlined, is correct, nor that his testimony concerning typographical errors in the application should have been accepted by the jury. Our reference to this phase of the case is purely for the purpose of illuminating the remaining points presented in support of a reversal of the judgment, which will be discussed later in this opinion.

It was the theory of the prosecution that the alleged false statement was intended to cover every month during the three years referred to in the application. No evidence was offered by the prosecution tending to show specifically what the actual production of the mine was during any one month of those years. The case of the prosecution consisted largely, if not entirely, of evidence as to what was the yearly production of the mine, from which its monthly production was arrived at by dividing the total production of the year by the number of months in the year. Part of the evidence of the prosecution, as to the production of the mine, was embodied in a bulletin of the state mining bureau containing statistics showing the quicksilver production of the state as a whole for the years 1900, 1901, and 1902, together with statistics of the quicksilver production of the individual counties in those years. The production shown by these statistics was a yearly production, and not the production per month. The evidence shows that the statistics in this bulletin were compiled from the reports of the various mine owners for each year as to the quantity and value of the production. The statistics for Lake county, where the mine in question is located, shows a production in 1900 of 3,165 flasks, valued at $127,345; in 1901 of 4,395 flasks, valued at $211,324; and in 1902 of 3,611 flasks, valued at $161,568. These statistics did not purport to show the individual production of any mine situated in Lake county. It was shown in evidence, however, that the statistics in this bulletin were based in part upon a report sent in by the defendant, as to the production of the mine in question in the years 1900 and 1901. This report showed a production of the mine in question for the entire year 1900 to be 1,300 flasks, without stating the value thereof. It was the defendant's claim that, in the early part of the year 1900, while he was using an 8-ton furnace, the production was, on account of the limited capacity of the furnace, much lower than at a later period of the same year, when he was using a 40-ton furnace, and that he put the mine upon a net paying basis of $7,000 net per month after the installation of the larger furnace in September, 1900. The report for the year 1901, during which time the larger furnace was in operation, shows a production of 2,000 flasks, worth $100,000.

There is evidence in the record, elicited by the testimony of a Mr. Roeth, a witness for the defendant, showing the amount of quicksilver handled, for the mine in question, during several of the months in which the defendant had absolute charge of the mine, by a quicksilver selling company, known as the Eureka Company, which bought and sold quicksilver from all the quicksilver mines in California. This is the only direct evidence as to the production of the mine in question for any one month. This evidence, covering, as it did, practically the period of time in which the defendant was in absolute charge of the mine, shows the production of the mine after the installation of the 40-ton furnace to have been as follows: In 1900: November, 273 flasks; December, 304 flasks; in 1901: January, 257 flasks; February, 265 flasks; March, 255 flasks, and May, 188 flasks. This testimony, coupled with defendant's testimony that the cost of production was $10 to $12 per flask, and the admitted fact that quicksilver was selling at the time in question at $45 per flask, shows a net profit of $7,000 or more for several of the months during the period stated. And a showing of the same profit would also result if, in lieu of the defendant's estimated cost of production per flask, resort is had to his general estimate of the operating expenses of the mine, as testified to by him, or from $3,000 to $4,000 per month. This is so because, during the several months referred to, there was produced at the mine the sum total of 1,542 flasks of quicksilver, which, at a selling price of $45 per flask, would make a gross return of $69,309, and deducting from this the sum of $24,000, the operating expenses estimated at $4,000 per month for a period of six months, a net profit is left of $45,390 for the period of six months, or an average net profit of $7,565 per month.

In corroboration of this claimed production from September, 1900, to May, 1901, there is the testimony of the defendant's witness O'Bryant, who hauled the quicksilver from the mine for shipping during that period, to the effect that he hauled on an average of 280 to 300 flasks per month. It is to be noted that the testimony of this witness covers practically the period of time during which the defendant claims to have been in absolute charge of the mine. The testimony of another witness for the defendant, one Buchanan, tended to corroborate O'Bryant's testimony. So, also, did the testimony of one Dunfield, a witness for the defendant, who was in charge of the condenser at the mine in question for five or six months commencing in the fall of 1900. This witness further testified that there was an enormous big run of quicksilver during the time he was there, which time coincides with the time in which the defendant claimed that he was in absolute charge of the mine. There is other evidence in the case that in 1901 the mine in question disclosed a formation which indicated a considerable amount of valuable quicksilver ore.

The evidence offered by the prosecution, as to the cost of the production of quicksilver at the mine in question, which, of course, was necessary in order to determine the net profit, consisted in a large measure of general estimates to the effect that the average cost of production was about $30 per flask, throughout the quicksilver mines of the state, but this evidence did not relate to, nor purport to bear directly upon the actual cost of labor, fuel, and other operating expenses of the mine in question. It was an undisputed fact in the case, that the cost of quicksilver production varies greatly at different mines throughout the state, and to such an extent that the cost of production at one mine may be twice as great as at another mine. True, there is other evidence, consisting of general estimates of the cost of production at the mine in question, based upon the probable number of men employed, the probable amount of cordage consumed as fuel, and a general assumption of a sum of money to be added for necessary development work. But it was shown by the testimony of several witnesses, testifying without contradiction upon behalf of the defendant, that the actual number of cords of wood consumed as fuel in the production of quicksilver at the mine in question, from September, 1900, to May, 1901, was only two cords per day, which amount is only one-third of the number of cords estimated by the witnesses for the prosecution to be necessary to the operation of the furnace. There is also evidence, uncontradicted, on behalf of the defendant that many men employed at the mine received but $2.50 per day, whereas the prosecution's witness estimated the probable cost of labor at the mine at $3 per day for all of the men employed. There was further evidence to the effect that the mine was comparatively dry, very little timbering was necessary, and that it was favorably located for cheap mining, in that it was not far removed from rail transportation; that wood for fuel grew in abundance, and that there was plenty of water for domestic purposes, steam, etc.

Upon behalf of the defendant, there was offered and received in evidence an excerpt from "Mineral Resources of the United States, Department of Interior, United States Geological Survey," which stated that, "under ordinary circumstances, quicksilver could be produced in California at a cost of $3 per ton of ore mined and smelted." And the defendant himself testified that the maximum cost of producing quicksilver at the mine in question, under the conditions existing there, was $3 per ton of ore, and that the cost of production per flask of quicksilver was but from $10 to $12 per flask.

In short, there is direct and positive evidence in the record adduced upon behalf of the defendant tending to show that, during several months of the years designated in the application, the mine did actually pay over $7,000 net per month over operating expenses. On the other hand, there is evidence consisting of general estimates tending to show that, during the said years, the mine did not pay $7,000 net per month. It is apparent, from a perusal of the evidence adduced upon the entire case, that the guilt or innocence of the defendant hinged upon the solution of a perplexing problem, which necessarily depended in a large measure upon a close consideration of a hypothetical situation developed by the evidence of the prosecution, as against an actual situation developed by the direct evidence of the defense.

[4, 5] We are not unmindful of the rule that, if there be any substantial evidence in the record tending to support a verdict, the judgment based thereon should be sustained. And, had the record before us disclosed no errors or irregularities occurring during the course of the trial, operating to the prejudice of the defendant to the extent that in all likelihood they contributed to the verdict, we might, in the instant case, be constrained to hold that the evidence adduced upon the entire case suffices to support the verdict. We are also not unmindful of the fact that judgments in criminal cases have been affirmed in spite of serious errors and irregularities occurring during the course of the trial, but in those cases the errors and irregularities were evidently the result of inadvertence, and the evidence of the guilt of the defendant so overwhelming that it could not be said that the result of the jury's deliberations would have been different had not the errors and irregularities intervened. On the other hand, there are cases in the books similar to the one at bar, where the evidence of the defendant's guilt was not overwhelming, which were reversed because of pronounced, persistent, and pernicious misconduct during the course of the trial, which obviously intervened to deprive the defendant of a fair and impartial trial, and which warranted the conclusion that, if the case had been fairly tried, the result may well have been different. See **People v. Edgar, 34 Cal. App. 459, 167 Pac. 89.**

The case as presented by the prosecution is not so overwhelming as to compel the conclusion that the verdict of the jury would have been the same, regardless of the errors and irregularities urged in support of a reversal. We are satisfied from a close consideration of the evidence pro and con that the said errors and irregularities tended to the prejudice of the defendant and the defendant's case to such an extent that they proved an important factor in the determination by the jury of the guilt of the defendant.

Numerous specifications of errors in the rulings of the trial court, relating to the reception of evidence offered on behalf of the prosecution and the rejection of evidence offered on behalf of the defense, are urged in support of a reversal of the judgment. In some instances the objections interposed by the defense were not well taken. These particular objections need not be discussed.

[6-8] Apparently it was the theory of the defense, in part, that the relative cost of treating high-grade ore was less than the cost of treating low-grade ore. In other words, the richer the ore the lower would be cost of production per flask, and conversely, of course, the lower the grade of ore the higher the cost of production. There is evidence in the case tending to show that the mine in question was a "high-grade ore" mine, and in keeping with the theory of the defense there was propounded to one of the witnesses the question, "From your experience, would you say it would cost any more per ton to treat low-grade ore or high-grade ore?" This question was objected to upon the ground that "the witness is not qualified as an expert, and, secondly, that according to his own testimony his experience is confined largely to one mine." It was not necessary, in order to render this witness' testimony admissible, that he should qualify as an expert in the strict sense of the term. It is the generally recognized rule that the opinions of nonexpert witnesses are admissible upon a great variety of unscientific questions arising every day and in every judicial inquiry. These opinions are not admitted in evidence as testimony of experts, strictly so-called, but rather upon the theory that they depend upon knowledge which any one may acquire, but which the jury may not have, and are the most satisfactory, and oftentimes the only obtainable, evidence of the fact to be proved. Opinion evidence is that which is given by a person of ordinary capacity, who has by opportunity acquired a particular knowledge which is outside the limits of common observation, and which may be of value in elucidating a matter under consideration. Accordingly it is the rule that the opinions of nonexpert witnesses may be received in evidence, when the witnesses have, by their experience, gained an acquaintance with a particular subject-matter not common to others, and which may aid the jury in coming to a conclusion. And if a witness has had ample opportunity of acquiring particular knowledge with reference to a particular process employed in a particular business, his opinion is not to be rejected because, perchance, he may be engaged in several other separate and distinct occupations, nor is his opinion to be rejected even though it is based upon observation and experience acquired in the operation generally of a business, rather than in the detailed operation of that business.

[9] Doubtless, if an answer to the question objected to had been permitted, it would have been followed by other interrogatories, which would have elicited the difference in the cost of the treatment of the different grades of ore. The trial court, however, sustained the objection upon the ground that "unless he [the witness] says he has some knowledge of the cost of production—of what the cost of production was at the Abbott mine [the mine in question], his testimony would be immaterial." Clearly the question objected to was not directed to the cost of production at the mine in question, but related solely to the question, as to what was the difference in the cost of the production of high-grade and low-grade ore, and therefore the ruling of the trial court was made and based upon a ground which was clearly at cross-purposes with the fact sought to be elicited by the question. The ruling of the trial court was tantamount to a declaration that, regardless of the qualification of the witness to give his opinion concerning the fact involved in the question objected to, he would not be permitted to testify unless it were shown that his opinion was based upon his knowledge and observation of the situation existing at the mine in question. It is obvious, therefore, that, no matter what the qualification of the witness may have been, the trial court would not, under its ruling, have permitted him to testify. It therefore cannot be correctly said, we think, that the trial court gave a wrong reason for a correct ruling. Clearly the ruling and the reason for the ruling were wrong.

The record shows, upon this phase of the case, that the witness, in addition to being engaged in various commercial enterprises, was also the principal owner of a quicksilver mine in California which, although now dormant, he "run with other parties since 1887." To "run" means "to conduct; manage; carry on." Webster's New International Dictionary. In addition to his intimate association with the operation of that mine, the witness had occasion to investigate and inspect a great many other quicksilver mines. He testified he "would look at * * * and class them" with his mine "from that time on." This witness was also a member of the Eureka Company, a corporation composed of all the quicksilver mines of the state, including the mine in question, which was organized for the purpose of selling the output of the quicksilver mines of the state, and keeping up the price of their products. His experience, we think, was sufficient to show that he was possessed of knowledge, based upon observation and experience, of the fact sought to be elicited by the question objected to, and therefore a proper and sufficient foundation was laid for the introduction of his testimony. Such a foundation, having thus been laid, he should have been permitted to answer the question.

[10, 11] We are not prepared to say that the difference in the cost of treating high and low grade ore is a matter of such common knowledge that the jury might well be assumed to know what that difference was without receiving evidence upon the subject. While it is true that the defendant himself testified as to the relative cost of treating high-grade and low-grade ore, still the defendant's testimony was so radically discredited by the personal interposition of the trial judge as to seriously impair, if not utterly destroy, its value as evidence. And in such a situation the refusal to receive in evidence the testimony of a disinterested witness concerning that subject-matter clearly redounded to the disadvantage of the defendant.

[12-14] The prosecution was permitted to have in evidence, over the objection of the defendant, a copy of the minutes of the organization meeting of the Alpha Quicksilver Company, which was operating the mine in question, dated March 27, 1917. The objection was that such minutes were irrelevant, immaterial, and incompetent, and did not pertain to any of the issues of the case. A reading of these minutes shows that they are immaterial and irrelevant to the issue raised by the plea of "not guilty," in that they did not show or tend to show the falsity of the statement upon which the defendant was informed against, or that he knew or had reason to believe that said statement was false. The purpose of the introduction of these minutes is not apparent. Its tendency was to incumber the record, confuse the jury, and cloud the issue by conveying to the jury, by innuendo, the thought that the defendant was unlawfully engaged, in some manner, in manipulating the stock and property of said Alpha Quicksilver Company. The defendant, however, was not charged with any fraud in connection with his dealings with the Alpha Quicksilver Company, and the minutes in question, failing to throw any light upon the truth or falsity of the statement upon which the defendant was informed against, should have been rejected. We are unable to find anything in these minutes which warrant the contention that the defendant represented at that meeting that the Abbott mine was actually worth in excess of $750,000. These minutes merely show that the Alpha Quicksilver Mining Company was to be organized with a capital stock of $750,000, to be divided into 150,000 shares of the par value of $5 each. And while there is evidence that the defendant did deraign title, prior to the organization meeting, through the medium of a sheriff's deed for the sum of $6,500, nevertheless it is not disputed that, as testified to by the defendant, some $200,000 had been expended, by the defendant and others associated with him, in the promotion of the mine for the operation, development, and equipment of the mine. In the situation thus presented, we are unable to perceive how it can be said that the minutes in question showed or tended to show any representation, false or otherwise, which had any material bearing upon the alleged false representation for which the defendant was tried and convicted. It is argued in support of the ruling of the trial court that, inasmuch as these minutes did incidentally show that the defendant was an officer and agent of the Alpha Quicksilver Company, they were relevant to that portion of the information which charged him with being such an officer, and that therefore a general objection, which went to the irrelevancy and immateriality of the said minutes, was properly overruled. It was an established and undisputed fact in the case that the defendant was an officer of said Alpha Quicksilver Company, and plainly the objection to the minutes was not directed to the fact that they showed the defendant was an official of said quicksilver company, and it appears just as plainly that the objection was directed to the exclusion of the text of the minutes which bore upon immaterial matters, and which might be used in the argument to the jury to the prejudice of the defendant. While it is true ordinarily that an objection to evidence must be sufficiently specific to inform the court of the scope of the objection, nevertheless, where the record shows, as it does in the instant case, that all the parties, including the court, must have understood the purpose of the objection, it will not be said that the objection failed of its purpose. People v. Shattuck, 109 Cal. 673, 42 Pac. 315; People v. Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

Moreover, the record shows that, after the minutes in question were offered and marked for identification, the district attorney announced that he offered "such portions thereof" as he had marked with a blue pencil, which he desired to thereafter read in evidence. Thereupon counsel for the defendant again interposed the objection that the reading of those portions of the minutes was "incompetent, irrelevant, and immaterial, and not pertaining to the issues of the case."

This objection was also overruled. Surely this objection was sufficiently specific to direct the court's attention to the many immaterial matters embodied in the minutes in question.

[15] The prosecution, in an endeavor to show that the defendant knew that his statement that he had made the mine pay a certain specified sum in the years 1900–1 and 2, was false, offered, and succeeded in having received in evidence a report made to and filed with the superior court of Lake county, February 19, 1904, by the defendant, as receiver of the mine in question. This particular piece of evidence was objected to upon the ground that it was immaterial, in that it did not purport to represent the condition and operation of the mine during the years mentioned in the alleged false statement. Responding to the objection thus made the district attorney declared that the report "goes to show that the defendant, at the time he made the application to the commissioner of corporation knew—it is a question of the knowledge of the defendant." The trial court, after examining the report, overruled the objection, and ordered that the evidence "be admitted for the purpose of showing knowledge, if any, on the part of the defendant." We fail to find anything in that report which shows or tends to show that the defendant knew or must have known that his statement that he had placed the mine, when under his absolute control in the years 1900, 1901, and 1902, upon a paying basis of $7,000 net per month, was false.

The report in effect shows, as declared in the application filed by the defendant with the corporation commissioner, that, after the mine was sold to a New York syndicate, dissension arose among the new owners, which in the year 1903 resulted in litigation; that the operation and output of the mine was at a very low ebb during a portion of that particular year because of the fact, among other things, that the mine was being operated only for the purposes of a "clean-up," which is made by means of closing down the furnace, cooling the same, and cleaning the flues and condensers, and the fact that the ore at hand, which was being used in the process of the "clean-up," was found not to possess the richness of the ore developed prior to that year; and that "all of the bodies" of ore which had been theretofore "blocked out for extraction and reduction had become exhausted," and that practically no ore of commercial value remained "*developed*" in the mine. (Italics ours.) Of course the report was evidence of the fact that the mine, under the conditions narrated in the report, was being operated at a great loss during the latter portion of the year 1903. And if the report had shown the operating conditions to be the same during that portion of the year of 1903 as they were in 1900, 1901, and 1902, then it might well be said that the defendant must have known that the mine could not have been made to pay $7,000 net per month in the three years last mentioned, and that therefore he knew that his statement in that particular was false. But it cannot be said in the absence of a showing of similar operating conditions—and the report shows upon its face that the conditions were different—that the admission by the defendant in the report in question, to the effect that the mine was a liability rather than an asset in the year 1903, showed that the defendant knew that the mine was being operated at a loss rather than a profit in the years 1900, 1901, and 1902. The admission in evidence of the report in question, for the purpose stated, was error, and doubtless redounded to the prejudice of the defendant.

[16-18] A witness for the prosecution was permitted to testify as to the low percentage of quicksilver extracted from the tonnage mined at the mine in question in the years 1916 and 1917, which percentage he learned upon an examination of the mine made in the year 1919. Counsel for the defendant first objected to the testimony sought to be elicited from this witness upon the specific ground that it was incompetent, irrelevant, and immaterial, "not pertaining to the issues in this case," "as hearsay," that the examination was not made at the request of the defendant, and that it was "too remote." This particular objection the trial court overruled, upon the ground that "it did not necessarily have to be at the request of the defendant. If a man finds a state of affairs existing there, it may have been as the defendant represented to the state, or he may have found different conditions." Counsel for the defendant then interposed the further objection that "the examination is not confined to the time; should be limited to the time alleged in this information." This objection was overruled. In support of these rulings it is insisted that the only objection made to this particular testimony worthy of consideration was that which went to its remoteness, and it is argued that the testimony in question, even though it related to a time some 16 years subsequent to the time mentioned in the alleged false statement, was not too remote. With this contention we cannot agree. Although the objection as made did not in terms specify as one of its grounds that no showing was made that the conditions at the mine were the same in 1919, when the witness examined it, as they were in the years 1900, 1901, and 1902, nevertheless the objection, as made, apparently was sufficient to direct the trial court's mind to the necessity of such a showing, for the court in one of its rulings upon the objection indicated clearly enough that the admissibility of the evidence depended upon a showing of the ex-

istence of similar conditions. And clearly, unless it were shown that the result of the examination of the mine by the witness was based upon similar existing conditions, it could not have been material or relevant to the issue involved in the instant case. The objection that the evidence tended to show a situation too remote from the time involved in the alleged false statement was, we think, well taken, and should have been sustained. True, there is no hard and fast rule relative to the admission of evidence claimed to be too remote. Ordinarily an objection to remoteness of evidence goes to the weight of the evidence, but there may be instances in which the remoteness will be so great as to render the proffered evidence utterly unsatisfactory and immaterial. This must depend largely upon the circumstances of each particular case, and as the law does not fix any particular limitation of time which will render evidence too remote, the admissibility of evidence in the face of objection upon the ground of its remoteness, ordinarily should be left to the sound discretion of the trial court. Estate of Akers, 184 Cal. 514, 194 Pac. 706; Coates v. Sulau, 46 Kan. 341, 26 Pac. 720; Snow v. Grace, 29 Ark. 131; Holliday Bros. v. Cohen, 34 Ark. 707; Cline v. State, 51 Ark. 140, 10 S. W. 225. But in view of the fact that the evidence complained of related to a situation existing some 16 years subsequent to the time mentioned in the alleged false statement, and that no showing was made that the existing conditions upon which the evidence was based were identical with, or substantially similar to the conditions existing some 16 years before, it must be held that it was an abuse of discretion for the trial court to admit the evidence complained of, and there can be no doubt but that such evidence tended to the prejudice of the defendant.

It is suggested that "the case presented by the prosecution was undoubtedly legally sufficient to support a verdict of conviction. The case thus made by the prosecution was strengthened rather than weakened by the evidence produced by the defendant, and especially by the cross-examination of the defendant himself." In support of this suggestion, excerpts from the defendant's testimony are referred to, and reference is also made to other evidence which, it is claimed, is in itself sufficient to compel and confirm the conclusion of the guilt of the defendant. We are not satisfied that this is so, and therefore feel constrained to comment upon those portions of the evidence which are relied upon to support the suggestion. Thus we are unable to concur in the contention that the defendant upon cross-examination was compelled to admit the falsity of the statement contained in the application to the commissioner of corporations that $200,000 was paid by the Empire Consolidated Quicksilver Mining Company on account, when the mine was sold in 1901 by the Empire Quicksilver Mining Company. The record, as we read it, shows in this particular that the defendant, upon his cross-examination, testified substantially that $200,000 was paid by the Empire Consolidated Quicksilver Mining Company to the Empire Quicksilver Mining Company for the mine in question, but that out of this money there was paid by the Empire Quicksilver Mining Company to the Abbott Quicksilver Mining Company of Illinois, predecessor in interest of the Empire Quicksilver Mining Company, the sum of $86,000, and that in addition a bond issue of $60,000 of the Abbott Quicksilver Mining Company of Illinois was assumed by the Empire Quicksilver Mining Company. The fact that the Empire Quicksilver Mining Company paid $86,000 and assumed a bond issue of $60,000 does not show that the Empire Quicksilver Mining Company did not receive $200,000 from the Empire Consolidated Quicksilver Mining Company, as claimed by the defendant in his application.

Nor can we concur in the contention that the defendant was compelled to admit that the statement in his application that "the Supreme Court records of California prove this fact"—referring to the fact that the mine paid $7,000 net per month—was false. The defendant explained that, when he made the statement in his application, he was referring to the briefs filed in the Supreme Court in the case of Continental Building & Loan Association v. Boggess. A perusal of Exhibit R, attached to the application to the commissioner of corporations, which contains excerpts from the briefs in the case referred to, shows that the defendant had in mind, when referring to the records of the Supreme Court, that the briefs of the attorneys in the case constituted a part of that record. Those briefs contained the statement that the mine was making $7,000 net per month, and they being the record to which the defendant doubtless referred in the application, it cannot be fairly said that his statement of what the record showed was willfully false.

As we read and understand the record, it does not show that the defendant declared under oath in the case of Continental Building & Loan Association v. Boggess that the profits of the mine from November, 1900, to May, 1901, amounted only to about $32,000. True, he did say that "the profits" of the mine went into the hands of Mr. Corbin as treasurer of the company, and that "these profits" amounted to about $32,000 over the actual operating expenses from November to May. But he explained further that this particular $32,000 was the residue of the profits of the mine, which actually came into the hands of Mr. Corbin as treasurer after there had been dispersed to other persons a sum aggregating $22,000, which would make a sum total of $54,000, and figure a net profit of over $7,000 per month.

It is asserted that the defendant made three different written statements as to the amount spent in reopening the mine in 1916 and 1917, in one of which he placed it at $135,000, in another of which he placed it at $165,000, and in the third at $60,000, and he testified on the stand that he thought it was close to $100,000. A close consideration of the evidence upon this phase of the case shows that the defendant when referring to the $165,000, was referring to the amount of money spent in regaining title to the mine, and not to the amount of money expended in re-equipping the mine, which obviously are totally different expenditures, and that when referring to the $60,000 he had in mind the amount of money expended in 1916 only. The only discrepancy therefore is between the $135,000 and the $100,000, and, inasmuch as the $100,000 referred to the amount of actual cash expended, and the $135,000 included the interest on the money expended, it cannot be said that there was any substantial variation in the defendant's statements as to the amount expended in reopening the mine.

It is contended that the evidence shows that the defendant "had endeavored to induce William Forstner, a mining expert, to make a false report on this mine for use in connection with the defendant's application to the corporation commissioner." The record in this behalf shows no more than that the defendant did forward to Forstner, who had previously made an investigation of the mine, a statement concerning the geological formation of the mine, its condition, and the cost of its operation and development. Forstner did not adopt the statement furnished him by the defendant in its entirety, but amended it in some particulars to conform to his observation and opinion of the mine, but in most particulars the report conformed with the statement furnished by the defendant, and in one instance was more favorable than the original statement of the defendant. The difference between the statement submitted by the defendant and the report of Forstner rested upon a difference of opinion existing between Forstner and the defendant as to the cost of production and an estimate of the cost of needed repairs to the mine. A perusal of the letter to Forstner indicates that the defendant intended that Forstner should rely upon his own judgment in making his report rather than upon the particulars of the statement furnished to him. It shows, in one instance at least, that Forstner was to make his choice of one of two statements. Forstner forwarded the statement as modified to the defendant, who filed it as modified with his application to the corporation commissioner.

We do not understand that the defendant in a letter written by him in 1918 to one Theo Smith, and offered and received in evidence upon behalf of the prosecution "represented that the mine cleared a net average of $7,000 per month until 1904." This letter reads:

> "A reduction plant, installed 1900, was then operated with this plant until 1904. It cleared net over all operating expenses an average of $7,000 per month."

This statement did not necessarily mean that the mine averaged that amount continuously until it was closed down in 1904, and when read and considered in conjunction with other evidence adduced upon behalf of the prosecution, it cannot be said that the statement in question was radically and willfully false. There is testimony in the case of the prosecution to the effect that the mine produced approximately 200 flasks of quicksilver as the clean-up of March of 1903, which at the defendant's estimated cost of production, would show a profit of $6,600 for that month. There is also evidence introduced by the prosecution that 192 flasks per month were produced by the mine during all of 1902 and part of 1903, which would show a net profit of $6,336 per month. There is in addition other evidence, as previously indicated, which shows that during several months of the time included in those years the mine produced *over* $7,000 per month.

It is true that the defendant in a letter to Theo Smith did state that "12 years' time and over $1,000,000 in cash were spent by the interests I represented in regaining title to the mine." The defendant admitted that this statement was not correct, and in explanation thereof stated that it was a typographical error, and in support of this contention cites the obvious and undisputed fact that in the same letter "$20 a month" was erroneous, and should have been written $20,000 a month. If it be conceded that the subject-matter of this letter was material to the issue of the defendant's guilt of the charge for which he was informed against, still, assuming the statement in question to be false, that fact alone would not suffice to warrant the jury in finding the defendant guilty as charged, and while it might be resorted to, in conjunction with the evidence adduced upon the entire case, the defendant was entitled to have it go to the jury free and clear of the many immaterial and prejudicial matters which were erroneously admitted in evidence. In short, we are not prepared to say that the jury, in the face of evidence which tended strongly to support the defendant's claim that, while he was in absolute charge of the mine, the mine did pay on an average of over $7,000 net per month, would have found the defendant guilty as charged merely because of the fact that he had made a misstatement as to the amount of money expended in regaining title to the mine.

[19] Complaint is seriously and properly made of the misconduct of the trial judge occurring during the trial of the case. In the preliminary report of the defendant as receiver of the mine in question was contained the following statement:

> "During the month of September, 1903, 31 flasks of quicksilver were shipped to Langley-Michaels Company. Referring to the August report, error was made in the last paragraph in stating that no quicksilver was shipped in that month. As a matter of fact 65 flasks were shipped during that month and duly accounted for in the August report under the head of 'Cash received $2,600.00, being an advance of $45.00 per flask on the 65 flasks.'"

When this portion of the report of the receiver was read to the jury, the court interrupted and, as the record shows, "speaking to the jurors," said—

> "Do you understand that it says that during August there were 65 flasks shipped, but that they had erroneously stated that no quicksilver had been shipped in that month—failed to report that amount; and it stated that there was 65 flasks shipped in the month of August, and 31 in the month of September?"

Manifestly, the report spoke for itself, and, if it were properly receivable in evidence, should have been submitted to the jury without any comment from the court which tended to accentuate any particular portion thereof, and it would seem that the purpose of the interruption and comment of the court was to emphasize the fact that the defendant had made a false statement in his August report, and was endeavoring to avoid the effect of that misstatement by the latter report. The remarks of the trial court, in this particular instance, constituted a comment upon a particular piece of evidence in the case, which doubtless tended to lead the jury to believe that the court was suspicious of the defendant, and naturally must have been understood by the jury as an argument against the defendant. This the court was not privileged to do. People v. Adams, 143 Cal. 208, 213, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92; People v. Patterson, 124 Cal. 102, 105, 56 Pac. 882; Thomas v. Gates, 126 Cal. 1, 4, 5, 58 Pac. 315; People v. Gordan, 103 Cal. 568, 576, 37 Pac. 534; People v. Lonnen, 139 Cal. 634, 637, 73 Pac. 586.

Frequently throughout the course of the trial, without apparent need, the trial court interrupted the examination of the defendant, when testifying as a witness in his own behalf, to the extent of practically taking the examination of the defendant out of the hands of his counsel, and indulged in an extensive course of examination and cross-examination of his own. This was done despite the objection of the attorney for the defendant, the trial court giving as a reason when overruling one of the objections that "the court is trying to facilitate the examination. He is trying to figure it from the blackboard, and if he knows I want him to tell the jury, and if he doesn't know, I want to find out." Conceding that there may have been times during the cross-examination of the witness by the district attorney, when it seemed that the defendant was evasive and nonresponsive in his answers, and that in such a situation the trial court may have been justified in endeavoring to elicit direct answers to the questions propounded, still that situation did not obtain during the direct examination of the defendant by his own counsel, and so far as we are able to glean from the record there was no need for the intervention of the trial court.

[20, 21] There can be no doubt that it is the duty of the trial court, if the exigencies of the occasion require it, to facilitate, by one or more proper interrogatories, the direct and cross examination of a witness. But for the court to repeatedly take the defendant as a witness out of the hands of his counsel, who, as the record before us shows, was apparently competent, conscientious, and expeditious in his conduct of the case, and proceed along an independent and extensive line of examination and cross-examination, is not only not commendable, but highly irregular, and for the sake of due and orderly administration of justice should not be indulged in. Ordinarily the proper course, and the one generally pursued, is to allow the examination by counsel—direct, cross, redirect, and recross—to conclude, and then, if anything in the judgment of the trial court remains obscure, which may be material for the jury to know, and it seems desirable that an examination of the witness should be further pressed, then, with perfect propriety, the trial court may, and indeed should, intervene, so that the ends of justice may be subserved. This, however, should be done with care, particularly where the witness is the defendant in the case, lest the jury should, because of the court's intervention, and because of that fact alone, indulge in adverse inferences and conclusions from the testimony of the witness.

In view of the situation of the evidence in the instant case, considered with reference to the erroneous rulings hereinbefore referred to, and the adverse impressions which the jury undoubtedly received from the court's intervention in the examination of witnesses in the manner indicated, we are of the opinion that said rulings and intervention, taken together, contributed materially to the conclusion reached by the jury.

Judgment is reversed.

We concur: LAWLOR, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

MYERS, C. J. I dissent.

I concur with the conclusions of the majority opoinion that the information herein states facts sufficient to constitute a public offense, that the same was properly triable in the superior court of Sacramento county, and that the evidence is legally sufficient to sustain the verdict of conviction. But I do not think that any error was committed at the trial to the substantial prejudice of the defendant. The opinion evidence offered by the defendant to prove that the cost of producing quicksilver from high-grade ore was relatively less than in the case of low-grade ore was, in my opinion, properly excluded, because the witness was not shown to have had any special knowledge or experience in the treatment of the two grades of ore. Moreover, assuming that this ruling was erroneous, I do not think that it could have prejudiced the defendant, because any intelligent juror would reason that, if the cost of producing quicksilver was $3 per ton of ore, the relative cost of production would be less in the case of high-grade ore, which produces more quicksilver per ton, and the same reasoning would apply equally to any other assumed figure as the cost per ton of ore. I do not think that the trial court erred in admitting in evidence, over the objection of the defendant, the minutes of the organization meeting of the Alpha Quicksilver Company, or the report made by the defendant while in charge of the mine as receiver, or the testimony of the witness who examined the mine in 1919. It was defendant's contention at the trial that he did not mean what he said in a portion of the statement, which was charged in the information to be false, and that the falsity of that portion of his statement was solely the product of a typographical error made by the stenographer. The three items of testimony, which the majority opinion holds were erroneously admitted, had a legitimate tendency to contradict and rebut this claim of defendant, in that they tended to show that other statements made by the defendant in the same application were also false, and must have been known by the defendant to be false when he made them.

I agree with the majority opinion that the trial judge should have refrained scrupulously from the making of any suggestion to the jurors as to the weight of the evidence or credibility of a witness, either by commenting thereon in the presence of the jury, or by the manner in which he cross-examined the witness. It appears from the record that the trial judge did in several instances overstep the bounds of propriety, but I am loathe to characterize his action in this respect as misconduct. However, even though entirely inadvertent on his part, it would nevertheless entitle the defendant to a reversal if it operated to his substantial prejudice to an extent which deprived him of a fair trial, but I do not think that such was the case herein. An examination of the entire evidence in the case convinces me that the statements charged in the information here were false and that they were made by the defendant wilfully, and with a design to deceive the corporation commissioner.

Under these circumstances I cannot concur in a reversal of the judgment.

I concur: WASTE, J.

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194 Cal. 305

STEGE et al. v. CITY OF RICHMOND et al. (S. F. 10503.)

(Supreme Court of California. Aug. 12, 1924. Rehearing Denied Sept. 8, 1924.)

1. Municipal corporations 🔑266—Right of city to proceed under improvement bond act not abrogated by constitutional amendment.

Right of city to proceed under Improvement Bond Act of 1915 (St. 1915, p. 1441) and amendment thereto (St. 1917, p. 142) was not abrogated by constitutional amendment of 1914 (article 11, §§ 6, 8), where municipality had failed to avail itself of right conferred by such amendment to amend its charter so as to render general laws inapplicable.

2. Municipal corporations 🔑269(1)—Improvement of street municipal affair.

Improvement of a public street is a municipal affair, as respects the power of city of Richmond under its charter. (St. 1909, p. 1263).

3. Municipal corporations 🔑293(1)—City of Richmond held to have properly issued bonds for street improvement.

City of Richmond had right to issue serial bonds for street improvements, pursuant to Improvement Bond Act of 1915 and article 2, § 1, subd. 22, of its charter (St. 1909, pp. 1265 and 1281), where a resolution of intention was adopted, reciting that "this resolution of intention is adopted under provisions of Improvement Act of 1911 and Improvement Bond Act of 1915."

4. Municipal corporations 🔑907—Improvement bonds held not general obligation of municipality.

Omission in amendment of 1917 (St. 1917, p. 212) of the provision in original section (St. 1915, p. 1445) that "neither municipality nor any officer thereof is to be holden for payment" of any improvement bond did not make improvement bonds general obligation of the city.

5. Municipal corporations 🔑298—Council held to have jurisdiction to order improvement, where it rescinded former resolution on objection.

Municipal council had jurisdiction to order improvement of a street under St. 1911, p. 730, where, upon objection of owners to term of bonds to be issued under St. 1915, p. 1441, it rescinded its former resolution of intention and started anew by adoption of another resolution of intention to which no protests or objections were interposed.

6. Municipal corporations 🔑575—Sale of lot in groups for assessment held unauthorized.

Sale of lots assessed for street improvements by municipality under St. 1915, p. 1447, § 12, which were separately assessed, but in delinquent roll and in notice of sale, were grouped, resulting in sale of each lot in a particular group to satisfy lien on other lots, *held* unauthorized.

7. Municipal corporations 🔑870—Improvement bond act held not unconstitutional as pledging credit of city.

Improvement Bond Act of 1915, prescribing a form of bond, and specifying manner of its payment, is not violative of Const. art. 4, § 31, prohibiting Legislature from pledging the credit of any city bonds issued under the act not constituting direct and primary obligation of the city.

8. Municipal corporations 🔑870—Ordinance requiring municipality to purchase property sold for improvements held not unconstitutional as gift to bondholders.

Ordinance of the city of Richmond, requiring it to purchase property sold for street improvements, *held* not unconstitutional as constituting a gift to improvement bondholders in contravention of Const. art. 4, § 31; improvement of streets being for a public purpose.

9. Municipal corporations 🔑578—Property owners held not entitled to decree quieting title without paying assessment for improvements.

That sale of owners' property for street improvements was invalid did not entitle them to a decree quieting their title, where council had acquired jurisdiction to order work performed, and lands had been benefited by improvement and expenditure incident thereto, and owners sought to relieve lands from burden of assessment without paying their just portion of cost of improvements.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Edith Stege, etc., and others against the City of Richmond, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. M. F. Soto, of San Francisco, for appellants.

D. J. Hall, of Richmond, and Kirkbride & Gordon, of San Mateo, for respondents.

SHENK, J. This is an action to quiet title. From a judgment in favor of the defendants the plaintiffs appeal. The appellants are the owners of certain lots in the city of Richmond. The respondents claim an interest in said lots by reason of certain assessments for street improvements. On the 21st day of August, 1916, the council of the city of Richmond adopted a resolution No. 281–2 declaring its intention to grade, curb, sidewalk, and pave certain portions of Forty-Seventh street in said city. The proceedings were taken under the Improvement Act of 1911 (Stats. 1911, p. 730) and amendments thereto (Stats. 1915, p. 1464), and the Improvement Bond Act of 1915 (Stats. 1915, p. 1441) and amendments thereto (Stats. 1917, p. 142). Said resolution of intention contained, among other things, a provision for the issuance of serial bonds to represent the assessments, the same to mature in five years, and gave notice of the time and place for hearing objections to said improvements. In due time the appellants signed and filed with the city clerk a document protesting and objecting to the proposed improvement proceedings in this: That at a prior meeting of the council when said proposed improvements were considered it had been agreed that the work should be carried out as proposed, but that the serial bonds to represent the assessments should mature in nine years; that because of the fact that the objectors were large property owners in the district they would be unable to pay their assessments within the five-year period. The communication concluded as follows:

> "Wherefore the undersigned pray that this honorable body correct and amend its resolution of intention or republish the same so as provide that the bonds under which the work is to be paid for shall mature nine years from and after a date to be fixed by your honorable body."

This document was presented to the council and during a consideration thereof appellant W. C. Dohrman appeared and stated that the protestants had no objection to the proposed work, but that they did object to the term of the bonds. The council thereupon rescinded said resolution, abandoned all proceedings taken thereunder, and immediately adopted a resolution of intention to perform said work, No. 281–3, in all respects the same in form as resolution No. 281–2 except that in the second resolution it was provided that the bonds to be issued to represent the assessments should mature in nine years as requested by appellants. Thereafter proceedings were taken pursuant to the second resolution of intention; the contract was let; the work was performed and accepted; the assessments were levied to pay the cost and expenses of the work; and bonds were issued to represent the assessments levied on the lands of the appellants. For delinquency in the payment of certain installments of said bonds and accrued interest the said property was sold to satisfy said assessments. No protests or objections were interposed by the appellants or any of them at any stage of the proceedings under the second resolution of intention until after the sale for delinquency, when this action was brought.

The complaint is in the ordinary form of a suit to quiet title, and the purpose of the action is to relieve said property from the burden of the assessment by a decree in this proceeding. The purpose is apparent from a stipulation made at the trial that the validity of the proceedings taken under the street improvement laws and resulting in said assessments was the only matter in dispute, and that whatever interest the city might have in said land by reason of taxes levied for general municipal purposes was not involved herein.

[1] 1. It is first insisted that the improvement Bond Act of 1915 was not available to the city of Richmond by reason of the amendment in 1914 of sections 6 and 8 of article 11 of the Constitution. Prior to the amendment of section 6 in 1914, and after its amendment in 1896, a charter framed and adopted under the authority of the Constitution was subject to and controlled by general laws except in municipal affairs. In accordance with the construction placed upon the amendment of 1896, especially in Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923, and subsequent cases (see Clouse v. City of San Diego, 159 Cal. 434, 114 Pac. 573), it was deemed necessary to enumerate in such a charter or in an amendment thereto the specific powers which the city might exercise in relation to municipal affairs in order to remove the city in its control of such affairs from the operation of general laws. That portion of the amendment of 1914 material to this contention reads:

> "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

Section 8 was amended so as to make it harmonize with the amendment to section 6. One of the purposes of these amendments was to obviate the necessity of specifically enumerating in the charter all powers relating to municipal affairs in order to remove the city as to such matters from the operation of general laws. City of Long Beach v. Lisenby, 175 Cal. 575, 166 Pac. 333. It does not appear that the city of Richmond has availed itself of the right granted by the amendment of section 6 to bring the city charter within its terms, but the appellants urge that the construction placed upon the amendment in Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 Pac. 351, and Morgan v. Los Angeles, 182 Cal. 301, 187 Pac. 1050, has abrogated the right of the city of Richmond to proceed under the act of 1915. We do not so construe those cases. In the Civic Center Case it appeared that the city of Los Angeles had by an amendment to its charter in 1917 availed itself of the privilege granted by the amendment of section 6 in 1914. With reference to the effect of this amendment on the city of Los Angeles the court said, at page 448 (166 Pac. 354):

> "The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it. Whether such powers heretofore conferred upon it by general law, if any there be, are now abrogated or suspended, is a question we need not decide."

It is observed that, even where the city had elected to amend its charter pursuant to the amendment of section 6, the question of whether powers conferred upon the city by general law prior to such amendment had been abrogated or suspended was expressly left open and not decided. Nor is that question involved in this case. With reference to the status of the city charter after the constitutional amendment of section 6 in 1914 and before the Los Angeles charter amendment of 1917, the court further said, at page 447:

> "In December, 1916, when this proceeding was begun in this court, the city of Los Angeles had not availed itself of the privilege given to it by the aforesaid amendments to sections 6 and 8. Consequently, so far as its charter provided for municipal affairs, it was paramount to general laws, but upon municipal affairs for which it did not provide and upon affairs not municipal, it was still subject to the operation of general laws."

There is nothing in the Morgan Case inconsistent with that declaration, and it must be concluded, in view of the fact that the city of Richmond has failed to avail itself of the right conferred by the constitutional amendment of 1914, that the city is in the same situation as it was prior to that amendment. In other words, if it had authority to proceed under the Improvement Bond Act prior to 1914, it still has that power. An examination of the Richmond city charter is therefore deemed necessary. The charter was adopted in 1909 (Stats. 1909, pp. 1263, 1281). Section 1 of article 2 thereof enumerates generally the powers vested in the city. In subdivision 4 of that section the city is granted the power to purchase and dispose of property of every kind and description for municipal purposes. In subdivision 7 power is given to levy and collect taxes and assessments. Subdivision 11 grants power to improve streets and to levy special assessments to defray the whole or any part of the cost of such works or improvements. Under subdivision 22 the city is granted the power to "exercise such other powers as may be hereafter granted by the Legislature to municipalities within the state," and under subdivision 23 "to exercise all other needful powers for the efficient administration of the municipal government, whether such powers are herein expressly enumerated or not." In section 1 of article 3 of the Charter it is provided that all powers vested in the city are, with exceptions not here applicable, to be exercised by the council, with power to fix and establish the method and manner in which the vested powers shall be exercised. The Charter does not prescribe the method of procedure for the levying of assessments for street improvements and the issuance of street improvement bonds, and the council has not adopted a procedural ordinance on the subject.

[2, 3] It will be noted that the city in its original charter in 1909 was granted authority to exercise "such other powers as may be hereafter granted by the Legislature to municipalities within the state." This is especially true with reference to municipal affairs, and it is well settled that the improvement of streets such as is here involved is a municipal affair. Byrne v. Drain, 127 Cal. 663, 667, 60 Pac. 433; Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 445, 166 Pac. 351, and cases cited. Under the Improvement Bond Act of 1915 the Legislature authorized any municipality in the state to determine that serial bonds shall be issued in the manner therein provided to represent assessments for street improvements and by its terms specified that the assessments levied under the Improvement Act of 1911 may be the assessments for which such serial bonds shall be issued. Pursuant to the authorization so granted by the Legislature and by said subdivision 22 of section 1 of article 2 of the Charter said resolution No. 281–3 was adopted, incorporating therein the following clause:

> "This resolution of intention is adopted under the provisions of the 'Improvement Act of 1911,' and the 'Improvement Bond Act of 1915.'"

From the foregoing it is clear that the city had the right to proceed and did properly proceed in the issuance of said serial bonds under the Improvement Bond Act of 1915.

[4] 2. It is next contended that, assuming power in the city to proceed under the Improvement Bond Act of 1915, the said bonds as issued are nullities because they impose a direct liability on the city to pay the same and were not issued in conformity with the requirements of section 18 of article 11 of the Constitution and the municipal indebtedness act of 1901 (Stats. 1901, p. 27). The argument is based on the form of the bond as prescribed in section 6 of the act of 1915 as amended in 1917. The form of the bond as required by the original section (Stats. 1915, p. 1445) contained a provision with reference to the payment of the bond from the redemption fund provided for in the act as follows:

> "It is payable exclusively out of said fund, and neither the municipality nor any officer thereof is to be holden for payment otherwise of its principal or interest."

The amendment of 1917 (Stats. 1917, p. 212) provides that the bond "including principal and interest is payable exclusively out of said fund," and it is urged that by reason of the omission in the amendment of the clause "and neither the municipality nor any officer thereof is to be holden for payment," it was attempted to make and did make the bond a general obligation of the city. We find no merit in the contention. The form of the obligation was not changed by the amendment. The general plan of the act providing a method whereby bonds to represent the assessments could be issued, a redemption fund created for the payment of the principal and interest thereof and payment exclusively from said fund, remained the same. The bonds were still "payable exclusively from said fund," and the fund under the act was to be replenished only by payments on account of assessments or by sale for delinquency. The case of Union Trust Co. v. State of California, 154 Cal. 716, 99 Pac. 183, 24 L. R. A. (N. S.) 1111, involved the validity of improvement bonds issued by the city and county of San Francisco for the opening of Montgomery avenue in said city. The form of the bond was on its face a direct promise on the part of the city to pay the same. It did, however, contain a statement that it was issued "in conformity with an act" of the Legislature authorizing its issuance. After commenting on an earlier case involving the same bonds (Liebman v. San Francisco [C. C.] 11 Sawy. 158, 24 Fed. 705), which decided that the holders of the bonds could look to no other source of payment than the special assessments provided in the act, this court used language very appropriate to the subject in the case at bar:

> "This view comports with the entire scheme of the act, which contemplates, not the creation of an indebtedness to be paid by funds

raised by a general taxation of property in the city, or the state, but the creation of a special improvement district and the payment of the cost of the proposed improvement by means of assessments levied exclusively on lands within this district. These lands, which in the contemplation of the Legislature would be benefited by the opening of the avenue, were to be made to pay, to the extent of the benefit received, the expense incurred in such opening. It was not anticipated by the framers of the law that any other source of payment would or could be resorted to."

[5] 3. It is next claimed that the council never acquired jurisdiction to order the work done under resolution of intention No. 281–3, for the reason, as counsel contends, that the record does not disclose that the objections filed by the appellants on September 8, 1916, to the proceedings as contemplated by resolution No. 281–2, were properly disposed of. It may be observed that under section 6 of the act of 1911 (Stats. 1911, p. 734) the protests which the property owner may file are "against the proposed work or against the extent of the district to be assessed, or both." The communication filed by the appellants raised no objections to the proposed work nor to the extent of the assessment district, but objected only to the time of the maturity of the bonds. The issuance of such bonds is discretionary with the council under the bond act (Stats. 1915, p. 1441), and no opportunity for objection or protest to the issuance thereof is provided for by the terms of the act. But, if it be assumed that an objection to the term of the bonds in a broad sense might be included within an objection to the "proposed work," still the record discloses that the objections and petition of the appellants were acceded to and granted by the council, for it immediately rescinded the resolution of intention No. 281–2 and started anew by the adoption of resolution of intention No. 281–3. No valid reason has been suggested by the appellants why the council did not have full power to so proceed, and, as no question of a statutory stay of further proceedings is involved, it is idle for appellants now to contend, having obtained the result which they sought, that the council should have made a formal order granting or denying their request. The proceedings taken under the second resolution of intention were independent and complete in every detail. No protests or objections were interposed thereto by the appellants on any ground whatsoever, and the council acquired jurisdiction to order the work performed.

4. It is further contended that the sale of the lots was invalid for the reason that they were not sold separately, but were sold in groups. Section 12 of the act of 1915 provides that upon default in payment of said bonds or of any installment of principal or interest thereof the lands securing such installments and assessments shall be sold and be subject to redemption in the same manner in which real property in said city is sold and redeemed for nonpayment of general municipal taxes. This section also provides that the city may be the purchaser at any delinquent sale in like manner in which it may become the purchaser of property sold for nonpayment of general municipal taxes. As hereinbefore noted, the city is authorized by its charter to levy and collect taxes and assessments and to fix the method and manner in which such powers shall be exercised. In June, 1916, the council adopted ordinance No. 405, entitled:

> "An ordinance providing a system for the assessment, levying, and collection of all city taxes in the city of Richmond."

By this ordinance the city fixed and established a complete scheme for the levying and collection of municipal taxes. As to the assessment of property for municipal purposes the ordinance requires in section 17 thereof that the assessor prepare an assessment book with appropriate headings, in which must be listed all taxable property within the city, and in which must be specified in separate columns, under appropriate headings, (1) the name of the person, if known, to whom the property is assessed; (2) lands by metes and bounds, etc., sufficient for identification, (3) city lots, numbers of lots and blocks, tract names and improvements thereon, and (6) the cash value of city lots. Section 52 requires the tax collector to publish the delinquent list, which must contain the names of the persons and a description of the property delinquent, and the amount of the taxes, penalties, and costs due opposite each name and description. Under this section the tax collector is also required to publish with the delinquent tax list a notice that, unless the taxes delinquent, together with the costs and penalties, be paid, the property upon which such taxes are a lien will be sold to the city of Richmond. Section 57 provides for a redemption within five years from the date of the sale, and section 61 provides that the city auditor shall make an estimate of the amount required to redeem on application of any person desiring to redeem and deliver to such person a certificate specifying the several items in the amount to be paid. It is apparent from the procedure outlined in this ordinance that the lots and lands in the city must be separately assessed for municipal purposes as therein provided, and that each of such lots or parcels of land should be sold separately. It may be said that the requirements of said section 17 providing that the assessor list the several parcels of land for purposes of general municipal taxes has no direct bearing upon the method of assessment under the act of 1911, for the reason that the assessments involved herein were made under the resolution of intention, and could only be made under that act. But the general plan of the city ordinance, including the method of assessment, is of assistance in determining what method should be followed by the city in the sale of lands assessed for street improvements under section 12 of the act of 1911. If the method provided by the city for the sale of property for delinquent municipal taxes requires that the several lots and lands be sold separately, it must necessarily follow that any lots and lands sold by the city to satisfy delinquent assessments for street improvements must also be sold separately in order to satisfy the requirements of section 12 of the bond Act that "upon default in payment, the lands securing such installments and assessments shall be sold in the same manner in which real property in such city is sold, for the nonpayment of general municipal taxes." It must be concluded that the method provided by the city for the sale of property to satisfy unpaid taxes for municipal purposes contemplates that the same be separately advertised and sold.

[6] The record in this case shows that the several lots of the plaintiffs were located in a tract known as "East Shore Park," and were separately assessed under the Improvement Act. Each item specified the lot, block, assessment, number, and amount of the assessment in cash. But in the delinquent roll and in the notice of sale the lots were not so separately designated, but were grouped. For example: Lots 23, 24, and 25 of block M were grouped and sold as one item; lots 33, 34, and 35 in the same block were grouped and sold as one item; lots 1 to 3 and 6 to 12 in block N were grouped and sold as item, and so on. This plan was followed throughout, and resulted in the sale of each lot in a particular group to satisfy the lien on each of the other lots in the same group. We think the method thus pursued by the city was unauthorized. In Brady v. Kelly, 52 Cal. 371, which was an action to enforce a street assessment, the court said:

> "Where two or more lots are assessed for the expenses of work on a street, each lot is chargeable only with the amount assessed upon it, and not for the amount assessed against another lot. * * *"

In Gillis v. Cleveland, 87 Cal. 214, 218, 25 Pac. 351, 353, the court said, with reference to a lien against lots which were required to be "separately assessed" under the Vrooman Act (Stats. 1885, p. 174):

> "It is obvious that the lien here referred to is one for the particular amount assessed against each lot, and not the whole amount of several assessments against all the lots of one owner, without regard to the proportion properly chargeable to each."

See, also, Knox v. Higby, 76 Cal. 264, 18 Pac. 381.

[7] 5. It is urged that the Improvement Bond Act of 1915 prescribing the form of the bond and in specifying the manner of its payment violates the provisions of section 31 of article 4 of the Constitution prohibiting the Legislature from pledging the credit of any city in the state. But the contention is based upon the false assumption that the bonds when issued are direct and primary obligations of the city. As has been pointed out, they were not under the original bond act of 1915 and the legal effect so far as the obligation of the city is concerned was not changed in form prescribed by the amendment of 1917. Hence no difficulty with reference to the applicability of the form prescribed by such amendment to the proceedings theretofore commenced can arise herein, and the rights of the appellants were not affected by the amendment.

[8] 6. Several objections to the validity of the tax ordinance No. 405 are raised. In the main they relate to the method followed by the city in advertising for sale and selling the property of the appellants, but, inasmuch as we have decided that the sale under the ordinance was irregular and appellants' contentions in that regard have been sustained, we deem it unnecessary specifically to enumerate or pass upon them. But the contention that the provisions of said ordinance to the effect that the property when sold shall be sold to the city is unconstitutional should be determined. It is the position of the appellants that the ordinance adopted by the city requiring the city to purchase the property at the sale is imposing a burden upon all of its taxpayers for the benefit of the bondholder who holds the same in private ownership, thus constituting a gift to the bondholder in contravention of section 31 of article 4 of the Constitution. The argument assumes that in the improvement of streets the work is a private matter. On the contrary, such work is for a public purpose. The city might have expended its general funds for that purpose. It was not compelled to do so, and when it elected to proceed under the general street improvement laws it simply adopted the means provided by law whereby it might in accordance therewith exercise a public function without incurring a contractual liability such as is contemplated under section 18 of article 11 of the Constitution and the bond act of 1901. When the city elects to proceed under said act, it assumes the burden of discharging its duties thereunder to the end that the assessment may be enforced. See Federal Construction Co. v. Wold, 30 Cal. App. 360, 158 Pac. 340. We discover no reason from this or any point raised by the appellants why the city may not properly proceed under its tax ordinance to enforce the assessments for delinquency in the payment thereof.

[9] But the fact that the sale of appellants' property was invalid would not necessarily entitle the appellants to a decree

quieting their title under the circumstances here shown. By appropriate proceedings the council acquired jurisdiction to order the work performed. In fact, all the proceedings leading up to and including the issuance of the bonds were valid. The work has been performed and the lands have been benefited by the improvements and the expenditure incident thereto. The plaintiffs in this equitable action seek to relieve the lands from the burden of the assessment for such benefits without praying or offering to pay their just portion of the cost of the improvements. In the early case of Weber v. City of San Francisco, 1 Cal. 455, it was said:

> "An assessment was laid for the purpose of improving a street, and thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street. The work has been completed; and after the plaintiff has derived all the benefit and profit therefrom, and after the contractors with the city have expended their labor and money to improve the plaintiff's lots, he comes into court, when he is called upon to pay his proportion of the expense, and asks, in effect, that he may be exempted from the general burden imposed for the common benefit of himself and others, on the ground that there are some irregularities in the mode of making the assessments. I think that should not be permitted. The plaintiff asks for the equitable interposition of the court to prevent a sale of his land by the defendants; but, every principle of equity and justice demands that the plaintiff should pay; and it is one of the first maxims of equity jurisprudence, that he who asks equity must do equity."

The rule thus announced has been approved and consistently followed in this state. Estabrook v. O'Brien, 98 Cal. 671, 33 Pac. 765; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Savings & Loan Society v. Burke, 151 Cal. 616, 91 Pac. 504; Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492. The later case of Hayne v. San Francisco, 174 Cal. 185, 162 Pac. 625, was an action to quiet title. The defendant asserted a lien on the land by virtue of certain special assessments levied to pay the costs of the construction of a tunnel. The plaintiffs did not pay or offer to pay the assessments. The court said:

> "As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. 253 [66 Pac. 303], 'this being the case they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them. Here no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief.'"

Such is the situation of appellants in this case.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; RICHARDS, J.; SEAWELL, J.

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194 Cal. 320

Ex parte DAEDLER. (Cr. 2669.)

(Supreme Court of California. Aug. 13, 1924.)

1. Constitutional law ⚿313—Infants ⚿12—Jury ⚿21(2)—Juvenile Court Law is constitutional.

Juvenile Court Law 1915, is not in violation of Const. art. 1, § 7, relative to trial by jury, or section 13, relative to due process of law, as proceedings thereunder are not penal, but reformatory.

2. Infants ⚿16—Failure of judge committing minor under Juvenile Court Law to find that parents were incapable held immaterial.

In proceedings under Juvenile Court Law of 1915, and acts amendatory thereof, that, in ordering minor's removal from custody of his parents, judge of juvenile court made no finding that parents were incapable or had neglected to provide for his proper maintenance was immaterial, where court found that minor's welfare required that custody be taken from his parents.

3. Infants ⚿16—Removal of minor from parent's custody warranted by commission of felony.

That minor had committed the crime of willful murder was not only sufficient, under Juvenile Court Law 1915, § 1, subd. 13, to require minor to be made a ward of court, but furnished some evidence that he had passed beyond parental control, so as to be taken from parents' custody.

4. Jury ⚿21(6)—Minor not entitled to jury trial, when proceeded against under Juvenile Court Law.

In proceedings under Juvenile Court Law of 1915, against a minor for commission of a felony, minor was not entitled to a jury trial.

In Bank.

Habeas corpus by Paul Daedler, a minor, directed against Margaret Bullen, Superintendent of Juvenile Hall, Los Angeles County, to secure his release from custody. Writ denied.

E. D. Martindale, of Los Angeles, and Daniel Riordan, of Pasadena, for petitioner.

J. W. Joos and E. W. Widney, both of Los Angeles, for respondent.

RICHARDS, J. The petitioner herein, Paul Daedler, a minor, appearing by his natural guardians, L. O. Daedler and Pauline Daedler, applies for a writ of habeas corpus for the purpose of securing the release of said minor from the custody of one Margaret Bullen, superintendent of the juvenile hall of Los Angeles county, who is alleged to be detaining said minor under and by virtue of an order of the juvenile court of the said county of Los Angeles, and which detention the petitioner alleges to be illegal for the reasons set forth in his petition. The facts upon which the petitioner predicates his reasons for asserting that his said detention is illegal are those embraced in certain judicial proceedings, the record in which is embodied in certain exhibits attached to his said petition, and as to the correctness of which there is no present dispute. It sufficiently appears therefrom that on the 7th day of December, 1923, a criminal complaint was presented by one Salvador Martinez to one Kenneth C. Newell, a justice of the peace of Pasadena township, county of Los Angeles, wherein it was charged that on the 5th day of December, 1923, at Pasadena, in said county, a felony was committed by said Paul Daedler, who at that time and place did willfully and with malice aforethought kill and murder one Arthur Martinez, a human being. That thereupon a warrant was issued by said magistrate for the arrest and detention of said Paul Daedler upon said charge; that by virtue of said complaint and warrant said Paul Daedler was arrested and brought before said magistrate on the 7th day of December, 1923; that it was then made to appear to said magistrate that said Paul Daedler, charged with the commission of said felony, was a minor of the age of a little over 14 years, upon ascertaining which fact the said magistrate made an order that the proceedings against said minor upon said charge be and they were thereby suspended, and that said minor be taken before the juvenile court of said county for its consideration and proceeding under the Juvenile Court Law. The order and direction thus made in the proceeding then pending against said minor was, it is conceded, in substantial conformity with the provisions of section 6 of the Juvenile Court Law, as amended in 1921 (Stats. 1921, p. 799). Thereupon said minor was brought before Edwin F. Hahn, judge of the superior court of the county of Los Angeles, sitting as judge of the juvenile court at a special session of said court upon the charge of being within the provisions of subdivision 13 of section 1 of the Juvenile Court Law, approved June 5, 1915 (Stats. 1915, p. 1225), and the acts amendatory thereof, which said section of said Juvenile Court Law provides that it shall apply to any person under the age of 21 years "who violates any law of this state * * * defining crime." A hearing was had upon said charge after due notice to the above-named parents of said minor, who were present at said hearing, and testimony being taken without objection of any kind at that time being made, it was found, by the judge of said juvenile court that said minor was of the age of 14 years; that a felony had been committed by him in the unlawful killing of Arthur Martinez; that said minor should be a ward of said court within the meaning of section 1, subdivision 13, of the Juvenile Court Law; that the welfare of said minor required that he be taken from the custody of his said parents. An order was accordingly made declaring and adjudging said minor to be a ward of the juvenile court, appointing W. H. Holland, probation officer, to be in charge of said minor, and committing him to the care and custody of such officer until further order. By a further order of said judge the said minor was committed to the Preston School of Industry until he attained the age of 21 years, when he was to be returned to the jurisdiction of said juvenile court for further proceedings. After a brief period spent there the said minor was returned to the custody of Margaret Bullen, superintendent of the juvenile hall of Los Angeles county, in whose care and custody he was when this writ was sought and issued.

[1] The petitioner herein, both in his petition and through his counsel, concedes that the proceedings by which said minor was committed to the care and custody of the officers of said juvenile court and to the Preston School of Industry were in all respects regular, as being in conformity with the Juvenile Court Law; the only contention of the petitioner and his counsel being that relating to the constitutionality of the sections and subdivisions of said statute under which the foregoing proceedings were taken. The particular contention of the petitioner, his parents, and his counsel in that regard is that said minor, having been arrested upon a charge of murder made in a complaint before a magistrate having jurisdiction to entertain such complaint, and having been brought before such magistrate upon such charge, he was entitled to the right of trial by jury upon said charge under those certain constitutional and statutory guaranties, to be later noted, upon which he relies, and that the proceedings of the Juvenile Court Law under which, without such trial, he has been committed to the care and custody of the officers and representatives of the juvenile court and to the Preston School of Industry, are unconstitutional in so far as their effect has been to deny and deprive him of such right of trial by jury and of vindication by said means of such charge. The particular sections of the Constitution upon which the petitioner and his counsel rely in making this contention are section 7 of article 1 of the state Constitution, which reads, in part, as follows:

> "The right of trial by jury shall be secure to all, and remain inviolate. * * * Trial by jury may be waived in all criminal cases not

amounting to felony, by the consent of both parties, expressed in open court."

He also relies upon the provisions of section 13, art. 1, of the Constitution, which reads, in part, as follows:

> "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial. * * * No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

The petitioner also cites and relies upon section 811 et seq. of the Penal Code, defining the procedure in cases of any person charged with a felony. In order to a determination of these contentions, it will be necessary to review briefly the history and philosophy of juvenile court laws.

The theory that the state and its instrumentality, the court, is the guardian of all such minors as require its care and protection is ancient of origin, looking back to the feudal times in England when the crown, through the inquisitio post mortem, had the matter of the supervision over the estates of minors, in order to realize the fruits of tenure and of livery to the overlord. This was succeeded by the Court of Wards and Liveries in the time of Henry VIII (33 Hen. VIII, c. 22), and which continued to exercise such jurisdiction until the year 1660, when, the feudal system having run its course, the jurisdiction of this court was transferred to the Court of Chancery, through which the king, as we are told by Blackstone, in his capacity of parens patriæ, assumed the general protection, not only of infant tenants, but of all infants in his kingdom, through the keeper of his conscience, his chancellor (3 Blackstone, 427, 428). The development of the English law investing the crown as parens patriæ with the supreme guardianship and supervision over infants and of the investiture of courts of equity with jurisdiction over the persons and estates of minors is fully set forth in the leading case of Eyre v. Shaftsbury (1722) 2 Peere Williams, 103. The doctrine that the state was parens patriæ of the people who compose it, for the purpose of the care, protection, discipline, and reform of those of its citizenship, whether dependents, lunatics, minors, or criminals needing these offices, thus became a part of the British system of government and of jurisprudence, and the jurisdiction of courts of equity over minors thus firmly established in the English law passed to this country upon the establishment of courts of law and equity in its various states, and came regularly into our system of jurisprudence upon the consolidation of these courts.

With the modern development of more merciful methods of dealing with the delinquencies of minors, various statutes came into being in the several states, which provided for special proceedings in the cases of such delinquents, and for particular institutions in the nature of detention homes and schools of industry for the discipline, education, and reform of the delinquents, with a view to their restoration to a higher grade of character and a better quality of citizenship. The efforts of the earlier laws in these directions were variously interpreted by the courts of the several states, depending somewhat upon the form of enactments, and upon the diverse views of the courts as to how far they invaded the constitutional rights of those charged with crime. In the state of California, however, the more enlightened view of the purpose of the law in thus attempting to deal with the cases of juvenile dependents or delinquents was early adopted by this court. In the case of Ex parte Ah Peen, 51 Cal. 280, the action of a police magistrate in committing a minor child to an industrial school for his training and reformation was upheld by this court, in the face of the express contention that the proceedings resulting in his detention were in conflict with the provisions of section 3 of article 1 of the Constitution of 1849, which provided that the right of trial by jury should be secured to all, and also with the provisions of section 8 of the same article, providing that no person should be deprived of his liberty without due process of law. The court said:

> "It is obvious that these provisions of the Constitution have no application whatever to the case of this minor child. The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law, in which the right of trial by jury is guaranteed. The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the state, as parens patriæ, has succeeded to his control, and stands in loco parentis to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves. Ex parte Crouse, 4 Whart. 1; Prescott v. The State of Ohio, 19 Ohio, 184."

The principles thus early announced have, with one exception, been reaffirmed and followed by the later decisions of this court in dealing with the underlying purpose of our later enacted juvenile court laws. Speaking of the Juvenile Court Act of 1909 (Stats. 1909, p. 213) this court said:

> "The main purpose of the act is to provide for the care and custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, in order to have them trained in good habits and correct prin-

ciples. To accomplish this it gives additional jurisdiction and power to the superior courts of the state and provides the officers necessary for the execution of that jurisdiction and power. It is an exercise of the police powers of the state, through the judicial department. It is a matter which concerns the whole state as much as any other extension of the judicial system." Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302.

Commenting upon this case, and quoting its foregoing language, this court further said in the case of Matter of Maginnis, 162 Cal. 200, 121 Pac. 723:

> "The statement might perhaps be broadened to the extent of saying that the act aims, as its principal object, at the proper custody and education of children who lack the care and control deemed essential to their right development, whether or not their situation be such as to be likely to lead them to actual crime. This is the purpose declared by the opening words of the title, viz. 'An act concerning dependent and delinquent minor children, providing for their care, custody and maintenance.' * * * It needs no argument to show that the existence of dependent or delinquent children is detrimental to the best interests of the community. Ultimately, of course, the act seeks to prevent such dependency or delinquency. One method of doing this is to take the child out of the custody of the person who has caused or permitted it to become dependent or delinquent."

In the case of Moore v. Williams, 19 Cal. App. 600, 127 Pac. 509, in which a petition for hearing in this court was denied, that court, citing the foregoing decisions of this court, held that:

> "These juvenile courts, which are in fact but an extension of the jurisdiction of the superior courts, are the creation of modern philanthropic endeavor, and are designed to and in fact do provide a most excellent means of restraining and reforming wayward persons who, unchecked, may become a menace to society."

The single exception to this current of authority above referred to is the case of In re Becknell, 119 Cal. 496, 51 Pac. 692, in which this court in a brief opinion and without any citation of authority held that an order of the superior court, based upon the recommendation of a grand jury, after evidence taken before it sufficient to show that a minor of the age of 13 years had committed the crime of burglary, should be sent to Whittier State School, was void for the reason that said minor had not been accorded a trial by jury. The court in that case had before it the provisions of the particular statute (Stats. 1893, p. 332), under which the above procedure had been followed, and evidently treated the proceeding in question as penal in character, and the order as in effect a judgment imposing imprisonment for a crime. The decision is entirely out of line with the earlier ruling of the court in the Ah Peen Case, and also the later holdings of the court as to the nature and purpose of reformatory legislation, and hence cannot be taken or followed as authority upon the interpretation to be placed upon our later juvenile court legislation.

When we turn from these decisions of our own courts dealing with the objects and purpose of juvenile court laws, we find a wealth of learning grouped and still growing around the statutory efforts of nearly every state in the union to adequately deal with the problem of juvenile dependence and delinquency through the establishment and operation of juvenile courts; and while, as we have stated, there was some disposition in the earlier decisions of the courts of certain states to give strict application of the constitutional safeguards of trial by jury and due process of law to proceedings before the juvenile courts, and to hold that the proceedings in the cases of minors brought before such courts were criminal in their nature, the main trend of modern authority has been away from this viewpoint, and has been distinctly and almost universally in the direction pointed out by this court in the early Case of Ah Peen, supra, and emphasized in its later decisions above noted. It would be impractical to comment upon or even to cite all of the cases within this increasing volume of authority, but a few of the more recent apt and striking cases involving almost the precise situation and contentions presented in the instant case may well be referred to.

In the case of Ex parte Januszewski (C. C.) 196 Fed. 123, the facts were almost identical with those of the case at bar, and the questions presented were the same except that the contention in that case was that the Juvenile Court Law of the state of Ohio was unconstitutional, as contravening the provisions of the federal Constitution relating to the right of trial by jury and to due process of law. The court, upon quite a full review of the decisions of the various states interpreting juvenile court laws, held that there was no merit in the contention, since the delinquent child was not being charged or tried before the juvenile court with the commission of a crime, but merely with being a delinquent minor, whose incorrigibility consisted in the fact that he had shot at another with intent to kill. The court said:

> "He was not charged with, or tried for, or convicted of, or imprisoned for the crime of shooting with intent to kill. The evidence offered in the juvenile court must have shown that he shot as charged in the affidavit, but as he was charged with and tried for a species of delinquency only, such evidence could not by any known rule be used in such hearing to convict him of the crime of shooting with intent to kill. The only office which it could perform was to establish the particular kind of delinquency alleged. His commitment was not designed as and is not a punishment for crime, but to place him under suitable guardianship for proper care and discipline until he is reformed, or arrives at the age of majority. Nor is the industrial school a prison (Prescott v.

State, 19 Ohio St. 184, 2 Am. Rep. 388), or the purpose of juvenile act punishment [citing numerous cases]. The object of the industrial school is the reformation of those committed to its charge. * * * Its inmates receive such education and are instructed in such branches of industry, agricultural or mechanical, or otherwise, as the board of trustees may determine; the reformation of such inmates and their preparation for usefulness being always kept in view. * * * The purpose of the statute is to save minors under the age of 17 years from prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil minded persons surrounding them; to protect and train them physically, mentally, and morally. It seeks to benefit, not only the child, but the community also, by surrounding the child with better and more elevating influences and training it in all that counts for good citizenship and usefulness as a member of society. Under it the state, which through its appropriate organs is the guardian of the children within its borders (Van Walters v. Board, 132 Ind. 569, 32 N. E. 568, 18 L. R. A. 431), assumes the custody of the child, imposes wholesome restraints, and performs parental duties, and at a time when the child is not entitled, either by the laws of nature or of the state, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection. It is of the same nature as statutes which authorize compulsory education of children, the binding of them out during minority, the appointment of guardians and trustees to take charge of the property of those who are incapable of managing their own affairs, the confinement of the insane, and the like. The welfare of society requires and justifies such enactments. The statute is neither criminal nor penal in its nature, but an administrative police regulation."

This comprehensive view of the scope and purposes of juvenile court laws is fully in harmony with the most enlightened views of the various state courts upon the same subject. An example of this is to be found in the case of Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92, wherein the same contentions were made as to the unconstitutionality of the Pennsylvania statute, providing courts for the care, treatment, and control of juvenile delinquents under the age of 16 years. In disposing of the question as to whether the act in question is violative of the provisions of the Pennsylvania Constitution providing that "the right to trial by jury shall remain inviolate," the court says:

"There was no trial for any crime here, and the act is operative only when there is to be no trial. The very purpose of the act is to prevent a trial, though, if the welfare of the public require that the minor should be tried, power to try it is not taken away; * * * but, as already stated, the act is not for the trial of a child charged with a crime, but is mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child's own good and the best interests of the state justify such salvation. Whether the child deserves to be saved by the state is no more a question for a jury than whether the father, if able to save it, ought to save it. * * * The act is but an exercise by the state of its supreme power over the welfare of its children."

And in conclusion the court says:

"Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered. The conclusions above expressed are in accordance with adjudications elsewhere with but very few exceptions" (citing many cases).

In the case of State ex rel. Olsen v. Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, 36 Am. St. Rep. 651, the Supreme Court of that state, in commenting upon the case of People v. Turner, 55 Ill. 281, 8 Am. Rep. 645, which is strongly relied upon by the petitioner herein, shows that it is one of the few exceptional cases upon the subject under review, and that it is contrary to the main current of authority upon the subject, and is expressly disapproved in that case. In the case of Mill v. Brown, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935, certain other of the cases cited and relied upon by the petitioner herein are commented upon and shown to be contrary to the main current of modern authority. Without further citation of cases, it may be stated that the almost universal trend of modern cases is in the direction of upholding the constitutionality of juvenile court laws as against assaults upon their validity based upon the grounds urged by the petitioner and his counsel in the instant case.

[2-4] But one remaining contention of the petitioner herein requires attention. It is that the judge of the juvenile court made no finding to the effect that the parents of the minor were incapable of providing for, or had failed or neglected to provide, proper maintenance, training, and education for such minor, and that such finding is required by the provisions of section 9b of the Juvenile Court Law, and that, in the absence of such finding, no ward of the juvenile court shall be taken from the custody of his parent or legal guardian. An examination of that section of the act, however, shows that such finding is by its express terms rendered unnecessary if the court shall find "that the welfare of such person requires that his custody be taken from said parent or guardian." The judge of the juvenile court, in this case, did

expressly make this latter finding, and if it be claimed that there was no evidence before the said magistrate to support such finding, the answer is twofold: First, that we have not the evidence taken by such magistrate before us; second, that it is expressly found by said magistrate that there was testimony before him showing that the minor had committed the crime of willful murder, which in itself would not only be sufficient, under the terms of subdivision 13 of section 1 of said act to require that said minor be made a ward of said court, but would suffice to furnish some evidence that said minor had passed beyond parental control. To the argument of counsel for the petitioner that the said minor is entitled to a trial by jury in order to vindicate his character and good name, it may be answered that a minor has in that regard no other greater right than an adult has; and that an adult has no inherent right to a trial by jury until such time as the penal processes of the law are put in motion toward his punishment for an alleged crime. The processes of the Juvenile Court Law are, as we have seen, not penal in character, and hence said minor has no inherent right to a trial by jury in the course of the application of their beneficial and merciful provisions to his case.

The application is denied.

We concur: MYERS, C. J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; SHENK, J.; WASTE, J.

194 Cal. 332

MARR et al. v. MARR et al. (L. A. 8223.)

(Supreme Court of California. Aug. 21, 1924.
As Modified Aug. 30, 1924.)

1. Appeal and error 🔑277—Order denying new trial deemed excepted to as final decision.

Order denying motion for new trial is deemed excepted to, under Code Civ. Proc. § 647; such order being a final decision and determining rights of parties so far as they were involved in that particular proceeding, and word "decisions," as used in section 646, including both orders and rulings.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decision.]

2. Appeal and error 🔑780(1) — Appeal not dismissed because limited to order denying motion for new trial.

That appellant by his bill of exceptions saw fit to limit scope of review on appeal to order denying a new trial presented no grounds for dismissal thereof, in view of Code Civ. Proc. § 956.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Winifred F. Marr against the Southern California Gas Company and others, in which the Farmers' & Merchants' Bank and others intervene. Judgment for defendants and interveners, and plaintiff appeals. On motion to dismiss appeal. Motion denied.

Winifred F. Marr, in pro. per.

O'Melveny, Milliken, Tuller & Macniel, of Los Angeles, for respondents.

PER CURIAM. This is a motion to dismiss the appeal on the ground that the appellant has not filed her transcript upon appeal within the time allowed by law. In support of the motion respondents show by affidavits and by the certificate of the clerk of the trial court that the time has elapsed for the preparation and filing of a transcript under the so-called alternative method, and that no proceedings have been instituted by the appellant therefor, and they show further "that no bill of exceptions to said judgment or to any proceeding at said trial has been settled or filed, and that no proceeding for the settlement of any such bill of exceptions is now pending or has ever been instituted." In response thereto appellant contends that a bill of exceptions for use upon this appeal has in fact been settled, and that the time allowed her by law for the filing of a transcript thereafter had not expired at the time this motion was made.

The record before us shows that a paper purporting to be a "bill of exceptions on order denying plaintiff's motion for new trial" was in fact settled and allowed by the trial court herein as a bill of exceptions, and if this does constitute in fact and in legal effect a bill of exceptions, which may properly be used upon this appeal from the judgment, the appellant is not in default, and the motion must be denied. The purported bill of exceptions is very brief. It recites the coming on of the case for trial, the trial thereof before the court without a jury, the making and filing of findings of fact, conclusions of law, and judgment thereon against the plaintiff, the service and filing by plaintiff of notice of intention to move for a new trial, with a copy of the notice of intention, the setting of the same for hearing, the making of said motion for new trial and argument thereof, and that the same was argued and denied; the minute order thereon being as follows:

"Motion for new trial comes on for hearing, plaintiff appearing in propria persona, and Paul E. Schwab et al. for defendant. Motion for new trial is argued and denied."

It recites the service of notice of the order denying the new trial, an order extending plaintiff's time within which to prepare and serve a bill of exceptions to be used upon appeal from the judgment, the preparation and service of this proposed bill of exceptions, and the certificate of the trial judge certified that "the foregoing bill of exceptions is settled and allowed as correct."

As stated above, the sole question necessary to be decided upon this motion is whether or not this constitutes a bill of exceptions, and such a bill as may properly be used upon this appeal from the judgment. It is respondents' contention that the so-called bill of exceptions is not in fact a bill of exceptions at all, and should be disregarded, for the reason that there is nothing in the alleged bill showing that the appellant excepted to the order denying the motion for a new trial. Respondents contend that since the amendment of 1915 (St. 1915, p. 209) to section 963 of the Code of Civil Procedure, which took away the right of appeal from an order denying a motion for new trial, it has been necessary for the party against whom such an order was made, if present at the making thereof, to expressly except thereto in order to have the correctness thereof reviewed upon appeal. Section 646, Code of Civil Procedure, provides that "the exception must be taken at the time the decision is made, except as provided in section six hundred and forty-seven," which provides that "the verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, * * * are deemed to have been excepted to."

[1] Respondents say that prior to the 1915 amendment an order denying a motion for new trial was deemed excepted to solely because of the circumstance that it was an appealable order. But we are of the opinion that it is also comprised within the phrase "the final decision in an action or proceeding." A motion for a new trial is a new and independent proceeding in a sense collateral to the action which terminated in the judgment. 1 Hayne on New Trial, § 2. The order denying such motion, when duly made and properly entered in the minutes of the court, is the final decision in that proceeding, and is one which finally determines the rights of the parties, in so far as they are involved in that particular proceeding. Nothing else remains to be done thereafter, either by the court or the parties, in so far as the finality of that proceeding in the trial court is concerned. It is true that this court, in Railroad Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627, held that an order denying a new trial is deemed to have been excepted to for the reason that an appeal might be taken therefrom. But the court did not thereby decide that such an order was not at the same time a final decision in a proceeding. Having found that the circumstance that the order was appealable was in itself sufficient to preserve the exception the court had no occasion to examine the remaining provisions of section 647.

It is true that in sections 951, 952, and 963, Code of Civil Procedure, the ruling upon motion for new trial is referred to as an order, but that the final decision in a proceeding may be embraced in an order is witnessed by the fact that such is usually if not invariably the case in proceedings for the writs of habeas corpus, mandamus and prohibition. The word "decisions," as used in section 646, Code of Civil Procedure, plainly includes both orders and rulings. It is true that it has been repeatedly held that an order granting a motion for nonsuit cannot be reviewed upon appeal, unless excepted to and assigned as error. But the cases so holding were, with one exception, decided prior to the amendment in 1897 (St. 1897, p. 98) to section 581, Code of Civil Procedure, which provides that such an order, when entered upon the minutes of the court, is "effective for all purposes." Prior to that amendment an order granting a motion for a nonsuit did not terminate the action unless and until it was followed by a judgment of dismissal. The case of Hanna v. DeGarmo, 140 Cal. 172, 73 Pac. 830, which was decided since the adoption of that amendment, followed the rule of the previous decisions; the significance of the amendment not having been brought to the attention of the court.

[2] Nine years have elapsed since the amendment to section 963, which took away the right of appeal from an order denying a motion for new trial, and, so far as we are advised, this is the first time that the contention has been made that one of the effects of that amendment was to require the express reservation of an exception to such order. This circumstance is, of course, in no way conclusive, but it is strongly persuasive to the conclusion that the bar of the state has with practical unanimity placed a construction upon section 647, Code of Civil Procedure, which is at variance with respondents' contention. We conclude therefore, that the bill of exceptions herein forms a sufficient basis for the review of the order denying appellant's motion for a new trial. Such order may be reviewed upon an appeal from the judgment. Code Civ. Proc. § 956. The fact that appellant has seen fit to thus limit the scope of the review upon appeal presents no ground for a dismissal of her appeal.

The motion is denied.

68 Cal. App. 49

PEOPLE v. BAENDER. (Cr. 1155.)

(District Court of Appeal, First District, Division 1, California. July 1, 1924. Hearing Denied by Supreme Court Aug. 28, 1924.)

1. Forgery 🔑15—Title held not in defendant, so as to prevent deed constituting forgery.

Where defendant intended that property should be conveyed to his brother-in-law, and represented that title was in the brother-in-law, and though, as claimed, he intentionally had the brother-in-law's name misspelled, he was never known by the name as so misspelled, and never pretended it was his name, the title was not in him under a fictitious name, so as to permit him to execute a deed in that name, or have another do so without the deed being a forged deed, within Pen. Code, § 115.

2. Forgery 🔑15—Deed signed by persons impersonating grantee and wife held "forgery" within penal statute.

Where grantor had land deeded to his brother-in-law, who knew nothing about it, a deed reconveying the property, signed and acknowledged by persons impersonating the grantees, the woman using a fictitious first name for the wife, constituted a forgery, within Pen. Code, § 115, making it a felony to offer for filing, a false or forged deed, in view of section 470, defining forgery.

3. Forgery 🔑12(1)—Of instrument void on its face is impossible.

There can be no forgery of an instrument void on its face.

4. Forgery 🔑12(3)—Deed subject to forgery, though purporting to convey land not owned by grantor.

A deed valid on its face may be the subject of forgery, though it purports to convey property to which named grantor had no title.

5. Forgery 🔑14—That grantee be actually defrauded by forged deed is unnecessary.

That grantee should be actually defrauded is unnecessary, if in fact a forged deed might possibly deceive another and was prepared with intent to deceive and defraud another.

6. Divorce 🔑254—Life estate, awarded wife by interlocutory decree, becomes operative, if decree is not reversed or modified on appeal.

While entry of interlocutory decree of divorce awarding life estate in property to wife vests no present interest, the life estate being merely inchoate, such estate becomes operative, if the decree is not reversed or modified, on appeal.

7. Forgery 🔑15—Defendant held to have procured forged deed to be recorded.

Where escrow instructions signed by defendant authorized title company to record forged deed placed by him in escrow when agreement for exchange was complied with, and he gave oral instructions to the same effect, he offered or procured the forged deed to be recorded, within Pen. Code, § 115.

8. Forgery 🔑44(1)—Evidence held to show defendant's knowledge that deed offered for filing was forged.

In prosecution under Pen. Code, § 115, for offering forged instrument for record, evidence *held* to show that defendant knew the deed in question was false or forged.

9. Forgery 🔑15—Statute held to apply to deed properly acknowledged and expressing consideration, regardless of defective form.

Pen. Code, § 115, making offering of forged instruments for filing a felony, when instrument, if genuine, might be filed or registered, *held* applicable to a deed properly acknowledged in form, expressing valuable consideration, regardless of defective form or certification.

10. Forgery 🔑37—Forged deed is admissible in prosecution for offering for record.

In prosecution under Pen. Code, § 115, for offering forged deed for record, the deed, which was false and forged, and the subject of the prosecution, was admissible.

11. Forgery 🔑38—Witnesses 🔑191—Judgment in divorce decree, and letter to wife after forgery, held admissible to show intent to defraud.

In prosecution for offering a forged deed for record, judgment and findings in divorce decree awarding wife a life estate in the property involved, and defendant's letter to her shortly after the crime, joking about trouble she would have over her life estate, *held* admissible to show intent to defraud the wife.

12. Witnesses 🔑52(1, 2)—Letter from husband to wife not inadmissible.

Code Civ. Proc. § 1881, relative to testimony by wife for or against husband, did not render inadmissible letter from husband to wife in connection with testimony of third person. where the wife did not testify concerning the letter.

13. Forgery 🔑15—Whether deed vested title in grantees held immaterial.

In prosecution under Pen. Code, § 115, for offering a forged deed for record, whether the deed passed or vested title in the grantees *held* immaterial, and instructions on that question properly refused.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Charles L. Baender was convicted of offering for filing a false and forged deed, and he appeals from the judgment and order denying a new trial. Affirmed.

Milton E. D'Askquith, of Oakland, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Ezra W. Decoto, Dist. Atty., and Chas. Wade Snook, Deputy Dist. Atty., both of Oakland, for the People.

KNIGHT, J. The defendant, Charles L. Baender, was charged by indictment with having knowingly procured and offered for filing in the office of the county recorder of

Alameda county a false and forged deed. Upon that charge he was tried and convicted, and from the judgment of conviction and the order denying his motion for a new trial he has appealed.

The indictment was drawn under, and the appellant was prosecuted for a violation of, section 115 of the Penal Code, which provides that:

> "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within the state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state or of the United States, is guilty of a felony."

Section 470 of the Penal Code defining forgery, in so far as it applies to this case, provides that:

> "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing [at the time] he has no authority so to do, * * * is guilty of forgery."

One of the main contentions of appellant on this appeal is that the deed in question was not a false and forged instrument within the meaning of said Code section defining forgery. The facts disclosed by the record are as follows:

The real property described in the deed in question had been the community property of Baender and his wife for a number of years. In 1919 the property was about to be sold under execution by the sheriff, and in order to save it Baender requested one Schyler, with whom he had been and was then associated in a business transaction, to bid in said property at the sheriff's sale. This was done, and when the business relation existing between Schyler and Baender was ended Baender requested Schyler to convey the property to his brother-in-law, G. F. Gillelen, of Los Angeles; the latter being married to Baender's sister, whose name was Matilda A. Gillelen. Schyler executed the deed accordingly, except that the surname of the grantee was misspelled at Baender's request, for reasons which will hereinafter appear. The Gillelens of Los Angeles paid no consideration for the property, and in fact knew nothing about this transaction; but Baender's wife had full knowledge thereof. The deed was delivered to Baender. Thereafter, on August 11, 1921, Mrs. Baender was granted an interlocutory decree of divorce, by the terms of which the property in question was declared to be community property, and upon stipulation Mrs. Baender was awarded a life estate therein. Subsequent to the date of the granting of said decree, Baender, without the knowledge of his wife, opened negotiations with a real estate firm, named Faustina & Pelton, for an exchange of properties. An agreement was eventually reached whereby Baender agreed to exchange the property in question for other real property and a cash bonus of $700. During the course of those dealings Baender represented several times to Faustina & Pelton that his property stood in the names of his brother-in-law and sister of Los Angeles, and that they would come from Los Angeles to sign the deed.

On the morning of November 22, 1921, Baender appeared before J. F. Holm, a notary public in Oakland, accompanied by a man and woman, whom he introduced to Holm as Mr. and Mrs. Gillelen from Los Angeles. He requested Holm to prepare for their execution a deed to said property. Holm declined to draw the deed, and the parties left with the understanding that they would have the deed drawn elsewhere and return to Holm's office that afternoon to execute the same before him as notary public. That afternoon Baender returned to Holm's office, accompanied by the man, but not by the woman. He explained to Holm that the woman whom he referred to as Mrs. Gillelen was ill, and requested that Holm take her acknowledgment over the phone; she having already signed the deed in the name of "Ada M. Gillelen." Holm did so, and thereupon the man signed the deed and acknowledged the same as "G. F. Gillellen." By that deed said property was at the request of Faustina & Pelton conveyed to one Charles Baumann. The deed was then delivered to Baender. Pursuant to the exchange agreement Baender on December 1, 1921, delivered said deed, together with the Schyler to Gillellen deed and with certain written escrow instructions to the Alameda County Title Company, who were acting also in the matter for the other parties to the exchange. When the transaction was ready to be concluded, the title company upon the strength of the representations made by Baender, supported by the recitals in the notarial certificate to the effect that the Gillelens of Los Angelos had signed the deed, issued title insurance upon the Baender property, and thereafter, pursuant to said escrow instructions, carried out the necessary legal requirements to consummate the exchange of the properties, including the filing for record on December 5, 1921, of the Gillellen to Baumann deed. The evidence further shows that on or about January 31, 1922, about seven weeks subsequent to the attempted disposal of the property in question, the appellant mailed Mrs. Baender the following letter:

> "Lately.
>
> "Mrs. Baender: I have this day deposited for you $30.00 in the State Savings Bank, 13th and Franklin streets, for the children.
>
> "I hear that you and your lawyers are having a little fun all to yourselves over some property on 20th street. Am I right?
>
> "Well, enjoy yourself while you are still

young. I really believe that life estate of yours can be made the source of a real and constant pleasure for you, Albert, and your lawyers. You will have entertainment for several years. Charlie."

Following the receipt of that letter it was discovered that the man who executed the deed to Baumann was not Gillelen, the brother-in-law of Baender, and that the woman who also signed said deed was not Baender's sister. They were strangers whose services were procured by Baender for the very purpose of impersonating his relatives in the matter of effecting a transfer of the title to said property. The Gillelens of Los Angeles, as a matter of fact, knew nothing about the transaction until some time after it had occurred. Baender's indictment and arrest followed.

We are of the opinion that the evidence above narrated, when considered along with the additional evdence which will be hereinafter set forth, establishes a violation of the Code section under which the appellant was charged and is sufficient in law to sustain the judgment of conviction. Section 115 of the Penal Code was obviously designed to prevent the recordation or registration of spurious documents, which were knowingly offered for record with intent to defraud. The evidence here briefly stated shows that, in order to avoid the demands of creditors the appellant, with full knowledge on the part of his wife, with whom he was then apparently on friendly terms, caused the title to their community property to be placed in the name of his brother-in-law, and thereafter, and after the wife had obtained an interlocutory judgment of divorce, and had on stipulation by that interlocutory judgment been awarded a life estate in said community property, he endeavored to defeat said life estate by disposing of the property, and in order to accomplish that purpose he procured strangers to impersonate his brother-in-law and his sister in the execution of the deed by which the disposal was made.

[1] Appellant's contention that said deed was not false and forged is based upon the assertion that Schyler conveyed the property to him, that at his request he took title under the fictitious name of "G. F. Gillellen," and that having thus taken title in such name he was vested with full authority to use that name in divesting himself of title, either by signing that name personally, or by procuring another to sign it for him. In this respect appellant testified that in spelling the name of his brother-in-law it properly contained but three "ls"—G-i-l-l-e-l-e-n—but that he purposely caused the name of the grantee in said deed to be spelled with four "ls," so that such grantee would in fact be a fictitious person, thereby allowing him, the appellant, as the fictitious Gillellen, to reconvey the property in that name. In support of such contention appellant cites the cases of Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 955, and Wilson v. White, 84 Cal. 242, 24 Pac. 114, which he claims legally justified the course adopted by him in transferring the title to such property. Those cases hold to the doctrine that if a person is in existence and ascertained, a conveyance to or by him by a fictitious name passes title. But upon examination of those cases, and the cases cited by them, it will be seen that the doctrine there applied is founded upon the established fact that the particular person named as grantee was known and identified by such fictitious name, either by having voluntarily assumed the same or by having been generally known by such name. In other words, the doctrine contended for by appellant is applied where there is a concurrence of identity in person and in name. For instance, in Wilson v. White, supra, it is said:

> "It is involved in the very conception of a deed that there must be a grantee, to whom delivery is made, and in whom the title can vest. If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called. He may assume a name for the occasion, and a conveyance to and by him under such name will pass the title."

And again, in Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536, quoted approvingly in Emery v. Kipp, supra, the court says:

> "The name is not the person, but only a means of designating a person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him."

That is not the situation here. The evidence in the case at bar proves beyond question, we think, that the grantee specified in said deed was intended to be and in fact was G. F. Gillelen of Los Angeles, the brother-in-law of appellant, and not the appellant, and it further shows that throughout this entire transaction appellant consistently so claimed and represented to all of those with whom he was dealing. According to the undisputed facts, appellant never was known as, nor did he pretend to be, G. F. Gillellen, the party named as the grantee in the Schyler deed. They were always known and treated as separate individuals. He was personally known to all of the parties to this transaction—Schyler, Holm, Faustina & Pelton, and the representatives of the title company—as Baender. Schyler testified that Baender instructed him to deed the property to "Mr. Gillelen, his brother-in-law in Los Angeles." The deed was executed accordingly, describing the grantee as a resident "of the city and county of Los Angeles." During the negotiations for the exchange of the properties Baender represented to Faustina & Pelton that the property stood in the names of his brother-in-law and sister of Los Angeles. When Baender appeared in the office of Holm for the purpose of having him prepare and as notary acknowledge the deed to Baumann, he presented to Holm that the property stood in the names of his brother-in-law and sister of Los Angeles, and he introduced the strangers to Holm as his brother-in-law and sister of Los Angeles, and the deed to Baumann designated "G. F. Gillellen, and Ada M. Gillellen, his wife, of the city of Los Angeles, county of Los Angeles," as grantors. After the deed was executed Baender represented to Faustina & Pelton and to the title company that said deed had been signed by the Gillelens of Los Angeles.

[2] That it was the intention of the appellant to transfer the title to the name of his brother-in-law, Gillelen, of Los Angeles, and not to himself, is further supported by appellant's own testimony, wherein he stated that he deposited the Schyler deed in his desk and attached to it written instructions to the effect that in the event of his (appellant's) death, the deed should be delivered to his brother-in-law, G. F. Gillelen, for the purpose of making him trustee to handle the property as he might deem best, and he further explained that he believed that in that situation his brother-in-law, in divesting himself of title, might spell his name both ways, and thereby overcome the misspelling of the name in the Schyler deed. It will therefore be seen that because of the dissimilarity in facts, as above pointed out, between those cases relied upon by appellant and the facts of the instant case, the doctrine of those cases is not available to appellant. And it being manifest that the person named as grantee in the Schyler deed was intended to be and in fact was G. F. Gillelen, of Los Angeles, the brother-in-law of appellant, the signing of the latter's name by another to the deed in question, and the impersonation of him in the acknowledgment thereof, constituted said deed a false and forged instrument, within the meaning of the Code section above quoted. Even were it possible to reach a conclusion different from the one stated, so far as the name of the grantor in the deed is concerned, we are still confronted with the situation that the appellant also procured a woman to impersonate the wife of G. F. Gillelen and had her sign and acknowledge said deed in the fictitious name of "Ada M. Gillellen." The name of appellant's sister was Matilda A. Gillelen. The conveyance was not made to Ada M. Gillelen, nor was there any one identified with the transaction known by that name. Therefore the signing of that fictitious name to said deed for a fraudulent purpose clearly constituted forgery. People v. Chretien, 137 Cal. 450, 70 Pac. 305.

[3, 4] Appellant endeavors to make the question of the investiture of title in Gillelen the pivotal point upon which the commission of the act of forgery turns, claiming that if title was not at any time vested in Gillelen, conceding him to be the person who was named as grantee in the Schyler deed, the crime of forgery was not committed. This contention is based upon the theory that no title was ever acquired by Gillelen, for the reason that the Schyler deed was never delivered to or accepted by him, and he paid no consideration for the property; that if Gillelen possessed no title he consequently had none to convey, and that therefore any deed which Gillelen might have made purporting to convey title would have been void. To this state of facts appellant attempts to apply the rule that there can be no forgery of a void instrument.

We are of the opinion that the question of the investiture of title in Gillelen is not material. The respondent does not claim that Gillelen even acquired title, and we think it matters little whether or not he did. It is doubtless the law that there can be no forgery of an instrument which is void upon its face. People v. Tomlinson, 35 Cal. 506. But this was not such a deed. Upon its face this deed was valid. It purported to be the deed of Gillelen who by virtue of the Schyler conveyance had become the record owner of the property, and whose deed, if genuine, would have formed a material link in the chain of title from Schyler through Gillelen to Baumann. That being so, Gillelen's deed would be the subject of forgery, even though it may have conveyed no title, for the rule is well established that "a deed may be the subject of such a crime [forgery], and in that case it is immaterial that the deed purports to grant land to which the grantor named had no title." People v. Van Alstine, 57 Mich. 69, 23 N. W. 594; Abston v. State, 134 Tenn. 604, 185 S. W. 706. To the same effect are West v. State, 22 N. J. Law, 212; Henderson v. State, 14 Tex. 503, and authorities therein cited.

[5] Nor was it necessary, in order to establish forgery, to prove that Gillelen or any other person was actually defrauded, if in fact it be shown that said deed might possibly deceive another, and was prepared with the intent to deceive and defraud another. People v. Turner, 113 Cal. 278, 45 Pac. 331; Henderson v. State, supra. In Henderson v. State, supra, it was said:

> "The intent to defraud, it is true, is of the essence of the crime. But it is not essential that any person be actually defrauded, or that any act be done towards the attainment of the

fruits of the crime other than the making of the instrument. And the very fact of the forgery iself will be sufficient to imply an intention to defraud, or at least it will be sufficient if, from the circumstances of the case, the jury can fairly infer that it was the intention of the party to utter the forged instrument (3 Greenl. Ev. § 103; 3 Arch. Cr. Pl. 546; 2 Russ. on Cr. 361 [7th Am. from 3d London Ed.]), and a fortiori if, as in this case, there is proof that he did utter it. It is well settled, it is true, as held in a case cited by counsel (People v. Shall, 9 Cow. [N. Y.] 778), that the forging of an instrument which on its face is void is not indictable. But that is not this case. The deed on its face appears to be a valid, legal conveyance of land. And it is sufficient that it is such a character of instrument as that the consequences of the forgery would necessarily or possibly be to defraud some person. It is sufficient if it appear that by possibility either the state or some person might be defrauded. Act above cited; 3 Greenl. § 103; 2 Russ. on Cr. 361, note; 2 New Jer. 212."

That the spurious deed in question did actually deceive the title company, and that by its execution appellant intended to defraud his wife of her life estate, is obvious. Acting upon the belief that it was the genuine deed of the Gillelens, the said title company insured the title, and in view of the letter hereinabove set forth, written by appellant to his wife, less than two months after the transaction in question was concluded, there can be but little doubt of his intention to defeat his wife's interest in the property which he had previously stipulated should be awarded to her by said judgment of divorce.

[6] While the entry of such interlocutory decree vested no present interest in the property in Mrs. Baender, the life estate thereby awarded being merely inchoate in character, nevertheless said decree would have become final if not reversed or modified on appeal. The said life estate would have then become operative. Remley v. Remley, 49 Cal. App. 489, 193 Pac. 604, and cases cited. For the reasons stated it must be held that said deed was a false and forged instrument within the meaning of said Code sections.

[7, 8] Appellant further urges that the evidence fails to show that the appellant offered or procured the deed to be recorded or that appellant knew that the deed was false or forged at the time he procured it to be recorded. We find no merit in either point. The written escrow instructions signed by appellant authorized said title company to record said deed when the agreement for exchange was complied with by the other parties to the transaction. These escrow instructions were supplemented by oral instructions given by the appellant to the representatives of the title company to the effect that the representatives of the title company were at liberty to record the deed to the Oakland property when the appellant received from the other parties the money due and the deed to the property to be taken in exchange. The transaction was afterwards consummated accordingly and the Gillelen to Baumann deed was recorded. The evidence already narrated is sufficient answer, we think, to the other point made, that the appellant did not know that the deed in question was false or forged.

[9] The contention made by appellant that there is no proof that the "genuine" counterpart of the alleged forged deed might be recorded, is disposed of by the case of People v. Webber, 44 Cal. App. 120, 186 Pac. 406, where it is held that section 115 of the Penal Code, under which this indictment was brought, "simply seeks to cover as coming within its terms the various classes of instruments entitled under our law to be recorded, such as deed, mortgages, etc. without any regard whatever, whether the particular instrument is defective in form or certification. The instrument in question on its face was a deed properly acknowledged in form expressing a valuable consideration and therefore an instrument which if genuine was entitled to be recorded under the laws of this state."

[10-12] Appellant also complains of the rulings of the trial court in admitting in evidence the deed in question, the letter from Baender to his wife, and the judgment and findings in the Baender divorce proceeding. The deed, being false and forged and being the very subject of the prosecution, was clearly admissible in evidence, and the other exhibits referred to were properly admitted as evidence upon the subject of intent to defraud. The provisions of section 1881 of the Code of Civil Procedure do not operate to exclude said letter from evidence in connection with the testimony of A. T. McDonald, the attorney for Mrs. Baender. Mrs. Baender did not testify concerning said letter. People v. Swaile, 12 Cal. App. 195, 107 Pac. 134.

There was no error committed by the court in the impanelment of the jury, for the reason that the record does not show that any of the jurors who tried said cause had been discharged as such within a year.

[13] The final contention of the appellant is that the court's instructions to the jury were erroneous and that it erred in refusing to give certain instructions proposed by the appellant. Appellant's objections cover some 24 instructions, and for that reason it is impracticable in this opinion to discuss the rulings of the court on each separate instruction. We have examined the court's charge, and also the instructions offered by the appellant, which were by the court refused, and it is our opinion that the jury was fairly, fully, and clearly instructed on all legal matters involved. Many of the instructions proposed by the appellant, and

which were by the court refused, related to the question of the passing and vesting title in connection with the delivery of deeds. As heretofore stated, that question was not material in determining the guilt of the defendant, and those instructions were therefore properly refused. The other instructions refused either misstated the law or assumed facts not in evidence. The indictment conforms to all requirements of the law, and the demurrer was properly overruled.

Finding no error in the record, the judgment and order appealed from are affirmed.

I concur: TYLER, P. J.

(67 Cal. App. 745)

BURKS v. WEAST. (Civ. 2766.)

(District Court of Appeal, Third District, California. June 20, 1924.)

1. Appeal and error 🔑1170(3)—Court's refusal to strike amended complaint, filed without leave, held harmless error.

Court's refusal to strike amended complaint filed without leave of court, if error, *held* not to authorize reversal, under Code Civ. Proc. § 475, and Const. art. 6, § 4½, where defendant had notice of real cause of action, and amended complaint was filed in ample time to enable him to make complete defense.

2. Appeal and error 🔑1041(2) — Filing of amended complaint, without notice to defendant, held not ground for reversal.

Defendant is not prejudiced by failure of plaintiff to give notice of filing amended complaint, if it appears by record that motion for leave to file such complaint should have been granted.

3. Judgment 🔑577(1) — Judgment against corporation after it has ceased to exist held a nullity.

Judgment against corporation, after it had ceased to exist, for amount of supplies furnished it, was a nullity, and did not bar action against president of board of directors on same cause of action.

4. Associations 🔑16 — Persons associating without formality held personally liable for supplies purchased by manager, irrespective of interest to become so liable.

Defendant and others, who simply proceeded to conduct restaurant and reading room without any formality whatsoever, were subject to liabilities of voluntary association and were severally liable to creditors for such obligations as might be incurred by manager in purchase of supplies, even though creditors gave credit to name of association, and defendant and his associates did not agree or intend to become personally liable.

5. Interest 🔑47(1)—Interest on account for goods sold held allowable only from beginning of suit, where no demand made prior thereto.

In an action for balance due on goods sold defendant, court erred in allowing interest from date of delivery of last item of goods, instead of from commencement of suit, in view of Usury Law, ratified November 5, 1918, § 1, where no demand was made for amount claimed until beginning of suit.

Appeal from Superior Court, Stanislaus County; E. N. Rector, Judge.

Action by J. R. Burks against F. A. Weast. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Leslie K. Floyd and E. H. Zion, both of Modesto, for appellant.

J. M. Walthall and Edward T. Taylor, Jr., both of Modesto, for respondent.

PLUMMER, J. The plaintiff's cause of action is based upon an assigned claim of the Modesto Package Company against the defendant for the sum of $1,521.79, alleged to be the balance due for goods, wares, and merchandise sold and delivered to the Modesto Coffee Club during the year 1920. Plaintiff had judgment, and the defendant appeals.

The cause of action is set forth in an amended complaint containing two counts, in which it is alleged that L. C. Black, doing business under the fictitious name of Modesto Package Company, sold and delivered to the defendant, operating under the name of the Modesto Coffee Club, goods, wares, and merchandise of the value of the sum above stated. The assignment of the claim by the Modesto Package Company to the plaintiff is properly set forth in the amended complaint.

[1, 2] In the original complaint filed by the plaintiff it is alleged that the plaintiffs, operating under the name of the Modesto Package Company, sold goods, wares, and merchandise to the defendant in the sum of $1,521.79. After a demurrer had been interposed to this complaint and overruled, the plaintiff filed an amended complaint setting forth his cause of action, as hereinabove stated, and correcting his complaint so as to conform with the actual facts of the transaction. This amended complaint was filed without leave of the court first had and obtained. Thereupon the defendant moved the court to strike said amended complaint from the files in the said action. This motion was denied, and such ruling is assigned by the appellant as his first ground for a reversal herein. The record shows that the defendant had notice of the real cause of action. There is nothing in the record to show that the defendant was in any wise injured by the action of the court. The amended complaint was filed a sufficient length of time preceding the trial to enable the defendant to make a full and complete defense, if any he had. The defendant was served with the amended complaint on the 22d day of September, 1922. The cause of action did not come on for trial until the 10th day of November, 1922,

thus showing that the defendant had ample opportunity to meet all the issues tendered by the amended complaint. It may be further stated that no attempt was made by the defendant in the trial court to set forth other than mere technical objections to the amended complaint, and the chief objection now is that it was filed without notice, and while, apparently, the amended complaint seems to state a different cause of action, in truth and in fact, the record shows that such was not the case. Under such circumstances, we think that the ruling of the Supreme Court in the case of Baker v. S. Cal. R. Co., 114 Cal. 501, 46 Pac. 604, is applicable. It is there stated that, if it appears by the record that motion for leave to file amended complaint should have been granted, defendants are not prejudiced by failure of plaintiffs to give notice. We also think that section 475, Code of Civil Procedure, is determinative of this question. That section sets forth, in substance, that "the court must, in every stage of an action, disregard any error, * * * or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties." An examination of the record shows that the ruling of the court, even if admitted to be error, did not result in a miscarriage of justice, and therefore does not authorize or warrant a reversal of the judgment. See section 4½ of article 6 of the state Constitution.

It appears from the transcript in this case that some time during the year 1909 a number of citizens, residents of the city of Modesto, organized a corporation, named the Modesto Coffee Club, for the purpose of establishing, maintaining, and operating restaurants, coffee clubs, lunch places, reading rooms, and other places of recreation where refreshments may be served, and people allowed to congregate, etc. This corporation began business in the city of Modesto and continued to operate as such, and continued to function as a corporation, until some time during the month of March, 1915, when by reason of failure of said corporation to pay the franchise tax levied against it by the act, approved on April 1, 1911 (St. 1911, p. 530), said corporation forfeited its charter and ceased to exist as a legal entity. It also further appears from the transcript that pursuant to a notice, by way of advertisement to all people interested in the coffee club, a meeting was had, at which the defendant and six others were elected directors of the Modesto Coffee Club. The date of this election is not definitely fixed, but appears to have been at some time in 1918. The board so elected proceeded to employ one Mrs. Walters as manager of the coffee club, and thereafter proceeded to conduct a restaurant, reading room, and place where people might congregate under the name of the Modesto Coffee Club, and continued to do so during the times mentioned in plaintiff's complaint, and in the conduct of said business the said Walters who had been employed by the defendant and the six other persons constituting the so-called board of directors, bought the goods, wares, and merchandise constituting the cause of complaint in this action, and used said supplies in the conduct and management of the business of said coffee club. The defendant in this action acted as president of the board of directors and appears to have taken the most active part in the management of the business of said coffee club, so far as the board of directors was concerned. A portion of the time checks was issued by the coffee club, signed only by the manager, and a portion of the time checks issued by the coffee club was countersigned by the defendant, as president thereof. The business of the club did not prove to be self supporting, and various suits were begun to collect the amounts due for supplies furnished thereto.

[3] It appears from the transcript that the plaintiff in this action first sued the Modesto Coffee Club as a corporation and obtained judgment by default for the identical sum sued for in this action, and it is now claimed by the appellant that that judgment is a bar to this proceeding. The record, however, shows that the action was not begun until long after the Modesto Coffee Club had ceased to exist as a corporation and therefore the judgment obtained against it by default was simply a nullity, or, as stated in the case of Cal. Nat. Sup. Co. v. Flack, 183 Cal. 124, 90 Pac. 634:

> "A judgment obtained against a corporation in an action on a promissory note after the corporation has failed to pay its taxes is not a bar to a subsequent action against the directors as trustees, since such nonpayment ipso facto terminates the corporate existence. A judgment rendered against a defunct corporation in an action brought after the forfeiture of its charter is void."

This case cites a number of other cases in which the same points were involved and where the same holding was had. This effectually disposes of appellant's contention, relative to the judgment had against the Modesto Coffee Club as a corporation. After the discovery by the plaintiff of the noncorporate existence of the Modesto Coffee Club, the present action was instituted against the defendant to obtain judgment against him upon his personal liability for the goods, wares, and merchandise sold and delivered to him and to his so-called codirectors, doing business under the name of the Modesto Coffee Club. In this behalf it is insisted on the part of the appellant that the goods were sold to the Modesto Coffee Club, and not to the defendant.

[4] It does not appear from the transcript

that the defendant and the others with whom he was associated entered into any agreement or contract between themselves relative to the business they were about to conduct, but that they simply proceeded and continued to conduct a restaurant and place of business under the name of the Modesto Coffee Club, without any formality whatsoever. This, we think, places them in a position and subjects them to the liabilities of a voluntary association, irrespective of whatever name they may assume in the conduct of their business, or whether the business is conducted without formally assuming any name. Nor does it matter whether they agreed to or intended to become liable for the costs and expenses of maintaining the club in question. When they assumed to conduct a club and manage it, under the name above designated, we think they severally became liable to creditors for such obligations as might be incurred by the manager selected by them in the purchase of supplies wherewith to conduct the business they had undertaken, and this is true, even though the parties selling and delivering the supplies gave credit to the name of the association under which the business was being conducted.

This very question has been decided in a number of cases. In Bennett v. Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222, the Supreme Court of Connecticut holds:

> "The members of a voluntary association are individually liable for an indebtedness incurred in the business for which it was organized, * * * although they did not agree to become, nor did they hold themselves out as, partners, or as personally responsible, and although the creditors gave credit to the associate name."

In Nolan v. McNamee, 82 Wash. 585, 144 Pac. 904, the Supreme Court of Washington holds that:

> "The liability of the members of an association is joint and several, and each member is individually liable for all the debts of the association."

In 5 C. J. 1362, the question of liability is thus stated:

> "While, as between the members of an unincorporated association, each is bound to pay only his numerical proportion of the indebtedness of the concern, yet, as against the creditors, each member is individually liable for the entire debt, provided, of course, the debt is of such a nature and has been so contracted as to be binding on the associates as a whole."

Further on it is stated:

> "An unincorporated association organized for business or profit is in legal effect a mere partnership, so far as the liability of its members to third persons is concerned, and accordingly each member is individually liable as a partner for a debt contracted by the association. * * * This liability for the debts of the association is imposed on each member by law. It arises out of his membership as a necessary incident thereto. It does not depend upon any stipulation in the laws of the society making him thus liable, upon his assent to the contract out of which the debt arises, nor is it necessary that the member should have held himself out as a partner, or that the credit should have been extended to him rather than to the association. But, on the contrary, by becoming a member, he subjects himself to liability for all debts contracted by the association, within the scope of its object and during the period of his membership."

See, also, 3 Cal. Jur. 348.

In Leake v. City of Venice, 50 Cal. App. 462, 195 Pac. 440, 441, the court approved the rule just stated, and on page 465 of the report cited states the law as follows:

> "Each member of an association is liable for the debts thereof incurred during his period of membership, and which have been necessarily contracted for the purpose of carrying out the objects for which the association was formed."

The court also approved of the statement of the law that, where parties are associated and conduct business as an unincorporated association, they are regarded as partners, so far as affects the question of liability for the debts necessarily incurred by the association.

In the case of Webster v. San Joaquin Fruit, etc., Ass'n, 32 Cal. App. 264, 162 Pac. 654, this court had an occasion to pass upon the questions herein involved, and it was there said, in substance, as follows: As against creditors, each member of such an association was individually liable for the entire debt, if the debt were contracted in the course of the business of the association, and, also, that such an association organized for business or profit was in legal effect a mere partnership, so far as liability to third persons was concerned. In that case the defendants, members of the association, were held liable for goods, wares, and merchandise issued to the association during the course of its business. There is no question in the case at bar but that the goods, wares, and supplies furnished by the assignor of the plaintiff were such as were necessary for the conduct of the business of the Modesto Coffee Club and were purchased by the person employed by the defendant and his coassociates to manage the business of said club. The fact that the defendant and his coassociates did not expect to reap any personal profit out of the enterprise in which they were engaged does not in any wise affect their liability. They were engaged in business and had appointed a manager to conduct that business for them, and, to a greater or less extent, exercised supervision over the business being conducted under the name of the Modesto Coffee Club, and in so doing, under the authorities which we have cited, rendered themselves individually liable for all supplies necessarily purchased in the conduct of the business in which they were engaged.

[5] We agree with the appellant that the court erred in the allowance of interest. It appears by computation that interest was allowed from the date of the last item of goods delivered by the assignor of the plaintiff. In so doing we think the court accepted the wrong date for beginning the allowance of interest. On November 5, 1918, the electors of this state ratified and approved what is commonly known as the Usury Law (see St. 1919, p. lxxxiii). Section 1 of that initiative measure reads as follows:

> "The rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year. * * *"

No demand is shown to have been made for the amount claimed by the plaintiff until the beginning of suit. It has been frequently held that the beginning of suit constitutes a demand. This action was begun on February 20, 1922. By correcting the computation and taking this date as the period from when interest should be allowed, we find that the judgment allowed the plaintiff was $165.40 in excess of what it should be. It is therefore ordered: First, that the judgment herein be and the same is hereby modified, by deducting therefrom the sum of $165.40; second, that in all other respects the judgment of the trial court be and the same is hereby affirmed.

It is further ordered that the appellant be allowed his costs on appeal.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

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68 Cal. App. 111

MADERA SUGAR PINE CO. v. ADAMS et al.

(No. 2749.)

(District Court of Appeal, Third District, California. July 8, 1924. Hearing Denied by Supreme Court Sept. 4, 1924.)

1. Payment 🔑65(6)—Burden on defendant to prove payment where plaintiff proves creation of debt within statute of limitations.

Generally where a plaintiff has proved creation of a debt within period of the statute of limitations, burden is on defendant to prove payment thereof.

2. Payment 🔑68—Burden of proving a particular application of payment is on party claiming that such application was made.

Burden of proving a particular application of a payment by either debtor or creditor is on party claiming that such application was made.

3. Payment 🔑68—Burden of proving facts warranting application of payment on obligation held to rest on claimant.

Where lien claimant had received payment during existence of obligation for which his claim of lien was thereafter filed, without applying it to any particular obligation, burden of proving facts warranting application to some other obligation, in accordance with Civ. Code, § 1479, was upon him, especially where evidence thereof was under his control.

4. Appeal and error 🔑1170(3)—Appellate court unauthorized to reverse judgment for error in defendant's pleadings, where plaintiff not prejudiced thereby.

Appellate court *held* unauthorized to reverse judgment in a suit to foreclose a lien, because answer was insufficient to support finding that certain payments should be applied to claim sued on, in view of Const. art. 6, § 4½, where plaintiff's demurrer was not directed specially to objection urged, and case was tried on theory of nonpayment, and both parties produced evidence bearing thereon.

5. Appeal and error 🔑1071(6)—Court's failure to find what items of general account were earliest in date of maturity in suit to foreclose lien held not prejudicial.

In a suit to foreclose a lien involving question of application of payments, court's failure to find what items of general account were earliest in date of maturity was not prejudicial, where there was no evidence bearing upon that question, and hence, any finding would necessarily have been against plaintiff; it having burden of proof.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the Madera Sugar Pine Company against David Preston Adams and others. From an adverse judgment, plaintiff appeals. Affirmed.

Fee & Ring, of Madera, for appellant. Sherwood Green and J. W. Maloy, both of Madera, and Oliver Dibble, of San Francisco, for respondents.

FINCH, P. J. Plaintiff sued to foreclose its lien for the value of materials furnished for and used in the construction of certain buildings upon town lots belonging to defendant D. P. Adams. It was given judgment against Adams in the sum of $751.71, which was $1,000 less than the amount claimed to be due, and plaintiff prosecutes this appeal from the judgment.

Munson constructed the buildings in question under an oral contract with Adams, and was paid the full contract price therefor before plaintiff's notice of lien was filed. At different times as needed, from July 6 to October 9, 1922, plaintiff sold Munson materials for and which were used in the construction of the buildings of the total value of $1,751.71. Munson had buildings under construction for four other persons during the same time that he was carrying out the Adams contract, and purchased materials for all of them from plaintiff. Plaintiff entered all charges for materials in a single general account with Munson, designating therein the particular job for which each item was furnished. Payments made by Munson were credited to his account generally, without applying the same to any particular item or to charges for material furnished for any particular job. Munson deposited the moneys received under all his contracts in one general bank account, and drew thereon in payment of bills incurred on any job, regardless of the source from which the moneys then on deposit were received.

The evidence does not show when or in what amounts the plaintiff furnished materials for buildings other than those of Adams, or whether such materials were furnished prior or subsequent to the time that the greater part of the materials for the Adams buildings were furnished. The evidence shows that Munson was indebted to plaintiff prior to the furnishing of any material for the Adams job, but it does not appear in what amount, or whether such indebtedness was subsequently paid prior to the particular payments hereinafter mentioned. In the latter part of July Munson was indebted to plaintiff in the sum of about $3,000; more than $1,000 of which was for materials used on the Adams job, and plaintiff requested Munson to reduce the amount of such indebtedness. The latter replied that he could probably pay something in a few days. On the 1st day of August Adams paid Munson something over $500 on the contract, and thereafter, on the same day, Munson paid plaintiff on account the sum of $500, without stating the source from which the money was derived. Adams paid Munson an additional sum of $500 on August 23d, and thereafter, on that day, Munson made plaintiff an additional payment of $500 on account. Neither Munson nor the plaintiff applied either payment to the extinction of any particular item or items of the account, and the question to be determined is the proper application of such payments.

Section 1479 of the Civil Code provides that, where neither party makes such application, "the performance must be applied to the extinction of obligations in the following order: * * * (1) Of interest due at the time of the performance. (2) Of principal due at that time. (3) Of the obligation earliest in date of maturity. * * *" This section would afford an easy solution of the question if the evidence showed what items of plaintiff's general account with Munson were "earliest in date of maturity." Since the record is silent in that regard, the issue must be resolved against the party having the burden of proof.

[1] It is the general rule that, where a plaintiff has proved the creation of a debt within the period of the statute of limitations, the burden is on the defendant to prove the payment thereof. Melone v. Ruffino, 129 Cal. 514, 518, 62 Pac. 93, 79 Am. St. Rep. 127. This rule has been held applicable in a suit against an owner to foreclose a lien for materials furnished his contractor. Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 300, 111 Pac. 760. Similar rulings under somewhat different circumstances, have been made in other states. Jones v. Mansfield Lumber & Mercantile Co., 97 Ark. 643, 132 S. W. 1004; Flexner University v. Strassel Gans Paint Co. (Ky.) 112 S. W. 686. A contrary rule is laid down in the state of Oregon. In Bartels v. McCullough, 102 Or. 66, 201 Pac. 733, it is said:

> "Contrary to the rule in other cases, the burden of proof of nonpayment is upon the person asserting the lien, and this is particularly the case where the contract out of which the lien arose was made with some one not the owner of the property upon which it is sought to fasten the lien."

[2, 3] "The burden of proving a particular application of a payment by either the debtor or creditor is on the party claiming that such application was made." 30 Cyc. 1267. "The burden is on the creditor where he claims to have applied a payment to a debt other than the one in suit to prove both debts, and the application of payments thereon." 21 R. C. L. 114. In Davis v. Hall, 70 Neb. 678, 97 N. W. 1023, it was held that while the burden was on defendant to prove payment of the notes there sued on, the burden was on plaintiff to show that an admitted payment was properly applied on a note not in suit. In Gunther v. McCormick, 60 Cal. App. 350, 212 Pac. 715, the plaintiff sued to foreclose a lien for work under three separate contracts. A payment on account had been made prior to the time the notice of lien was filed, but the record on appeal did not show whether the payment had been applied to any particular contract or to all of them. The lien was invalid as to work under two of the contracts, because not filed in time, and valid as to the third. It was held that the burden of proof was on the plaintiff to show what application was made of the payment, and, in the absence of evidence on the question, the appellate court applied the payment to the contract under which the plaintiff had a valid lien.

Where a lien claimant has received payment during the existence of the obligation for which his claim of lien is thereafter filed, without applying it to any particular obligation, in a suit to foreclose his lien in which he claims that such payment was properly applicable to some other obligation, it is logical to place upon him the burden of proving facts warranting such application, especially so where, as here, the evidence of such facts, plaintiff's book account with

Munson, is in the possession and under the control of the plaintiff, and not accessible to the defendant. By simply producing such book account the plaintiff would have enabled the court to apply the admitted payments in accordance with the provisions of section 1479 of the Civil Code. Having failed to produce such evidence, or any evidence upon the question, the plaintiff is not in a position to complain of the application of such payments to the claim in suit.

[4] It is urged that the answer is insufficient to support the finding that Adams was entitled to have the two $500 payments applied to plaintiff's claim. The complaint alleges that the plaintiff furnished Munson materials for the Adams buildings to the value of $1,869.10, and "that the same has not been paid except the sum of $25.20 credited thereon on account of materials returned to plaintiff by said Munson, and the balance of said sum, $1,843.90, together with interest, * * * is past due and unpaid after deducting all just credits and offsets." The answer of D. P. and Lena Adams contains the following:

> "These defendants further allege that they have no information or belief as to the sums that have been paid, if any, upon said alleged account, by said C. R. Munson, and therefore deny that the sum of $1,843.90 or any sum with interest thereon * * * remains unpaid upon said account, or otherwise or at all."

The plaintiff demurred generally and specially to the answer, but the demurrer was not directed specially to the objection here urged. The case was tried upon the theory that the question of nonpayment was in issue, and both parties produced evidence bearing thereon. Appellate courts are forbidden to reverse a judgment "for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. 6, § 4½. An examination of the record in this case shows that plaintiff suffered no possible prejudice from the error complained of.

[5] Appellant contends that the findings are insufficient to support the judgment. The argument made in support of such contention is sufficiently answered in what has been said relative to the application of the two payments made by Munson to the plaintiff. The court found that both of those payments "were made by defendant Munson from payments made by defendant David Preston Adams to defendant Munson on the contract between" them and "were by plaintiff applied upon a general account only of defendant Munson with plaintiff, and that said general account included items upon which said action is based, together with items on account of other jobs, viz.: Jobs for strangers to this suit, and that no direction was ever given plaintiff as to what application any portion of either of last two mentioned payments of five hundred dollars each should be given; and that plaintiff never made any application of any portion of either of last two mentioned payments to any specific items of said general account." The court did not find what items of the general account were earliest in date of maturity. Since there was no evidence bearing upon that question, any finding thereon would necessarily have been against the plaintiff; it having the burden of proof, and therefore it suffered no prejudice from the failure of the court to find upon the question. Hersom v. Hersom, 60 Cal. App. 383, 212 Pac. 717.

The judgment is affirmed.

We concur: PLUMMER, J.; BURROUGHS, Justice pro tem.

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68 Cal. App. 35

H. MOFFATT CO. v. HECKE, Director of Agriculture. (Civ. 4645.)

(District Court of Appeal, First District, Division 1, California. June 30, 1924.)

1. Animals 🔑15—Constitutional law 🔑318—Cattle Protection Act held unconstitutional, in not providing for notice to owner.

Cattle Protection Act 1917, and St. 1919, p. 542, amendatory thereof, providing for inspection for purpose of determining ownership of cattle about to be slaughtered, and that inspector may take such cattle as are found not belonging to shipper and deal with them in accordance with rules of board, is unconstitutional, as denying due process of law, in that no provision is made for notice, actual or constructive, to owner.

2. Constitutional law 🔑278(1)—Statute authorizing seizure of property in possession of one under claim of right must itself provide for notice and hearing; "due process."

One who is in possession of property under claim of right cannot be deprived of its possession without due process of law, and to constitute "due process," statute authorizing deprivation of such possession must itself provide for notice of time and place of hearing, giving to parties right of presenting in deliberate, regular, orderly manner issues of fact and law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. Constitutional law 🔑318—That authorities may provide for notice and hearing not sufficient to uphold statute, otherwise invalid as not providing therefor.

That authorities may provide for notice and hearing is not sufficient to overcome objection to Cattle Protection Act 1917 and St. 1919, p. 542, authorizing inspector to seize cattle in possession of one not able to prove ownership, as unconstitutional, in that no provision is made for notice to owner.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the H. Moffatt Company against G. H. Hecke, as Director of Agriculture of the State of California. Judgment for plaintiff, and defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen. (Edward E. Leighton, of Los Angeles, and George A. Clough, of San Francisco, of counsel), for appellant.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for respondent.

TYLER, P. J. Complaint in equity for permanent injunction. Plaintiff is a corporation engaged in the wholesale butcher business. In the conduct of such business it ships cattle from various points in the state to its slaughterhouse situated in San Francisco. The complaint alleges that its business is interfered with by defendant, the state director of agriculture, who, it is charged, enters upon plaintiff's premises for the purpose of inspecting cattle shipped thereto to be slaughtered. The cause of action is based upon the theory that the defendant is without power either to make such inspection or to charge fees therefor. A perpetual injunction against such acts, together with general relief, is prayed for. To this complaint a general denial was interposed. The case was tried upon an agreed statement of facts, which shows that the dedefendant, under threat of prosecution of plaintiff in case of refusal, did enter upon the plaintiff's premises for the purpose indicated. Defendant sought to justify his right so to do by virtue of the provisions of chapter 678, Statutes 1917, commonly known as the Cattle Protection Act, and chapter 325, Statutes 1919, pp. 542–546, amendatory thereof.

Plaintiff claimed below, and does here, that the statutes upon which the defendant relies for his authority contravene the due process of law clause of the federal Constitution, and are therefore void. Various other constitutional objections are urged. The trial court found in accordance with the agreed statements of facts. It entered judgment as prayed for by which the defendant was enjoined from entering the plaintiff's premises in San Francisco to inspect "such cattle as are shipped to said plaintiff's premises for the slaughtering of them when such cattle belong to the plaintiff and are owned by it from the time they are originally shipped at points in this state outside of the city and county of San Francisco," and also enjoin the defendant "from inspecting any cattle whatsoever shipped by the plaintiff for slaughtering purposes at or from any point in California," where the right to make such inspection is claimed under chapter 678, Statutes 1917 (Cattle Protection Act) or chapter 325, Statutes 1919 (act creating the department of agriculture, and transferring to the said department the duties of the cattle protection board and other governmental bodies or commissions).

[1] The decision of the lower court was based entirely upon the theory that the acts under which the defendant operated are unconstitutional as denying to the plaintiff due process of law. The court quotes the provision of the act of 1917, "If upon such inspection cattle shall be found not belonging to the shipper, all such cattle shall be taken by the inspector and dealt with in accordance with the rules of the board in such cases made," and concludes that, as no provision is made for notice, actual or constructive, to the owner of the action to be had the act is void. We are of the opinion that the trial court was correct in its conclusion. For a full understanding of the situation a review of the statutes in question becomes necessary.

The pertinent provisions of the original act are as follows:

> Section 1: "That there be and is hereby created a cattle protection board. * * * Said board is hereby authorized, and it is made its duty, to exercise a general supervision over and protect the cattle of this state from theft and to make such rules and regulations as may be necessary to carry out the purposes and intent of this act."
>
> Section 5: "Upon the sale or transfer of any range cattle in this state, the actual delivery of such cattle shall be accompanied by a written bill of sale, giving the number, kind and marks and brand of each animal, which bill of sale shall be signed by the party giving the same."
>
> Section 10: "No cattle, except cattle shipped for slaughter and which have been inspected as herein provided prior to shipment, shall be slaughtered until they shall have been first inspected and certified to as being the property of the person slaughtering the same or causing same to be slaughtered: * * * Provided, that any person licensed hereunder to slaughter cattle after 24 hours' notice in writing, addressed to the local inspector demanding his presence at a specified time and place for the purpose of inspecting such cattle for slaughtering, may, without the certificate of inspection of said inspector slaughter said cattle."
>
> Section 12: "It shall be the duty of inspectors to inspect all cattle for marks and brands which are offered for transportation to any common carrier at the loading stations thereof. If upon such inspection cattle shall be found not belonging to the shipper, all such cattle shall be taken by the inspector and dealt with in accordance with the rules of the board in such cases made. Inspectors must inspect all cattle subject to inspection immediately, and when inspected, the one in charge thereof shall pay to the inspector therefor the sum of five cents per head, whereupon the inspector shall certify that such cattle have been inspected."

The second act, that of 1919, contains the following provisions bearing upon this case:

> Section 1: "A department of the government of the state of California to be known as the department of agriculture is hereby created.

The department shall be conducted under the control of an executive officer to be known as the director of agriculture."

Section 5: "The director of agriculture may make investigations. * * * In connection therewith he shall have the right to inspect books and records and to hear complaints, administer oaths, certify to all official acts, and to issue subpœnas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding pertinent or material thereto in any part of the state."

Section 8: "The director of the department of agriculture shall succeed to and is hereby vested with all the duties, powers, purposes, responsibilities and jurisdiction of [naming various bodies, including] the cattle protection board and of the several officers of such bodies. * * * Said bodies, offices and officers whose duties, powers, purposes and responsibilities are so transferred to and vested in the director of the department of agriculture, are and each of them is hereby abolished, and shall have no further legal existence, but the statutes and laws under which they existed and all laws prescribing their duties, powers, purposes and responsibilities and jurisdiction together with all lawful rules and regulations established thereunder, are hereby expressly continued in force. * * *"

[2, 3] From a reading of the statutes in question it is manifest that they were designed for the protection of owners of range cattle from theft. It will be noticed that the original act, referred to as the Cattle Protection Act, provides for inspection for the purpose of determining ownership of cattle about to be slaughterd for the market. It will be further noticed that section 12 of the original act makes no provision for the giving of notice either to the apparent owner or to any other person. The appellant contends that as the law presumes that a public officer will act lawfully a presumption is raised that such rules and regulations as will be made by the defendant will be duly promulgated and will provide a lawful method for the disposition of cattle taken from the possession of a shipper or slaughterer. Whether the board has or has not made rules covering the situation we do not know, for none are before us. However this may be, we do not consider that there is any merit in this contention. One who is in the possession of property under a claim of right cannot be deprived of its possession without due process of law. To constitute due process the statute itself must provide for notice of a time and place of hearing, giving to the parties an opportunity to present in a deliberate, regular and orderly manner issues of fact and law. It is essential to the validity of the statute that it furnish the means whereby one may enforce his constitutional rights. It is no answer that the authorities may provide for a notice and hearing, for the right of a person to have his day in court must rest upon something more substantial than favor or discretion. The essential validity of the law is to be tested not by what has been done under it but by what may by its authority be done. Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 Pac. 56. See, also, Suckow v. Alderson, 182 Cal. 242, 249, 187 Pac. 965; Hewitt v. Board of Medical Directors, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315. The law itself must provide for notice and give a right of hearing. Lacey v. Lemmons, 22 N. M. 54, 159 Pac. 949, L. R. A. 1917A, 1185. The vice of the acts in question is that no notice, either actual or constructive, is required to be given.

An extended discussion of this subject is not necessary, for the Legislature, evidently recognizing the infirmity of the acts, amended the same in 1921 by enacting what is known as the hide and brand law, wherein it is provided that cattle found in the possession of a person unable to produce indicia of ownership are to be dealt with as estrays. Stats. 1921, c. 725. No further interference with plaintiff's business, therefore, will occur in the future under the two acts here considered.

From what we have said it follows that the trial court properly enjoined the defendant from the acts complained of. The judgment is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

(68 Cal. App. 800)

HENRY LEVY CO., Plaintiff and Respondent, v. G. H. HECKE, as Director of Agriculture of the State of California, Defendant and Appellant. (Civ. 4646.)

(District Court of Appeal, First District, Division 1, California. June 30, 1924.)

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen. (Edward E. Leighton, of Los Angeles, and George A. Clough, of San Francisco, of counsel), for appellant.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for respondent.

TYLER, P. J. In this case the plaintiff, a foreign corporation, brought an action to enjoin defendant from inspecting cattle shipped by it from other states into the state of California for slaughtering purposes. It is a companion case to H. Moffatt Co. v. G. H. Hecke (No. 1, Civ. 4645) 228 Pac. 546, in this court, and which was this day decided, and presents the same questions.

Upon the authority of that case the judgment herein is affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

68 Cal. App. 91

SHEARER v. FLANERY, County Auditor.* (Civ. 2810.)

(District Court of Appeal, Third District, California. July 5, 1924.)

1. Statutes 🔑166—Amendatory statute operates as repeal of omitted parts of amended statute not re-enacted.

Under Const. art. 4, § 24, providing, "No law shall be revised or amended by reference to its title; but * * * re-enacted and published at length," amendment of statute or section operates as repeal of those parts of statute or section which are not re-enacted.

2. Counties 🔑74(5)—Salary provision for county surveyor held repealed by omission from amendatory statute.

Pol. Code, § 4277, subd. 12, as amended by St. 1919, p. 114, which fixed salary of county surveyor at $900 yearly, by omitting from its list, showing salaries of county officers in certain counties, that of county surveyor, repealed such salary provision for surveyor, in view of Const. art. 4, § 24.

3. Constitutional law 🔑48—Presumption that Legislature determined that change in compensation did not result in increase invoked to sustain statute fixing compensation.

Contention that St. 1923, p. 1139, amending Pol. Code, § 4270, by fixing compensation of county surveyors in counties of forty-first class at $2,100, increases compensation of incumbents over that previously allowed under Pol. Code, § 4044, providing per diem for such officers, and therefore violates Const. art. 11, § 9, cannot be sustained; section 4044 not showing on its face that compensation of surveyors thereunder does not equal or exceed $2,100, and conclusive presumption in such case being that Governor and Legislature, after investigation, have determined that charge has not resulted in increase.

4. Officers 🔑100(1)—Statute fixing compensation after term begins not violative of constitutional prohibition against increase during term, if previously no compensation fixed.

Const. art. 11, § 9, prohibiting increasing compensation of any officer after his election or during his term of office, does not prevent Legislature from fixing compensation after term begins, if prior thereto no salary or compensation had been fixed at all.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Petition for writ of mandate by William Shearer against H. C. Flanery, Auditor of Sutter County, to compel issuance of warrant for salary. Judgment for defendant, and petitioner appeals. Reversed, with direction.

A. H. Hewitt and Loyd E. Hewitt, both of Yuba City, for appellant.

Arthur Coats, of Yuba City, for respondent.

FINCH, P. J. This proceeding was instituted to compel the defendant, as auditor of Sutter county, to issue a warrant for salary alleged to be due petitioner as county surveyor under the provisions of section 4270 of the Political Code, as amended in 1923. Stats. 1923, p. 1139. Judgment was entered in favor of defendant, and the petitioner has appealed. The facts are undisputed.

Prior to the legislative session of 1921 Sutter county was in the forty-eighth class. Section 4277, subd. 12, as amended in 1919, fixed the compensation of surveyor in counties of the forty-eighth class at $900 per annum. Stats. 1919, p. 114. Acting under the provisions of the County Engineer Act (Stats. 1919, p. 1290), and prior to the legislative session of 1921, the supervisors of Sutter county appointed a county engineer. Section 11 of the act provided that "the office of county surveyor of any county shall be and is hereby abolished" upon the appointment of a county engineer, to take effect not later than the expiration of the then current term. Sections 4005c and 4006 of the Political Code were so amended in 1921 as to place Sutter county in the forty-first class. Stats. 1921, pp. 2 and 3. At the same session section 4270 was amended to read as follows:

> "In counties of the forty-first class the county officers shall receive, as compensation for the services required of them by law or by virtue of their offices, the following compensation and salaries, to wit:" Then follows a list of all county officers, except county surveyor, and their compensation. Stats. 1921, p. 634.

The office of county surveyor was omitted for the probable reason that it was deemed abolished by the appointment of a county engineer. October 7, 1921, the County Engineer Act was held to be unconstitutional. Coulter v. Pool, 187 Cal. 181, 201 Pac. 120. At the general election in 1922, the petitioner was elected to the office of county surveyor for the term commencing in January, 1923. The Legislature of 1923 amended section 4270, by re-enacting and publishing the section at length as amended. Stats. 1923, p. 1139. Subdivision 11 of the amended section fixes the compensation of county surveyor at $2,100 per annum. The amending act contains the following:

> "21. That wherever in this act the salary of a county officer is changed from a fee basis or a fee and salary basis to a flat salary only, it is hereby found that such change does not effect or constitute an increase in the salary of such officer.
>
> "22. The provisions of this act are intended to apply to, and effect incumbents, except in so far as such provisions constitute, an increase in salary of such incumbent."

For many years section 4044 of the Political Code has contained the following provision:

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* Hearing in supreme court denied September 2 1924.

> "In lieu of fees, as now provided by law, the surveyor shall receive such compensation as the board of supervisors may allow, not to exceed ten dollars per day for all work performed for the county."

Respondent contends that the amendatory act of 1923, in so far as it fixes the salary of county surveyor at $2,100 a year during the current term, is in conflict with article 11, section 9, of the Constitution, which provides:

> "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office."

It is argued that prior to such amendment the surveyor's salary was $900 a year, as fixed in 1919 by amendment of section 4277, or "not to exceed ten dollars per day for all work performed for the county," as provided by section 4044. Appellant contends that, prior to the amendment of 1923, he was entitled either to no compensation or to the per diem provided by section 4044, and that in either case the salary fixed by the amended section is not an increase of compensation.

[1, 2] Article 4, section 24, of the Constitution provides:

> "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."

Under the provisions of this section it is clear that the amendment of a statute or section operates as a repeal of those parts of the statute or section which are not reenacted. "The revising or amending act is intended as a substitute for the original statute or section, continuing in force that which re-enacted and repealing what is omitted." Pierce v. Solano County, 62 Cal. App. 465, 469, 217 Pac. 545, 546. Petitioner was at no time entitled to the salary of $900 a year provided by section 4277 as amended in 1919, because that provision was omitted from the amendatory act of 1921 and was thereby repealed.

[3] Appellant suggests that the foregoing provision of section 4044 is invalid as an unlawful delegation of legislative power to boards of supervisors to fix the compensation of a county officer, contrary to the constitutional provision that the Legislature "shall regulate the compensation of all such officers." Const. art. 11, § 5. It is not necessary to decide the question thus presented, because, as further suggested by appellant, assuming section 4044 to be valid and applicable to the facts of this case, it does not show on its face that the surveyor's annual compensation thereunder, in counties of the forty-first class, does not equal or exceed $2,100, the sum fixed by the amendment of 1923. Under such circumstances "the conclusive presumption is that the governor and the Legislature have investigated, ascertained, and determined that the change does not result in an increase of compensation." Galeener v. Honeycutt, 173 Cal. 100, 104, 159 Pac. 595, 597.

[4] If it be assumed that section 4044 is invalid, and that, prior to the amendment of 1923, the petitioner was entitled to no compensation, the same result will follow. "It is a common provision in the Constitutions and statutes of states, that the salary or compensation of a public officer shall not be increased or diminished during his term. * * * Where, however, the salary or compensation has not been fixed at all at the time of the election or appointment, this provision does not prevent its being fixed after the term begins." Mechem on Public Officers, § 858; Gwynn v. McKinley, 30 Cal. App. 381, 158 Pac. 1059; Harper v. Board of Comrs., 54 Okl. 545, 149 Pac. 1102, 154 Pac. 529; Board of Supervisors v. Stephens, 20 Ariz. 115, 177 Pac. 261; State v. Harper, 33 Okl. 572, 123 Pac. 1038; James v. Duffy, 140 Ky. 604, 131 S. W. 489, 140 Am. St. Rep. 404; Stone v. Pryor, 103 Ky. 645, 45 S. W. 1053, 1136; Purcell v. Parks, 82 Ill. 346; State v. McDowell, 19 Neb. 442, 27 N. W. 433; Rucker v. Supervisors, 7 W. Va. 661.

The judgment is reversed, and the trial court is directed to enter judgment in favor of petitioner as prayed for in the petition.

I concur: PLUMMER, J.

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67 Cal. App. 762

WILEY v. COLE. (Civ. 4017.)

(District Court of Appeal, Second District, Division 1, California. June 23, 1924.)

1. Trial ⟹253(8)—In automobile collision case, instruction on question of speed held erroneous as ignoring essential elements.

In automobile collision case, instruction, based on St. 1919, p. 220, § 22, limiting speed at street intersections in business districts, or where driver's view is obstructed, to 15 miles per hour, to effect that if plaintiff exceeded such limit he was guilty of negligence as matter of law, *held* faulty in not taking into consideration whether or not intersection was within business district, or whether driver's view was obstructed.

2. Municipal corporations ⟹706(8)—In automobile collision case, instruction on speed held erroneous as inapplicable to facts.

In automobile collision case, instruction, based on statute limiting speed at street intersections, to effect that if plaintiff exceeded limit prescribed he was negligent as matter of law, *held* prejudicially erroneous, where accident occurred outside of intersection.

3. Municipal corporations 🔑705(10)—Negligence of plaintiff contributing to collision of automobiles bars recovery.

Any negligence on part of plaintiff, which contributed directly or proximately to automobile collision, would bar his recovery for injuries inflicted thereby.

4. Trial 🔑253(3) — In automobile collision case, instruction held erroneous as ignoring question whether exceeding speed limit by plaintiff proximately contributed to accident.

In automobile collision case, in which it was admitted that defendant was negligent in driving on wrong side of road, instruction that if plaintiff was exceeding speed limit verdict should be for her, unless jury should find that she could have avoided accident after actual discovery of peril of plaintiff, *held* erroneous as not being further predicated on assumed excessive rate of speed being a proximate cause of accident.

5. Municipal corporations 🔑706(7)—Whether unlawful speed of plaintiff's automobile proximately contributed to collision for jury.

In automobile collision case, in which it was admitted that defendant was negligent in driving on wrong side of road, question of whether alleged exceeding of speed limit by plaintiff proximately contributed to accident was for jury.

6. Municipal corporations 🔑706(8)—In automobile collision case plaintiff held entitled to instruction as to care required in emergency.

In automobile collision case, refusal to instruct that plaintiff was not guilty of contributory negligence, merely because in time of imminent danger he did not take every precaution which, from careful review of circumstances, it afterwards appeared he might have taken to avoid accident, *held* error.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by H. C. Wiley against Pauline Cole. From judgment for defendant, plaintiff appeals. Reversed.

See, also, 52 Cal. App. 617, 199 Pac. 550.

David R. Faries, John R. Berryman, Jr., and J. Allen Davis, all of Los Angeles, for appellant.

Arthur E. Koepsel, of Santa Ana, for respondent.

HOUSER, J. From the record in this case it appears that a collision between two automobiles occurred at about 9 o'clock at night near the intersection of two streets, by reason of which plaintiff sustained damages to his automobile, and thereafter brought an action against defendant therefor, which resulted in a judgment on a verdict being rendered in defendant's favor, and from which judgment plaintiff has appealed to this court. Defendant was traveling in a southerly direction and plaintiff was traveling in a northerly direction. Defendant had been driving her automobile on the westerly or right side of the street, but as she approached a certain intersecting street, into which she intended to turn in an easterly direction, she left the westerly side of the street on which she had been driving and thereafter drove her automobile on the easterly side thereof to a point estimated as being at least 15 feet from the northerly line of the intersecting street, where the collision occurred. Plaintiff was driving his automobile at all times in question on the right or easterly side of the street, and was traveling at a rate of speed, as he crossed the intersection, of from 20 to 25 miles per hour.

[1-3] Many different forms of prejudicial error are urged by appellant, but, for the purpose of deciding this appeal, but one series of such alleged errors, consisting of certain instructions requested by plaintiff and refused by the court, or in the giving of certain other instructions requested by defendant and given by the court, need receive attention herein. One of such instructions given to the jury at the request of defendant was as follows:

"You are instructed that, under the Motor Vehicle Act, plaintiff was not permitted to drive his car at an intersection of a highway at a greater rate of speed than 15 miles per hour, and if you find from the testimony that the plaintiff was driving his car past the intersection of said highway at a greater rate of speed than 15 miles per hour, and you shall find that said intersection was a highway as heretofore defined in these instructions, then I instruct you that the plaintiff was guilty of negligence as a matter of law, and if such negligence directly or proximately contributed to the happening of the accident in any degree, however slight, then I instruct you that your verdict shall be for the defendant, notwithstanding the fact that the defendant may have been guilty of negligence."

The accident occurred on the 10th day of August, 1919, and the statute then in force (section 22[a], Stats. 1919, p. 220) provided in effect that where the intersecting highway was in a business district of an incorporated city, or where the driver's view of the roadway was obstructed, the rate of speed of an automobile in crossing an intersection of streets should not be greater than 15 miles per hour. Even assuming that, instead of the accident having occurred at a point at least 15 feet beyond the street line of the intersection, it had actually occurred within the lines of the street intersection, the instruction, standing by itself, is faulty, in that it fails to take into consideration whether or not the intersection was within a business district, or whether or not the driver's view was obstructed. There was no evidence as to what constituted either a "business district" or an "obstruction," within the meaning of the statute; nor was any instruction given by the court to the jury from which the meaning of either of such terms could be determined. The jury, however, was elsewhere instructed that it was unlawful to operate an automobile across a street intersection at a greater rate of speed than 15 miles per hour, where the "driver's view of the road is obstructed." With the foregoing conditions noted therein, the latter part of the criticized instruction, which tells the jury that plaintiff was guilty of negligence if he was driving his car at a greater rate of speed than 15 miles per hour, would perhaps be good law, if the accident had occurred within the intersection. But, in view of the fact that the accident unquestionably occurred at a point outside the intersection, the instruction was misleading and prejudicially erroneous. Any negligence on the part of plaintiff which contributed directly or proximately to the happening of the accident would bar his recovery, but the instruction, in effect, that if at some time before the accident occurred plaintiff was driving his automobile across a street intersection at a greater rate of speed than 15 miles per hour would constitute negligence (even taking into consideration the necessary qualifying provisions of the statute, together with the definitions thereof to which reference has been made), was a statement of the law which was inapplicable to the question of plaintiff's negligence at the time the collision occurred between the two automobiles, but which undoubtedly had a prejudicial effect upon the jury, as indicated by its verdict in the case.

[4] Appellant further complains of an instruction given to the jury at defendant's request, which, after instructing the jury in substance that in operating her automobile defendant had a right to act upon the belief that all other persons using the highway would exercise ordinary care in the operation of vehicles thereon, and that such persons would not violate any laws with reference to the operation of such vehicles, instructed the jury that:

> "Therefore I instruct you that the defendant in this case had the right to assume that the plaintiff, as well as all other persons using the highway were exercising ordinary care in driving their vehicles in accordance with law, and were not violating any of the speed limits, and if you shall find that the plaintiff was driving at an excessive rate of speed, still the defendant had the right to drive her car until in the exercise of ordinary care she had known that the plaintiff was in a position of danger, and, unless you shall find that the defendant could have avoided the accident after the actual discovery of the peril of the plaintiff, then your verdict will be for the defendant."

Taking into consideration the admitted fact that at the time the accident occurred defendant was violating the terms of the statute, in that she was operating her automobile on the easterly side of the road, by this instruction the jury was erroneously instructed that, although defendant was herself guilty of negligence in driving her automobile on the "wrong side of the road," she was to be wholly excused therefrom and a verdict should be rendered in her favor, unless, in the exercise of ordinary care, she knew that plaintiff was in danger, and after such discovery of plaintiff's danger "defendant could have avoided the accident." In other words, after defendant by her negligent acts had placed plaintiff in a dangerous situation and from which the accident resulted, if, thereafter, with knowledge of plaintiff's peril, defendant could not have avoided the accident, she was to be held blameless, without reference to whether or not the assumed "excessive rate of speed" that plaintiff was driving was a contributing proximate cause of the accident. The instruction appears further to prejudice plaintiff's rights, in that plaintiff's "excessive rate of speed" was thereby determined by the court as being at least a proximate cause of the accident.

[5] That, however, assuming that there was any evidence justifying the inference that *at the point of the accident* plaintiff was driving at a rate of speed which was in violation of the provisions of the statute, was a question which, under appropriate instructions from the court, was solely for the jury to determine; that is to say, whether or not the speed at which plaintiff's automobile was being driven was the cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the accident, and without which excessive and unlawful speed the accident would not have occurred. If the speed of plaintiff's automobile was not a cause which contributed directly or proximately to the happening of the accident—in other words, if the accident would have happened whether plaintiff was driving at the rate of 25 miles per hour, or at 5 miles per hour, or at any other speed, and if plaintiff was guilty of no other direct, contributing cause to the accident, no reason would be apparent why defendant should not be held responsible for the negligent act or acts which were the proximate cause or causes of the collision between the two automobiles.

[6] The court also incorrectly refused to instruct the jury, at plaintiff's request, in effect that a plaintiff in an action of the character before the court could not be lawfully charged with contributory negligence, merely because in time of imminent danger he did not take every precaution which, from a careful review of the circumstances, it afterward appeared that he might have taken to avoid the accident. Karr v. Parks, 40 Cal. 188. The question of what plaintiff should have done in the circumstances here presented was exclusively within the province of the jury, and it should

have been permitted to determine whether or not, all the evidence considered, plaintiff was guilty of contributory negligence. Shupe v. Rodolf, 185 Cal. 371, 197 Pac. 57; Jensen v. Fish, 54 Cal. App. 304, 201 Pac. 954.

Others alleged errors need not be considered. It sufficiently appears, as hereinbefore indicated, that plaintiff's rights were prejudicially affected, by reason of certain instructions which, at defendant's request, were given by the court to the jury, as well as by at least one of plaintiff's requested instructions which the court refused to give to the jury; for which reasons plaintiff is entitled to a new trial.

It is ordered that the judgment be and the same is reversed.

We concur: CONREY, P. J.; CURTIS, J.

(68 Cal. App. 72)

FINCH v. FINCH et al. (Civ. 4357.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1924. Rehearing Denied July 24, 1924.)

1. Corporations 🔑619—Allegation of nonpayment against trustee of defunct corporation held sufficient.

Complaint in an action against defendant, as trustee of a defunct corporation and individually, to recover payment by plaintiff on a judgment against corporation, alleging "that nothing has been paid on account of liability of said corporation or of its trustees or stockholders," *held* sufficient.

2. Appeal and error 🔑1152—Error in authorizing judgment against defunct corporation to be paid out of a particular fund, held not to require a reversal.

In an action against defendant, as trustee of a defunct corporation, and individually, to recover amount paid by plaintiff on judgment against corporation, erroneous direction that judgment be paid out of a specific fund, and that lien thereof attach to particular property, did not require a reversal, since it might be corrected by modification.

3. Judgment 🔑754—Kind or extent of lien created by judgment cannot be prescribed by court pronouncing it.

A judgment ordinarily attaches to the real property generally of judgment debtor, and kind or extent of lien created thereby cannot be prescribed or regulated by court pronouncing it.

4. Limitation of actions 🔑58(4)—Limitations do not run against stockholder's liability to surety until payment by it.

Limitations do not run against stockholder's liability to surety on corporation's undertaking on appeal until surety's payment of the judgment recovered against the corporation.

5. Corporations 🔑264—Limitation of actions 🔑34(5) — Action to enforce stockholder's liability must be commenced within three years after liability created.

Under Code Civ. Proc. § 338, subd. 1, and section 359, an action to enforce a stockholder's liability on a corporate indebtedness must be commenced within three years after liability is created.

6. Corporations 🔑619—Trustee's attempted cancellation of his own stock in defunct corporation held void.

Where director of corporation became trustee thereof, with power to settle its affairs on forfeiture of its charter, under St. 1915, p. 422, his attempted cancellation of his own stock, after judgment against corporation had become final, was in nature of a fraud, and void; no powers being granted to trustee, which would result in a benefit to him personally and to disadvantage of beneficiaries of the trust.

7. Corporations 🔑617(1)—Corporation's and stockholders' liability to surety for judgment paid by it not affected because corporate charter forfeited prior to payment.

That corporation's charter had been forfeited for failure to pay its state license tax, prior to time that surety on an undertaking for corporation had paid a judgment against it, did not affect liability of corporation or stockholders, under Civ. Code, § 322.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Mary L. Finch, executrix of Allen Finch, deceased, against B. A. Finch, trustee of the property and assets of the United Trade School Contracting Company, a defunct corporation, and individually, and others. Judgment for plaintiff, and the named defendant, as trustee and individually, appeals. Modified and affirmed.

Dockweiler & Dockweiler & Finch, of Los Angeles, for appellant.

Wm. Hazlett, Ray Howard, and Chas. M. Easton, all of Los Angeles, for respondent.

HOUSER, J. This is an appeal by the defendant B. A. Finch, as trustee of the United Trade School Contracting Company (hereinafter referred to as the corporation), from a judgment rendered against him as such trustee for the sum of $8,224.94, and it is also an appeal by defendant B. A. Finch, individually, from a judgment rendered in the same action against him for the sum of $2,756.66.

On July 7, 1913, a judgment was rendered in the superior court of Los Angeles county against the corporation, from which judgment the corporation appealed to the Supreme Court. The undertaking on appeal to stay execution on the judgment was executed on September 5, 1913, by plaintiff in her individual capacity, and by Allen Finch—the latter of whom died before the determination of the appeal, and which appeal resulted in an affirmance of the judgment. Prior thereto the plaintiff here qualified as executrix of the will of Allen Finch, deceased. After the judgment had been affirmed, an action was brought against Mary L. Finch, as such executrix, on the said undertaking, and judgment was recovered therein against said Mary L. Finch, in such capacity, which judgment, in pursuance of an order of the court, was compromised and paid on July 12, 1918. On March 4, 1916, for failure to pay its corporation license tax, the corporation forfeited its charter to the state of California. The action here involved was brought by said executrix against B. A. Finch, as the remaining trustee of the defunct corporation, to recover a judgment for the amount paid on the undertaking, and against said B. A. Finch, individually, as a stockholder of the corporation for his proportion as such stockholder, of the amount so paid by the plaintiff on account of such undertaking.

[1] Appellant urges that because the complaint contains no specific allegation that nothing has been paid on account of the liability upon which the action was brought, no cause of action is stated in the complaint, and hence that the judgment should be reversed. The criticism by appellant probably arose from a typographical error in his copy of the complaint containing an allegation "that nothing has been paid on account of the liability of said corporation or by its trustees or stockholders," etc.; whereas, according to the clerk's transcript of the record herein, it appears that the allegation of the complaint was "that nothing has been paid on account of the liability of said corporation or of its trustees or stockholders, either in proportion to their respective holdings or otherwise." We think that, under the authorities cited by counsel, the allegation was sufficient.

The next point presented by appellant, as a reason for a reversal of the judgment, depends upon the particular wording of the judgment itself, which, in part, provides that:

> "This judgment of $8,224.94 is payable only from the assets and property of the United Trade School Contracting Company, a defunct corporation, which forfeited its charter to the state of California on the 4th day of March, 1916, *in which it then had any interest, or from the proceeds of such property or assets.*"

It is contended that the italicized portion of the judgment is erroneous and should be stricken therefrom, for the reason that it is an attempt to make all the property and assets, or the proceeds of said property and assets, which the corporation owned on March 4, 1916, when the forfeiture of its charter occurred subject to the lien of the judgment herein which was rendered on May 1, 1922, and which was more than six years after the charter of the corporation was forfeited.

[2, 3] From the record of the proceedings, which took place among the respective counsel and the court, it appears that, at the request of counsel for defendant, the judgment was made payable only from the assets and property, if any, of the corporation defendant. But nowhere does it appear that defendant was responsible for that part of the judgment which directs that it be paid from such property as on March 4, 1916, the corporation "then had any interest, or from the proceeds of such property or assets." There was nothing in the nature of the action by which the court was authorized to direct that the judgment be paid out of a specified fund, or that the lien thereof attach to particular property. A judgment ordinarily attaches to the real property generally of the judgment debtor, and the kind or the extent of the lien created by the judgment cannot be prescribed or regulated by the court pronouncing the judgment. 23 Cyc. 1350, and cases cited; Freeman on Judgments, § 342. The judgment, however, in that regard, may be corrected under an order of modification, rather than by an order of reversal of the entire judgment.

[4, 5] It is further contended by appellant that the cause of action as against B. A. Finch individually was barred by the provisions of section 359, and by subdivision 1 of section 338, of the Code of Civil Procedure. The undertaking was signed on September 5, 1913, and the judgment for the payment of which the undertaking was given was paid on July 12, 1918, by plaintiff herein as executrix of the will of Allen Finch, deceased. It is settled by a long line of authorities in this state, and particularly by the case of Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87, that an action to enforce a stockholder's liability on a corporate indebtedness must be commenced within three years after the liability is created. The principal question involved in the instant case is the date at which the defendant B. A. Finch, as a stockholder of the corporation, became liable on account of the undertaking which was signed on the 5th day of September, 1913, and paid on the 12th day of July, 1918. If the liability was created at the date when the undertaking was signed, defendant B. A. Finch as a stockholder is not liable; but if the liability was incurred as of the date of the payment of the amount of the judgment, it is conceded that the statute has no application. The attention of this court has not been directed to any case which deals with a situation like the one presented by the facts herein. There are several California cases in which the question of the liability of stockholders is treated, but in none of them is there found a statement of the law which refers to such liability, where an undertaking on appeal

has been the basis on which the determination of the question depended. In the case of Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939, certain merchandise was contracted to be purchased by the corporation at a certain time, and which merchandise was not delivered, to the corporation until several months after it had been purchased. On the failure of the corporation to pay the purchase price, an action was brought to enforce the stockholders' liability as to certain stockholders who became such after the merchandise was purchased, but before it was delivered. It was held that such stockholders were not liable. In the course of the opinion, having to do particularly with the question of the date when a stockholder's liability attaches, the court said:

> "* * * It is apparent that, under the provisions of the Constitution and section, a 'liability' is created when a contract binding on it is made by a corporation and independent of any question as to whether that 'liability' is absolute or contingent, or as to when the right to enforce it may accrue, and therefore that those who are stockholders when the 'liability' is created or incurred are alone liable in any actions arising from its breach."

To the same effect, see Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87.

While such language is very strong, the force thereof is somewhat lessened, because in neither of the cases to which reference has been made were the facts strikingly analogous to those here presented. No question of suretyship was therein involved. In each of those cases the obligation of the corporation to pay a fixed or determinable amount was agreed upon at the outset. Here, whether or not the surety would ever be called upon to pay on account of the undertaking, depended, first, upon the outcome of the appeal from the judgment; and, secondly, assuming that the judgment against the corporation should be affirmed by the Supreme Court, and the judgment against the corporation should become final, upon the question of whether or not the corporation itself would pay the judgment. The effect of the undertaking was that, in the event a liability on account of the judgment were eventually established against the corporation, the surety promised to pay the same. The surety did not agree to pay the judgment as of the date when the undertaking was signed, but agreed to be bound only upon the happening of a certain event. He incurred no liability on account of the undertaking unless the judgment were affirmed. No cause of action arose in favor of the judgment creditor and against such surety until after the judgment was affirmed, and since the surety incurred no present liability on account of the undertaking no present cause of action existed in his favor on account of such undertaking, either as against the corporation or as against any of its stockholders. He had parted with nothing of value, and his right to maintain an action against either the corporation of its stockholders became fixed only after he had paid the amount which he had agreed to pay on the affirmance of the judgment. Up to the time the payment be actually made by the surety, his position is that of a mere promisor. He promises that he will pay; but a promise on his part cannot be accepted as a consummated fact. If by reason of his insolvency or other inability to pay the amount of the judgment, he fail to pay the same, no liability to him is ever incurred. In the leading case of Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094, and in which the facts nearest approach the facts here presented, it is held that one, who signed a corporation promissory note as an accommodation indorser thereon, and who, on the default of payment thereof by the corporation, was compelled to pay the same, was entitled to recover from those persons who were stockholders, not when the note was signed, but from those who were stockholders when the note was paid—in other words, that no debt or liability was incurred by the corporation to the surety, or accommodation indorser of the note, until after he had actually paid the same.

From analogy it may therefore be announced as a rule of law that on an undertaking of the character here involved, as between the surety and the stockholders of the corporation, the statute of limitations does not commence to run until the surety has met the obligation imposed upon him by the undertaking.

[6] At the time the charter of the corporation was forfeited, defendant B. A. Finch was the only director thereof; and under the terms of the statute then governing the forfeiture of charters of corporations, because of failure to pay state license taxes (Stats. 1915, p. 422), he became a trustee of the corporation and the stockholders thereof, with power to settle the affairs of the corporation. After the judgment against the corporation had become final, and before plaintiff herein had paid on account of the undertaking the amount of the judgment theretofore rendered against the corporation, defendant B. A. Finch, as an individual stockholder, surrendered his stock in the corporation to himself, acting as trustee of the corporation, for the purpose of having such stock canceled. Acting thereon, B. A. Finch, as trustee for the corporation and its stockholders, accepted the said stock from himself individually and went through the form of its cancellation. The findings of the court show that, at the time the said stock was thus attempted to be canceled, certain other stock in the corporation was owned by certain other stockholders. B. A. Finch was a trustee not only for the corporation as a legal entity, but was also a trustee for all

the stockholders. The effect of a valid cancellation of the stock of any one stockholder would necessarily increase the liability of the remaining stockholders for any debts of the corporation. To permit B. A. Finch as a trustee for all the stockholders to cancel his own stock, and thereby to relieve himself from liability for debts of the corporation, would be to recognize the right of a trustee to benefit himself by virtue of such a transaction, to the injury of others to whom he stood in a fiduciary relationship. Notwithstanding the broad powers possessed by trustees of a defunct corporation, rendered such because of the forfeiture of its charter to the state, "to settle the affairs of the corporation," it cannot be presumed that such powers are granted as will result in a benefit to the trustees personally, and at the same time work to the disadvantage of the beneficiaries of the trust. It follows that the attempted cancellation of the stock of B. A. Finch was in the nature of a fraud and as such was a nullity.

[7] It is finally contended by appellant that, because the corporation had failed to pay its state license tax, and as a result thereof that its charter had been forfeited to the state prior to the time that the surety on the undertaking paid the judgment which had been affirmed by the Supreme Court against the corporation, the corporation ceased to exist, and consequently that there were no stockholders thereof against whom any statutory liability could attach. Section 322 of the Civil Code provides in effect that those persons only are liable as stockholders of a corporation, who were stockholders at the time the debt or liability of the corporation was incurred. The case of Van Landingham v. United Tuna Packers, 189 Cal. 353, 208 Pac. 973, is authority for the rule that, where the charter of a corporation has been forfeited to the state because of failure on the part of the corporation to pay its state license tax, such corporation, during the period of its suspended powers, has no authority to continue to function as a de facto corporation, so as to give validity to any contract which might be attempted to be entered into between the corporation and any other person; and there are other California cases which in effect announce a similar principle. Those cases, however, all deal either with a new obligation on the part of the corporation, contracted by it during the period of the suspension of its corporate existence, or with questions related to matters of procedure. Nowhere in any of such cases is there discussed the legal effect of an original obligation existing against the corporation before the forfeiture of its charter, which obligation has been assumed and discharged by a co-obligor under and by virtue of legal procedure, with the resultant right in such obligor to relief, as against the corporation after its corporate franchise had been forfeited, and during a time when such corporate franchise was in a state of suspension, dependent upon action by such corporation, in the way of redeeming its charter by means of payment of the delinquent license tax.

The statute which provides for the forfeiture of the charter of a corporation also provides the procedure by which such a corporation may be restored to its original powers. During "forfeiture," or the time that the corporation is denied the right to exercise corporate functions, its existence is merely in a state of suspension. Immediately upon compliance by its representatives with the simple requirements of the statute, it fully regains its original "corporate status," with the same powers and functions which it possessed prior to the temporary loss of its corporate franchise. The statute contains no express declaration, nor do we perceive any indication of legislative intent, to the effect that any change in the personnel of either the officers or the stockholders arises by virtue of the fact that, for a time, the corporate powers of the corporation are suspended. Upon restoration to corporate existence, each of the officers who were in office and the respective stockholders who owned the stock of the corporation, prior to the forfeiture of the charter of the corporation, resumes each his original status with all the rights appertaining thereto, including, as to the stockholders, the right on dissolution of the corporation to a proportionate division of the assets thereof. It follows that, during the time that "forfeiture" of the corporate franchise obtains, both the corporation and its stockholders are in a state of legal existence, with the corporate power to voluntarily act as a legal entity removed; but the sovereign power which may exercise the right of suspension of such corporate powers with reference to voluntary contractual ability on the part of the corporation, may also retain in behalf of the corporation certain duties and burdens, including the involuntary, yet legal, assumption by the corporation of those liabilities which, by virtue of other regulatory provisions of the law, would ordinarily be cast upon the corporation. In the instant case, a just debt in the form of a judgment subsisted against the the corporation prior to the loss by it of its corporate charter. That debt was paid by the plaintiff herein for the benefit of the corporation and its stockholders, and thereupon an implied obligation, not of the choosing of the corporation, but cast upon it by operation of law, came into existence on the part of the corporation and its stockholders to reimburse the plaintiff.

The purpose of the Legislature, in decreeing a penalty of temporary loss of corporate powers for the failure of the corporation to pay its state license tax, could not reasonably be held to include such an advantage as that of freeing either the corporation or its stockholders from the payment of such just debts as had accrued against the corporation prior to the forfeiture of its charter. Such a construction of the statute, with such a disastrous result, could not have been within the contemplation of either the Legislature as a whole or of any honest legislator. It follows that the judgment herein should be affirmed, other than that said judgment should be modified by striking therefrom the provision hereinbefore italicized and being the words "in which it then had any interest, or from the proceeds of such property or assets." It is so ordered; respondent to recover costs on appeal.

We concur: CONREY, P. J.; CURTIS, J.

194 Cal. 352

HARLAN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10997.)

(Supreme Court of California. Aug. 25, 1924.)

1. Master and servant 🔑375(2)—Injury received while transported to place of work held compensable as "arising out of and in course of employment."

Where an employee, while being transported by automobile from one of his employer's farms to another, to perform certain duties, was struck by locomotive and killed, his injuries arose out of and were in the course of his employment, within Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant 🔑388—Dependent of member of family of employee, entitled to compensation regardless of relationship.

Under the Workmen's Compensation Act, § 14c, a dependent of deceased employee, who is a member in good faith of his family or household, is entitled to compensation regardless of relationship by consanguinity or according to the rules of affinity or lack of such relationship.

3. Master and servant 🔑388—On showing dependency, relationship is sufficient to secure compensation.

Under the Workmen's Compensation Act, § 14c, providing for compensation to certain dependents of a deceased employee, good faith as to family or household membership is not necessary to the right of recovery of compensation under the relationship or kindred clause, such right existing by force of relationship alone, if dependency is shown.

4. Master and servant 🔑388—Aunt of deceased employee held dependent member of his family within Compensation Act.

Where deceased had been in effect adopted by his maternal aunt and was domiciled at her residence, and she was in part dependent upon him, the aunt *held* in good faith a dependent member of his household within the meaning of the Workmen's Compensation Act, § 14c.

5. Master and servant 🔑388—Minor held not member of employer's family.

That an employer of a minor, who intended to return to the residence of his aunt with whom he lived, expected to employ him as long as he gave satisfaction, did not make him a member of the employer's household so as to defeat the claim of his aunt for compensation for his death as a dependent member in good faith of his household, under Workmen's Compensation Act, § 14c.

6. Domicile 🔑4(2) — Domicile of minor not changed by absence for temporary employment.

Under Pol. Code, § 52, subds. 1 and 7, where a minor left his residence with his maternal aunt for purpose of accepting employment and intended to return, his residence or domicile was not changed.

7. Master and servant 🔑388—Emancipation held to make compensation claimant member of minor employee's family.

Under Civ. Code, § 211, where mother abandoned her child which was reared by his maternal aunt, mother's disclaimer in proceedings by the aunt for compensation for the death of the minor, *held*, in effect, an acknowledgment of emancipation, so that his residence established with his aunt made her a member of his household in good faith, as required by Workmen's Compensation Act, § 14c.

8. Domicile 🔑5—Parent not entitled to custody of child has no right to control residence.

Parent not entitled to the custody of a child has no right to the control over his residence given by Civ. Code, § 213.

9. Master and servant 🔑388—Deceased need not be head of household "of" dependent.

Under Workmen's Compensation Act, § 14c, it is not necessary that deceased employee be head or master of the household of which dependent is member, the words "of such employee" being words of identification and relation rather than words of proprietorship or possession, and the preposition "of" meaning associated with or connected with, usually in some causal relation, efficient, material, formal, or final.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Of.]

10. Statutes 🔑184—Language must be construed to effect its evident object and purpose.

The language of an act must be construed to effect its evident object and purpose.

11. Master and servant 🔑348—Compensation Act liberally construed.

Under Workmen's Compensation Act, § 69, it must be liberally construed to effect its purposes, as expressed in section 1.

12. Master and servant 🔑388 — Beneficiary within Compensation Act.

All that is necessary to render one a beneficiary of the Workmen's Compensation Act is a bona fide family or household, and the existence of dependency of a member thereof.

13. Master and servant 🔑416—Finding in language of Compensation Act sufficient.

A finding of the Industrial Accident Commission in the literal language of the Workmen's Compensation Act, as to family or household membership, is sufficient to support an award to a dependent.

14. Master and servant 🔑417(1) — Insurer need not apply for a second rehearing before applying for writ of review.

Under the Workmen's Compensation Act, § 67a, giving any party affected 30 days after application for a rehearing is denied or if granted, 30 days after rendition of a decision on rehearing, to apply for a writ of review, liability insurer need not apply for second rehearing before applying for a writ of review.

In Bank.

Proceedings under the Workmen's Compensation Insurance and Safety Act by Violet R. Flint for the death of her nephew, opposed by T. W. Harlan, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurer. The employer and the insurer apply for certiorari to review and annul an order of the Industrial Accident Commission awarding compensation. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

Frank J. Creede and John J. Taheny, both of San Francisco, for amicus curiæ State Compensation Insurance Fund.

SEAWELL, J. Application for a writ to review and annul an award made by the Industrial Accident Commission.

The employee in this case was an illegitimate male child. The writ raises the question whether the applicant, widow and sister of the full blood of the mother of said illegitimate minor child, and therefore a maternal aunt, and who received him at birth into her family and treated him in all respects as her child and a member of her family, and which child had, from the time he was physically able to do so, contributed to the support of said aunt and her minor children and was so contributing at the time he was accidentally killed in the performance of services which were in the course of and arose out of his employment, is entitled to compensation within the intent and meaning of the dependency provisions of section 14(c) of the "Workmen's Compensation, Insurance and Safety Act" of this state (St. 1917, p. 831) which read as follows:

> "No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee, or unless such person bears to such employee the relation of husband or wife, child, posthumous child, adopted child or stepchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece."

The commission, upon a rehearing, specifically found that said illegitimate minor had since infancy lived in the home of the applicant, and his absence therefrom at the time he was killed was temporary merely: further, that applicant was in good faith a member of the family or household of said illegitimate minor at the time of his death; that applicant was his aunt on his maternal side, and is entitled to all the rights and benefits of an aunt under the compensation act that could be conferred upon legitimacy; that section 1388, Civil Code of California, substantially legitimatizes illegitimate children as far as relatives on the maternal side are concerned, and thereby furnishes an exception to the common-law rule that such children are nullius filius; that said illegitimate child left surviving him said applicant, and she was a member of the family or household of said employee, and was partially dependent upon him for support.

Such findings only as are necessary to sustain the commission's award will be noticed.

[1] Said minor was at the time of his death an employee of T. W. Harlan, the owner of two large farms situate near Willows, Colusa county, but separated by some

distance. Said minor, in company with four other employees, was being transported by automobile from one of said farms or ranches to the other to perform certain duties. In crossing the railroad track of the Southern Pacific Company, the automobile containing said employees was struck by a locomotive, causing the death of four of said employees, including said minor, and wounding the fifth. That the injuries inflicted upon said employees, and which resulted in death, arose out of and were in the course of their employment within the meaning of the compensation act, we have no doubt. That question was decided by this court's refusal to grant a writ of review, wherein the circumstances of this accident were fully related and finally determined in a proceeding instituted by the widow of one of said employees in the case entitled "T. W. Harlan et al. v. Industrial Accident Commission et al.," S. F. No. 10927. We are not disposed to again review those findings.

It cannot successfully be disputed, and we do not understand that it is disputed, that applicant was partially dependent upon said minor for her support. A determination of that issue in applicant's favor leaves but two questions remaining for solution, to wit, "Has applicant shown herself to be included within the enumeration of persons who are entitled to claim as legal dependents as specified in section 14(c) of the Compensation Act?" second, "Has petitioner insurance company lost its right to apply for a writ of review for the reason that it did not apply to respondent Industrial Accident Commission for a rehearing of the decision rendered after a rehearing once granted?" In other words, was petitioner required to petition for a second rehearing before it was entitled to apply for the writ herein prayed for?

[2, 3] Returning to a consideration of the first proposition, it is quite clear that section 14(c) provides that if either of the two conditions or relationships described therein exist the dependent person is entitled to the benefits conferred by the statute. The first requirement is satisfied by establishing that the dependent was a member in good faith of the family or household of the employee. In such a case no question of relationship by consanguinity or according to the rules of affinity is involved. If it be determined that the applicant was in good faith a member of the family or household of said employee, then it becomes immaterial what the degree of relationship was, if any, that existed between applicant and said employee. On the other hand, good faith as to family or household membership is not a necessary prerequisite to the right of recovery under the relationship or kindred clause. Such right exists by force of relationship alone, if dependency is shown.

[4] A determination of the question whether dependent was "in good faith a member of the family or household of such employee" (said minor), as that clause must be construed, requires a brief review of the uncontradicted evidence given at the hearing.

Said minor was, at the time he met his death, of the age of 18 years and unmarried. He was born out of wedlock, at the home of applicant. His mother was a young woman who had been deluded into the belief that she had been lawfully wedded to the father of said minor under a contract of marriage. Upon discovering the invalidity of common-law marriages in this state, and realizing the ignominy of her condition, she became embittered against the man who had deceived her, refused to consent to a solemnization of marriage with him, repudiated and abandoned the child, and went her way. Applicant took said minor into her family, gave it the family name, and reared it as a twin brother of her eldest son, who was born two months after the birth of said illegitimate child. The family at that time and until augmented by the birth of her son consisted of applicant, her husband, and said illegitimate child. Subsequently two other children, a son and daughter, were born as the issue of applicant and her husband. None of applicant's children to the day of the death of said illegitimate child knew or had ever suspected, nor did said illegitimate child itself know, that he was not in fact a brother. Applicant and her husband were afterwards divorced. The wife retained the custody of said illegitimate child and her two younger children, while her older son went to live for a time with his father, who later married. Applicant, being without sufficient funds or property to support herself and children, was compelled to seek employment, offering herself as nurse, hairdresser and physical culturalist. Said illegitimate minor upon arriving at an earning age was employed by a firm at Vancouver, where the family was then residing, at a wage of $15 per week. He turned the whole of his earnings over to his putative mother for the support of the family. Later he attended an auto school, and in March, 1923, applicant moved with her family to San Francisco. There said minor was employed during the months of April, May, and June, 1923, at a wage of $18.50 per week. Applicant was then in poor health and under the care of a physician. She had recently removed from Vancouver to San Francisco with the expectation of re-establishing herself in the business in which she had formerly engaged. Finding her health broken, and being depleted in finances and said minor being without present employment, she chanced to meet said T. W. Harlan, of Willows, in San Francisco, and made the arrangements whereby said minor was to be employed to operate farm tractors at the place where six days later he lost his life. It was the understanding between applicant and said minor that his employment at Willows was only temporary, and that he was to return to her and the family just as soon as she could rehabilitate and establish herself in business in San Francisco, which was the family home. It was the intention and understanding that he would remain in the employ of Mr. Harlan until the following Christmas holidays.

[5] The fact that Mr. Harlan expected to employ said minor as long as he gave satisfaction is not proof that he was a member of his family or household. Any employer of labor would have said as much. But this does not bind the employee to change his domestic relations or residence. He was at best an employee. When he failed to give satisfaction as such he was no longer entitled to remain in the household. Petitioner quotes a portion of applicant's testimony with reference to the time when said minor was to return to his home, which was dependent upon the time required by her to "get her business going." The answer given by the witness, to the effect that said minor was to come to her if he could, had reference to her ability to complete her plans within a definite period. As soon as and when this was done he was to come to her. This portion of her testimony, read with reference to its context, makes it perfectly clear that it was the intention of both parties that said minor's absence was in the performance of temporary employment. There is absolutely nothing in the evidence which would justify the inference that the household or family ties had become severed. If the separation, under the circumstances of the situation before us, can be regarded as a severance of family or household relations there would be but few families or households that could be said to be intact. Such a relationship resting upon 18 years of reciprocal acknowledgment of parent and child is not to be lightly set aside.

[6] According to the intention of said minor his place of residence or domicile was not changed by his temporary employment at Willows. Applying section 52, Political Code, subdivisions 1 and 7, there can be no doubt as to the residence of said minor. Subdivision 1 provides that, "It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose;" * * * subdivision 7 provides that, "The residence can be changed only by the union of act and intent." It was clearly not the intention of said minor to change his residence to Willows. In this case there had been a clear abandonment by the mother, and the aunt stood in her place.

[7, 8] Abandonment by the parent is presumptive evidence that the parent relinquishes all right of controlling and receiving the earnings of his or her child. Section 211, Civ. Code. A parent not entitled to the custody of a child has no right to control his residence. Section 213, Civ. Code. The natural mother of said minor, while not expressly acknowledging maternity in herself, caused to be filed with the Commission her affidavit disclaiming any interest in or to any compensation that might be found to be owing on account of the death of said minor. She avers that she "has no interest in or no right to any compensation; that she has never received any money from, and has never been dependent in any manner nor to any extent whatsoever upon, said deceased, and to the best of her knowledge and belief 'applicant' was and is the sole person dependent upon said deceased, and the sole person having any right to or interest in such compensation." The disclaimer in effect amounts to an acknowledgment of emancipation if abandonment was doubtful, and would be sufficient to free the child from her parental control. There were but two persons who could have exercised the right to control the residence of said minor child, to wit, the applicant, with whom he had always resided and to whom he had rendered obedience, and the minor himself. The home of applicant in the city of San Francisco was selected as the residence of both. Domicile could not be more firmly established than it is shown to be by the facts and circumstances of this case. We feel satisfied that the abuses which have been suggested by the amicus curiæ, will find no protection in this opinion by reason of the conclusion compelled by the evidence, and as found by the Commission to the effect that the applicant was in good faith a member of said minor's household as herein construed. Proof of good faith more impressive in its convincing force can scarcely be imagined than that which is found in the tragic story of the birth, life, and death of this unfortunate youth, and the commendable efforts of the putative mother to lift him from without the shadow of illegitimacy by giving him a name and a place in her family. Her example in this respect will furnish no encouragement for those who would improvise family relationships for fraudulent purposes.

[9] We now come to a consideration of the effect to be given to the words "of such employee" as used in section 14(c) of the Compensation Act, which reads: "No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee. * * *" It is petitioner's claim that a natural construction of this clause would exclude applicant from the class which the act was designed to benefit. In other words, it is contended that it is not sufficient to show that said deceased employee was in good faith a member of applicant's family or

household, or that both were members of or belonged to the same family or household, but it must appear that the applicant was a member of the family or household of which said deceased employee was the head or master. Such a restricted construction would tend to defeat rather than to promote the purpose of the act. We think that petitioner has lost sight of the object and purpose of the law. It is not to be doubted that the words "of such employee," are words of identification and relation rather than words of proprietorship or possession within the contemplation of the act. In this connection the preposition "of" is very commonly used and has a meaning well understood. The Standard Dictionary thus defines it. "(1) Associated or connected with, usually in some causal relation, efficient, material, formal or final." It will be noted that the act does not employ the term "head of the family," for the reason, doubtless, that the head of the family or person who by common consent exercises authoritative domestic control may not, in fact, be a breadwinner at all, but in many cases a dependent. The act cares for the support of dependents, and does not concern itself with the real or nominal heads of families or households, except so far as that station may have a causal relation to the support of dependents of the household.

[10, 11] The cardinal rule of statutory construction is too well settled, to the effect that the language of an act must be construed to effect its evident object and purpose, to require citations of authorities. The object and purpose of the workmen's compensation, insurance, and safety laws is so clearly stated in the following language that there can be no mistake concerning the purpose aimed to be accomplished. To this end it must be liberally construed. Section 69, Workmen's Compensation Act. Section 1, in defining the scope and intent of the act declares that "a complete system of workmen's compensation includes adequate provision for the comfort, health, safety and general welfare of any and all employees *and those dependent upon them for support* to the extent of relieving from the consequences of any injury incurred by employees in the course of their employment, irrespective of the fault of any party. * * *" (Italics ours.) Considering this language in connection with section 14(c) it is very apparent that applicant comes within the intent of said section, and must be regarded as a dependent member of the family of the deceased employee and entitled to the benefits conferred by the statute.

[12] We do not think that the Legislature intended to prescribe over-nice rules by which the head of a family should be determined. It may often become a very difficult question in cases of broken families, where increasing responsibilities fall upon the individual members of the household in proportion to their ability to sustain them, to determine which one is the technical head of the family. Such responsibilities are often divided and shifted from one to the other and depend upon many varying circumstances peculiar to the particular family. The Workmen's Compensation Act does not, in our opinion, make the question of dependency rest upon such refinements. All that it requires is a bona fide family or household and the existence of dependency of a member thereof as illustrated by the facts of the instant case.

While the precise question now under consideration is a new one in this state, it was decided by the Supreme Court of Michigan in Peay v. Fred Kulow & Co., 226 Mich. 512, 197 N. W. 1020. In that case neither the facts nor the statute were as favorable to the claims of the dependent as the facts and law in the instant case are to this applicant. The statute of that state provided:

> "No person shall be considered a dependent unless he or she is a member of the family of the deceased employee, or unless such person bears to said deceased employee, the relation of husband or widow, or lineal descendant, or ancestor, or brother or sister."

It will be observed that our statute is broader inasmuch as it ex industria includes a member of the household as well as a member of the family, and extends the line of collateral kindred. In that case a youth of the age of 14 years, whose parents had died, went to live and make his home with his aunt. His status with his aunt's family was the same as that of a son. When working he contributed a portion of his wages to said aunt. The lad found employment at Detroit while the aunt lived in Youngstown, Ohio. He had resided apart from her for a period of 3 years but contributed on an average of $10 per month to her support. While at work he fell, and died from the effects of the injuries so received. The point made in that case, as here, was that he was not a member of the aunt's family, and therefore she could not recover under the compensation act of the state of Michigan. The court, in its discussion of this objection, said:

> "Counsel construes this statute to mean that no one outside of the specific blood classes can be a dependent, unless he or she is a member of a family of which the deceased was at the head; in other words, that plaintiff was not a member of deceased's family. I am of the opinion that this construction is too restricted. The idea which underlies and which gave birth to the Compensation Law was to afford timely relief to the injured employee, and in event of his death to afford relief to persons who were receiving care and support from him. In view of this, it would be more nearly in accord with the spirit of the statute to construe it to apply to any person who was a member of the same family of which the deceased was a member. It is not uncommon to hear a wife speak of *her* family, *her* church or *her* lodge,

not because she is at the head of the family, church, or lodge, but to indicate her relation to them. It is not one of those cases where the word 'of' is used as a sign of possession, but it is used rather to indicate his relation to the family. It appears to me that the language of the statute was used in this sense. Had the Legislature intended the statute to have the meaning contended for, may we not assume it would have indicated 'the family of which the deceased was at the head?' If the construction contended for is to prevail, foster parents can never, under these circumstances, take an award from one who was a member of the family, and had been cared for and treated as a child. The deceased had been taken when a young boy, and given a home, and treated as a son in plaintiff's family. He was unmarried, and plaintiff's home was the only home he had, and he was contributing to the upkeep and maintenance of that home. We think it is within the spirit of the statute to hold that plaintiff was a member of the same family that deceased was a member of, and hence comes within the class of dependents that are entitled to an award."

[13] The finding of the Commission in the literal language of the act as to family or household membership is sufficient to support the award under the construction we have given the act.

In view of our construction of section 14(c), Workmen's Compensation Act, it becomes unnecessary to consider the rules of succession as affecting illegitimates as they existed at common law, or as since modified by the statute of this state and many of our sister states. We are not here considering a statute of succession, which was the subject of consideration by most, if not all, of the cases cited by petitioner. The real question is pointedly discussed in Portin v. Portin, (Tenn.) 261 S. W. 362, wherein it is said:

> "The Workmen's Compensation Act is not a statute of descent or distribution. It was intended to relieve society of the burden of caring for injured workmen or the dependents of deceased workmen, and to place that burden upon the industry employing the workman. In case of the workman's death, the lawmakers were concerned for the case of his dependents, and not about the devolution of the workman's property. The dependency of the claimant is the true basis of his right to compensation rather than blood or marriage. Relationship is really only evidence of dependency."

In Scott's Case, 117 Me. 436, 104 Atl. 794, it is said:

> "It is a well-recognized rule of construction of acts of this kind, however, and expressly enjoined upon those whose duty it is to administer this statute, that it shall be construed liberally with a view to carrying out its general purpose, and not strictly as other statutes in derogation of common-law rights usually are." * * *

See, also, Piccinim v. Conn. Light & Power Co., 93 Conn. 423, 106 Atl. 330.

A decision on the question of legal succession, so far as the illegitimacy of said minor is concerned, is rendered unnecessary by reason of the conclusion we have reached as to said minor's status in applicant's household, and the findings of the Commission on the issue of succession are not, for the reasons heretofore assigned, material.

[14] Only one other question, which is raised by respondent, remains for consideration, to wit, whether petitioner, Ocean Accident & Guarantee Corporation, Limited, has lost its right to apply to this court for a writ of review for the reason that it did not apply to respondent Industrial Accident Commission for hearing after rehearing once granted.

We think the act furnishes no substantial grounds for the claim that a second petition for a rehearing is required before an application may be made to this court for a writ of review. The act contemplates a speedy determination of questions involving the right to compensation, and the Commission is given broad powers to the end that long delays may be avoided. It is the policy of the law in general practice to consider but one application for a rehearing, and there is less justification for an exception to this rule in proceedings that are somewhat summary in character, as the act under consideration undoubtedly is. The language of section 67(a) is determinative of the question against respondent's claim. It provides:

> "Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby may apply to the supreme court of this state, or to the district court of appeal of the appellate district in which such person resides, for a writ of certiorari or review, hereinafter referred to as a writ of review, for the purpose of having the lawfulness of the original order, rule, regulation, decision or award, or the order, rule, regulation, decision or award on rehearing inquired into and determined."

From the above language it will be noted that any party affected by the Commission's decision may apply to this court or to the District Court of Appeal for a writ of review without petitioning for a second rehearing. The case of Federal Mutual Liability Insurance Co. v. Industrial Accident Commission, 190 Cal. 97, 210 Pac. 628, is an authority supporting what we have here said. The reasoning in Carroll et al. v. Industrial Commission of Colorado et al., 69 Colo. 473, 195 Pac. 1097, 19 A. L. R. 107, and Schrewe v. New York Cent R. R. Co., 192 Mich. 170, 158 N. W. 337, is also applicable to the question.

The award is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; RICHARDS, J.; SHENK, J.

194 Cal. 337

SUNTER v. FRASER et al. (S. F. 10465.)

(Supreme Court of California. Aug. 25, 1924.)

1. Municipal corporations 🔑184(2) — One falsely imprisoned may not recover on policeman's bond.

Under Const. art. 11, §§ 6, 8, as amended in 1914, empowering cities to make and enforce all laws and regulations respecting municipal affairs, subject only to charter restrictions and amendment to Eureka City Charter, art. 3, § 22, taking advantage of such privilege, one falsely arrested and imprisoned by an Eureka policeman may not recover on his official bond, running to the city as obligee.

2. Officers 🔑135—At common law only obligee may sue on bond of public official.

At common law, only the obligee named in the bond of a public official can maintain an action on it.

3. Municipal corporations 🔑79 — Power over municipal affairs restricted by charter only.

Under Const. art. 11, §§ 6, 8, as amended in 1914, and amendment to Eureka City Charter, of art. 3, § 22, the powers of that city over its municipal affairs became all-embracing, restricted by its charter only, and independent of control by general laws.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action for damages for false arrest and imprisonment by Janet Sunter against John M. Fraser and others. Judgment for plaintiff, and defendants appeal. Reversed.

Pierce H. Ryan and A. G. Bradford, both of Eureka, for appellants.

J. Logan Beamer and Henry L. Ford, both of Eureka, for respondent.

WASTE, J. This case was transferred to the Supreme Court after decision and judgment in the District Court of Appeal, for the reason that the principal question involved is a new one in this state, and it was thought well to give the opposing parties further opportunity to present their respective views. After such presentation and examination of the matter, we are satisfied that the conclusion reached by the District Court of Appeal in and for the First Appellate District, Division 2, on the first point presented by the appeal, is correct, and conclusively settled all of the matters involved in the present litigation. We therefore approve and adopt, as the opinion of this court, the following portion of the decision prepared by Mr. Justice Nourse:

"This is an appeal from a verdict in favor of the plaintiff and against the defendant Fraser, a police officer of the city of Eureka, and the defendants Hodges and McDonough, as sureties upon his official bond. The complaint was framed in three causes of action, alleging, respectively, that the defendant Fraser had breached the obligations of his official bond in that he had subjected the plaintiff to a false arrest, that he had committed a physical assault upon her in making the arrest, and that he had falsely imprisoned her as a result of the arrest. The verdict of the jury upon which the judgment rests awarded the plaintiff $2,000 against the defendant Fraser and $1,000 against the defendants Hodges and McDonough. In each cause of action the complaint relies upon the alleged breach by the defendant Fraser of the conditions of his official bond; the allegations in each case being that he 'committed a breach of his said official bond as aforesaid in that by reason of the premises as aforesaid he did not faithfully perform his official duties.'

"The facts of the case are, generally, * * * that the defendant Fraser, while acting in the course of his official duties, attempted to restrain the plaintiff under the belief that she was insane or at least irrational at the time, and that she immediately became either hysterical or 'fighting mad,' as a result of which the two became engaged in a tussle. This became so violent on the plaintiff's part that the defendant Fraser was required to call a citizen to assist him in making the arrest. These two thereupon forcibly took the plaintiff to the city prison, where she was booked upon a charge of disturbing the peace and turned over to the police matron, who kept her in her own home for the remainder of the night. The plaintiff was released early on the following morning, and a few days later, upon a hearing before the police court, the charge of disturbing the peace laid against her was dismissed.

"On this appeal the appellants urge that, inasmuch as the bond upon which the suit is based was given to the city of Eureka in accordance with the terms of the municipal charter, it does not inure to the benefit of an individual who has been offended by the acts of the police officer, and that accordingly the respondent in this action could not maintain her suit upon this bond or against these sureties. The position of the appellants is that, the city of Eureka having expressly provided in its charter the form of bond to be given by its public officials, and having therein provided that the city of Eureka should be the obligee of said bonds, and there being no statutory authorization for someone other than the named obligee to sue for a breach of the bond, the common-law rule requiring the obligee to be the actual party plaintiff obtains. Respondent answers that the case is controlled by section 961 of the Political Code, which authorizes any person injured or aggrieved to bring suit on an official bond in his own name. In reply * * * appellants point out that section 961 is a part of article 9, which covers the subject of official bonds to be given by state, county and township officers only (Rowe v. Rose, 26 Cal. App. 744, 745, 148 Pac. 535), and that all such bonds are required by section 958 to be made payable to the state of California 'with such conditions as required by this chapter.' In section 961 it is then provided that such a bond 'is in force and obligatory upon the principal and sureties therein *to and for the state of California, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of* *such officer in his official capacity; and any person so injured or aggrieved may bring suit.'* (Italics ours.)

[1, 2] "Conceding, as we must, that the subject of requiring bonds of municipal officers and employees is a municipal affair, and that the provisions of the municipal charter relating to a municipal affair are controlling over the general state laws, the question arises whether, without express statutory authority, an individual aggrieved by an act or default of a municipal officer may sue upon his bond which runs solely to the benefit of the municipality. The question is a new one in this state, and there is therefore no California authority to aid us in a solution of the question. An examination of authorities from other jurisdictions satisfies us that the accepted rule is that under the common law an action upon a bond of a public official could be maintained only by the obligee named in the bond, and that, unless the right has been given to an individual by statute to maintain such an action in his own name, the right does not exist.

"The leading case upon this subject seems to be City of Eaton Rapids v. Stump, 127 Mich. 1, 86 N. W. 438, 89 Am. St. Rep. 451, in which, in a case similar to the case at bar, the Supreme Court of Michigan say: 'The bond was not given for the protection of third parties, but for the protection of the city alone. * * * There is no statute in this state providing that such actions may be brought on such a bond, in the interest of or for the benefit of a third party, for damages arising by the act or omission of such appointive officer. Our statutes do provide for actions on official bonds, but suits by third parties on bonds given by appointive municipal officers are not included, and without the aid of some statute no such suit can be maintained. * * * The bond in this case runs to *the city of Eaton Rapids, and not to the people.* The rule as stated by Murfree on Official Bonds is as follows: "The primary object of an official bond is, of course, to protect the interest of the beneficiary named in it—the state, county, corporation, etc., as the case may be. By statute, however, it is usually provided that bonds given by officers of states and counties shall be available to protect the interests of private persons who may be aggrieved by the breach of such bonds. They cannot be used, however, for these purposes in cases unprovided for by such statutory enactment."' (Italics ours.) To the same effect are Carr v. Knoxville, 144 Tenn. 483, 234 S. W. 328, 19 A. L. R. 69; Alexander v. Ison, 107 Ga. 745, 33 S. E. 657; State v. Stout, 26 Ind. App. 446, 59 N. E. 1091; U. S. Fidelity & Guaranty Co. v. Jasper, 56 Tex. Civ. App. 236, 120 S. W. 1145; Cushing v. Lickert, 79 Neb. 384, 112 N. W. 616; U. S. Fidelity & Guaranty Co. v. Crittenden, 62 Tex. Civ. App. 283, 131 S. W. 232.

"In Alexander v. Ison, supra, the action was one to recover damages for false arrest and imprisonment. The defendants were the police officer and the sureties on his official bond, which ran to the city in accord with the municipal charter. The Georgia court held that the sureties were not liable to the plaintiff, saying: 'Being an entire stranger to the contract, it would require express legislative authority to give him a right of action thereon. Apparently the bond taken in the present instance was solely for the protection and benefit of the city in its corporate capacity.' Section 12 of the Georgia Political Code contained the same provision for suits by individuals as is found in section 961 of our Code, but the court, in the Alexander Case, said that this applied only to the public officers who owed a duty to the state at large, but not to a municipal officer, who is required by special legislation to give such a bond as the mayor and council 'may deem necessary to the proper protection of the city itself.'"

The District Court of Appeal is correct in its conclusion that no express statutory authority can be found under which the plaintiff may maintain this present action. The charter of the city of Eureka is silent on the subject, and section 961 of the Political Code does not apply. Whatever may have been the situation prior to the adoption of certain amendments to the state Constitution and to the charter of the city, plaintiff's right of action here sought to be maintained is now foreclosed. Cases cited and relied on by the respondent, but which were decided prior to these amendments to the Constitution, no longer have any controlling application. The charter of the city of Eureka was adopted in 1895. In 1896 section 6 of article 11 of the state Constitution was amended to provide, in respect to cities operating under freeholders' charters, that "all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." It was thereafter held by this court that, with respect to matters not municipal, or municipal affairs upon which the charter was silent, the provisions of any general law pertaining thereto would control the subject. Fragley v. Phelan, 126 Cal. 383, 395, 58 Pac. 923; Clouse v. City of San Diego, 159 Cal. 434, 437, 114 Pac. 573. It was also held that when a charter which was previously silent was amended so as to make a provision upon such municipal affair, that provision would would immediately suspend the general law so far as the two were in conflict. Byrne v. Drain, 127 Cal. 663, 667, 60 Pac. 433.

[3] In 1914, however, sections 6 and 8 of article 11 of the Constitution were amended by making important changes in the provisions thereof relating to the adoption of freeholders' charters and the effect thereof. In section 6 the provision relating to municipal affairs was changed to read as follows: "Cities and towns hereafter organized under charters framed and adopted by authority of this constitution are hereby empowered, and cities and towns heretofore organized by authority of this constitution may amend their charters in the manner authorized by this constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their

several charters, and in respect to other matters they shall be subject to and controlled by general laws." In section 8 this clause was inserted: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

In 1917 the city of Eureka availed itself of the privilege given to it by the amendments of sections 6 and 8 of the Constitution, supra, and amended section 22 of article 3 of its freeholders' charter to provide that thereafter the city should "have the power to make and enforce any and all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter as the same now is or as it may be hereafter amended; * * * and no enumeration or specific statement herein of any particular powers shall be held to be exclusive or a limitation of the foregoing general grant of powers." Stats. 1917, p. 1743. By this amendment to its charter the city brought itself within the conditions of the amendments of 1914 to sections 6 and 8 of article 11 of the Constitution. Thereupon, according to the terms of those sections, its powers over municipal affairs became all-embracing, restricted and limited by the charter only. The result is that the city has become independent of control by general laws upon municipal affairs. Civic Center Association v. R. R. Comm., 175 Cal. 441, 448, 166 Pac. 351.

This conclusion renders it unnecessary to consider the additional grounds urged by the appellants for a reversal.

The judgment is reversed.

We concur: MYERS, C. J.; RICHARDS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.

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68 Cal. App. 40

GILBERT et al. v. MILLER.

SAME v. BAIRD. (Civ. 4101, 4102.)

(District Court of Appeal, Second District, Division 1, California. June 30, 1924.)

1. Corporations 🔑404(1)—Secretary has no implied authority to assign or transfer assets of corporation.

The secretary of a corporation has no right to assign or transfer assets of a corporation without authority from the board of directors.

2. Bills and notes 🔑489(6)—One claiming under assignment must allege and prove valid assignment.

In action on notes by one claiming as assignee thereof, plaintiff must both allege and prove valid assignment.

3. Bills and notes 🔑523—Evidence held sufficient to overcome prima facie evidence of ownership of notes by indorsees thereof.

In action on notes by indorsees, prima facie evidence of ownership, made out by plaintiff's production of notes indorsed by secretary of corporation to which they were payable, was overcome by uncontradicted evidence that secretary had no authority to make indorsements, so as to sustain finding that plaintiffs were not owners of notes.

4. Corporations 🔑417, 466—Attempted release of claim against corporation, made to secretary, held a nullity, and not consideration for indorsement of notes to it.

An attempted release by attorneys of claim against corporation for legal services was a nullity, because made to secretary and not accepted by directors, and not a consideration for indorsement by secretary to attorneys of notes payable to corporation.

5. Bills and notes 🔑452(2)—Rule stated as to when defense of want of title not available.

Defense of want of title in plaintiffs to notes sued on cannot be interposed in absence of bad faith, if plaintiffs have possession of notes, and defendants would be protected by payment of any judgment on notes.

6. Bills and notes 🔑452(2)—Defense of want of title held available against indorsees in possession suing on notes.

Where corporation remains owner of notes payable to it, notwithstanding unauthorized indorsement of them by its secretary to plaintiffs, fact of possession of notes by plaintiffs will not prevent corporation from suing thereon, and therefore makers may interpose defense of want of title in action by indorsee, though bad faith is absent.

Appeals from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Actions by W. I. Gilbert and another against R. E. Miller and against Robert J. Baird. From a judgment in each case in favor of defendant, plaintiffs appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

Alonzo D. Hitchcock, of Van Nuys, for respondents.

CURTIS, J. These actions were instituted to recover upon two promissory notes, each for the sum of $750, one executed by the defendant Miller and the other executed by the defendant Baird, in favor of the Oak Forest Development Association, a corporation. Judgement went for the defendants in each action, and plaintiffs appeal therefrom.

There is practically no dispute as to the facts of the case. They are substantially as follows: The plaintiffs claimed that said association was indebted to them in the sum of $1,500 for legal services performed by them for said association. They demanded a settlement of their claim, and the secretary of said association indorsed and delivered to them the two promissory notes sued on. The notes were indorsed, "Oak Forest Development Association, by A. E. Place, Secretary." The secretary had no authority from the board of directors of said association to indorse said notes, nor to deliver them to the plaintiffs, nor was his act, in indorsing and delivering said notes to the plaintiffs, ever ratified by said board of directors. Neither was there any provision in the by-laws of said association whereby any authority was conferred upon the secretary of said association, either to indorse, transfer, or deliver said notes. The answer to the complaint in each case denied that the note sued on therein was ever assigned or transferred to plaintiffs, or that plaintiffs were the owners thereof. The court found that the Oak Forest Development Association had never assigned or transferred either of said notes to plaintiffs, and that plaintiffs were not the owners of either of said notes. Plaintiffs, in appealing from the judgments herein, attack this finding of the court.

[1, 2] It is well settled in this state that the secretary of a corporation has no right to assign or transfer the assets of the corporation, without authority is given him so to do by the board of directors. Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Buena Vista Oil Co. v. Park Bank of L. A., 39 Cal. App. 710–715, 180 Pac. 12. One claiming under an assignment must both allege and prove a valid assignment. Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162; Lapique v. Denis, 23 Cal. App. 683, 139 Pac. 237.

[3] A case very similar to the one before us is that of Read v. Buffum, supra, in which the Supreme Court states the law as follows:

> "In order to maintain his action, it was necessary for the plaintiff to allege an assignment to him by the California Powder Works of the claim sued on, and the denial of that allegation by the defendant cast the burden of proving it upon the plaintiff. This he attempted and failed to do. The secretary of the company, who executed the assignment on which plaintiff relies, is not shown to have had any power to make it."

The case before us is even stronger than that of Read v. Buffum, supra, where the evidence failed to show that the secretary of the company had authority to make the assignment. In the present case, the undisputed evidence is that the secretary had no authority, expressed or implied, to assign or transfer the notes to the plaintiffs. The authorities above referred to appear to be decisive of the question involved in this appeal, and to sustain the findings of the trial court, to the effect that the Oak Forest Development Company never assigned or transferred to plaintiffs the promissory notes, and that plaintiffs were not the owners thereof.

Appellants have called our attention to the cases of Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036, and Linder Hardware Co. v. Pacific Sugar Corporation, 17 Cal. App. 81, 118 Pac. 785, 789. They insist that, according to the doctrine laid down in these cases, the assignment of the notes to them was legal and binding upon all parties in interest. In the case of Dyer v. Sebrell, supra, the evidence showed that the plaintiff was the cashier of the Riverside Banking Company, and that she assigned to herself a promissory note belonging to the bank and executed by the defendant. She then instituted an action to collect the note, and the Supreme Court held that:

> "The cashier of a bank can indorse negotiable paper and convey the legal title to it to any person but himself. An indorsement to himself would be voidable merely at the instance of the bank, and, until avoided by the bank, would pass legal title to the cashier."

Evidently the authority of a cashier of a bank to indorse and transfer negotiable paper is much broader than that of the secretary of an ordinary commercial corporation. In the case of Linder Hardware Co. v. Pacific Sugar Corporation, supra, the note sued upon was executed by the defendant in favor of the Studebaker Bros. Co., a corporation. It was indorsed and assigned to the plaintiff by the treasurer of the Studebaker Bros. Co. There was no evidence as to the authority of the treasurer to make said indorsement. The court held in that case:

> "We think it was rightly admitted in evidence. Possession of commercial paper, with indorsement, makes a prima facie case of delivery by the indorser to the holder and of ownership of the latter."

A petition to the Supreme Court for a rehearing was filed in this case and denied. Chief Justice Beatty, in dissenting from the order denying a rehearing, said:

> "There was a plain and direct issue as to the assignment of the note given by defendant to Studebaker Bros. Co., and the plaintiff was bound to make proof of that fact. In my opinion the proof was wholly insufficient."

The rule enunciated in this case was also commented upon unfavorably in a note appearing in 11 A. L. R. 957. But, giving to this case full weight as an authority upon the question considered therein, we still question it as controlling upon the point involved in the present case. All that the court held in the case of Linder Hardware Co. v. Pacific Sugar Corporation, relative to the legality of the assignment of the note, was that possession of the note, indorsed by the treasurer of the corporation, the payee therein, was prima facie evidence of ownership thereof. In the case before us the evidence showed conclusively that the secretary had no authority to indorse or assign the note sued on. The prima facie case, made out by the plaintiffs' production of the notes indorsed by the secretary, was entirely overcome by the uncontradicted evidence that the secretary had no authority, expressed or implied, to make said indorsement.

[4] The claim of appellants that they obtained title and possession of these notes for an adequate consideration cannot be maintained. This consideration, plaintiffs assert, was the release of the association and its stockholders by plaintiffs of their claim for attorney's fees. This release, if made at all, was made to the secretary of the association, who had no authority to accept it. There is no evidence that said release was ever made to the board of directors of said association or that said board ever accepted the same. Without the acceptance by the board of directors, the attempted release made by plaintiffs to the secretary amounted to a mere nullity, and, never having been accepted, is not binding upon the plaintiffs nor upon the association. Plaintiffs still have their right of action against the association upon their claim for attorney's fees.

[5] Appellants, however, claim that, notwithstanding the fact that plaintiffs are not the owners of said promissory notes, the defendant cannot escape liability, upon the ground that title thereto is not in the plaintiffs. In support of this claim plaintiffs have cited the following authorities: Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116; Price v. Dunlap, 5 Cal. 483; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036; Linder Hardware Co. v. Pacific Sugar Corporation, 17 Cal. App. 81, 118 Pac. 785, 789; and Smith v. Woods, 164 Cal. 291, 128 Pac. 748. The rule laid down by these authorities is well stated in the case of Smith v. Woods, supra, as follows:

> "In the absence of bad faith an action upon a note cannot be defended upon the ground that the title is not in the plaintiff, if plaintiff has possession and defendant would be protected by the payment of any judgment on the note."

[6] There is no question of bad faith involved in this action. The plaintiffs were, at the trial of the actions, in possession of the promissory notes, and, if the defendants will be protected by the payment by them of any judgments which might be obtained against them in these actions, then, in accordance with the authorities above referred to, the defense interposed by them, of want of title to the notes by the plaintiffs, cannot be maintained. But would the defendants be protected by the payment of such judgments? The Oak Forest Development Association is still the owner of said notes. The fact that the possession of said notes is in the plaintiffs does not affect the association's title thereto, nor does such possession deprive the association of the right to institute actions upon said notes. The defendants, therefore, will not be protected against such actions by the payment of any judgments which might be obtained in the present action.

Accordingly, the defense interposed by the defendants, that plaintiffs are not the legal owners of the notes in suit, is a legal and valid defense, and the judgments in their favor must stand. The judgment in each of said actions is affirmed.

I concur: CONREY, P. J.

HOUSER, J., being disqualified, does not participate in the foregoing opinion.

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67 Cal. App. 731

DOLLEY et al. v. RAGON et al. (Civ. 4367.)

(District Court of Appeal, Second District, Division 1, California. June 20, 1924. As Modified July 11, 1924.)

1. Attorney and client ⚷52—To disbar attorney for misquoting record separate charges required.

So far as proceeding against attorney for misconduct in misquoting the record in his brief is in disbarment, separate disbarment charges, not bearing the title of original action, should have been filed, and informant's failure to so file required dismissal without prejudice as to disbarment matter.

2. Contempt ⚷44—Contempt charges considered after final judgment, though appeal was beyond court jurisdiction.

Notwithstanding judgment has become final, and appeal beyond appellate court's jurisdiction, the court may receive and consider any charges of contempt by an attorney in his conduct of the action.

3. Amicus curiæ ⚷1—In contempt proceeding for misquoting record on appeal, court will hear any qualified attorney.

In contempt proceedings, by one not party to appeal, against attorney for misquoting record on appeal, appellate court will hear any reputable attorney entitled to practice before it, appearing as friend of the court.

Action by L. F. Dolley and another against Edward D. Ragon and others. Judgment for plaintiffs, and defendants appealed. On application by Henry G. Dent, as friend of the court, for action by the court upon accusation of misconduct of counsel. Petition entertained in part.

See, also, 228 Pac. 665.

CONREY, P. J. This court's decision on appeal in this action was filed on the 24th day of April, 1924. The case is now before the Supreme Court on petition for rehearing. On the 23d day of May, 1924, Henry G. Dent, appearing as a friend of the court, presented to the court certain charges against certain attorneys for respondents, asserting that said attorneys were guilty of misconduct in making sundry alleged misstatements in their reply brief for respondents. The court by an order entered on that day directed attention to the fact that the document filed by Mr. Dent failed to set forth any specific description or statement of the facts constituting the alleged misconduct. Thereupon the court ordered that the petition for action by the court in said matter be denied without prejudice to the informant's right to file further charges if he so desired.

Accordingly, on June 16, 1924, Mr. Dent, who is not a party to the action, filed another document entitled in said action and being "Ex parte motion and petition in bank of Henry G. Dent, informant," charging misconduct of one of said attorneys.

[1] This document is capable of being considered in part as a disbarment proceeding and in part as a contempt proceeding. In so far as it is a disbarment proceeding, it should have been filed in the form of separate charges not entitled in this action. Then, under the rule of the Supreme Court, which assigns all special proceedings to Division 2 of this district in even numbered years, the proceeding would have been automatically assigned to Division 2, where it properly belongs. In so far as the matters contained in said information or petition state the subject-matter of a disbarment proceeding, the same is hereby dismissed, without prejudice to any right which the informant may have, to institute a disbarment proceeding in proper form if he so desires.

[2] We are of the opinion, however, that, notwithstanding the fact that the judgment has become final in this court, and the appeal is now beyond our jurisdiction, nevertheless, this court has authority to receive and consider any charges of acts constituting contempt of court by an attorney in his conduct of the action. Section 1209 of the Code of Civil Procedure declares that "the following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * 3. Misbehavior in office, or other willful neglect or violation of duty by an attorney. * * *" The court therefore retains this proceeding for the sole purpose of considering that part of the petition which charges that said attorney in his brief for respondent is guilty of willful misrepresentation of facts arising upon the record on the appeal in this action. The matters so retained are hereby designated as follows: Beginning on page 16 of the petition, the matters stated under the heading "Misconduct Relating to Assignment"; beginning on page 21, the matters stated under the heading "Misconduct Relating to References to Drilling Contract Exhibit 3"; beginning on page 28, statement under the heading "Misconduct Relating to 'the Facts'"; beginning on page 32, statement under the heading "Misconduct Relating to Allegations in the Original Complaint; also following in Amended Complaint."

[3] In his petition the informant, who is not an attorney at law, requests that he be permitted to submit to the justices of this court the names of five reputable attorneys, and that we select or express our approval that either of the five or two of the five may appear here as friends of the court. Without adopting that procedure, the court suggests that it will hear the application of any reputable attorney entitled to practice before this court who may offer to appear as a friend of the court in this proceeding. The document of more than 100 pages, filed by the informant, shows clearly enough that its voluminous contents could be far more briefly and clearly stated, and brought within the range of possibility of proper consideration by the court. The court further suggests that a copy of said petition should be delivered to the president or secretary of the Los Angeles Bar Association, so that some representative of that association duly designated by it may appear to aid in the proper disposition of the proceeding. A minute order will be entered in accordance with this opinion.

I concur: HOUSER, J.

Mr. Justice CURTIS, deeming himself disqualified, takes no part herein.

68 Cal. App. 223

DOLLEY et ux. v. RAGON et al. (Civ. 4367.)

(District Court of Appeal, Second District, Division 1, California. July 23, 1924.)

1. Contempt 🔑55—Court bound to examine charges of counsel's misconduct, though informant did not appear.

Where a nonprofessional friend of the court filed sworn charges of misconduct of counsel in misquoting the record, and informant, being informed of the hearing by mail at only address furnished by him, failed to appear, nevertheless the court is bound to examine for itself and see whether the record bears out the charges.

2. Contempt 🔑61(1)—Honorable and experienced member of bar entitled to careful examination of misconduct charges and vindication if not partially sustained.

Recognized, active, and honorable member of the bar, charged in good faith or otherwise, with misquoting the record in his brief, is entitled to a careful examination of the charges, and, unless partially sustained, to full and distinct vindication.

Action by L. F. Dolley and wife against Edward D. Ragon and others. On petition by Henry G. Dent as amicus curiæ, charging misconduct of an attorney for respondents. Petition dismissed.

Henry G. Dent, in pro. per.

George P. Adams, of Los Angeles, in pro. per.

PER CURIAM. This matter came on for hearing July 21, 1924. At the conclusion of the hearing, wherein an attorney for respondents was accused of acts constituting contempt of court, the decision of the court was announced orally by the presiding justice, as follows:

[1] Mr. George P. Adams was herein charged with misconduct in wrongfully misrepresenting the facts in the record; such alleged misrepresentations being contained in his brief for respondents. The court examined the petition very promptly after its filing, and made a statement, which was made a matter of record, that the whole matter was beyond the jurisdiction of this court, except in so far as there were any charges of misconduct amounting to contempt of this court. There were positive statements made in the petition that the respondents' brief filed by Mr. Adams contained false statements concerning the record, known by Mr. Adams to have been false. Of course, where a statement is made under oath by one purporting to inform the court of acts of that kind, the court is not justified in ignoring them, even though (as in this case happens to be true), the attorney against whom the charges have been made is one in whom the judges of the court, through many years of professional experience, have had complete confidence. For no one is above the law. The informant—who is not a party to the action—suggested to the court that he was not an attorney at law, and that he was willing to furnish the court with the names of five reputable attorneys practicing at the bar of this state, of whom the court might select any two to appear as friends of the court and present the matters complained of. The court, in passing preliminarily upon the application, declined to adopt that exact procedure, but stated that it stood ready to hear an explanation or prosecution of the charges by any reputable attorney who would appear for that purpose. The court has waited for some time; no one has appeared. The informant, Mr. Henry G. Dent, has been informed of this hearing, brought up at the instance of Mr. Adams; has been so informed by notice given in the only way that he has left open to give notice, for, in his communications to the court, he not only gives no residence or office address, but does specifically give his address as at a certain post office box in the city of Los Angeles. He has been notified by mail in that way, but does not appear.

Nevertheless, it is the duty of the court, I presume, in any instance where a suggestion is made of conduct constituting contempt of court, particularly where it is made under oath by one purporting to know the facts, to examine for itself and see whether the record bears out the charges. This petition was carefully examined by Mr. Justice Houser and by the presiding justice. Mr. Justice Curtis had declined to have anything to do with the decision of the appeal, and declined also to have anything to do with this proceeding, because, in a remote and indirect fashion, due to some property interest, he felt that he had a connection with the litigation, or might be thought to have had, such that it was not appropriate for him to take part in the case, although he was not technically disqualified. The examination as made by Mr. Justice Houser and by me led us to the conclusion that, upon its face, in certain paragraphs, the petition made a statement of charges which, if true, might constitute misconduct and might be contempt of court. Although the petition was not drawn in the form that a competent attorney familiar with such practice would have drawn it, nevertheless there were some of the elements there of such charges. In substance, these were charges of knowing and intentional misquotation from the record on appeal, charges capable of being tested throughout, as far as the matters are material, by comparison of the charges themselves with the brief and with matters of record. The court has gone through the record, comparing it from page to page in the course of Mr. Adams' argument, and our previous familiarity with the record enables us to pass upon the matter now without further examination.

[2] We are satisfied that in each and every instance the record contains matters which justified counsel (Mr. Adams), in his brief for respondents, in making the statements contained in his brief; and if, by chance, in any instance (but we are unable to find that such example exists), there has been any deviation from absolute and strict statement in conformity with the record, there is, nevertheless, every reason for the assumption and for the positive belief that it was mere inadvertence. Every one knows that in the course of litigations in which numerous details of extensive transactions have to be referred to, as they were referred to in this case, sometimes counsel, and sometimes the judges of the court, will commit errors, whereby a misstatement of fact may be made, or a fact may be omitted which ought to have been included in the statement. That occurs every day. No one reasonably expects perfection in such matters, and no one reasonably charges corrupt intention in the making of such errors. In this connection it is to be observed that appellants themselves never filed any reply to respondent's brief, or complained that there was any misrepresentation therein. Beyond this, we think that men are entitled to the benefit of earned reputations. Where a man has been a recognized, active, and honorable member of the bar for a long series of years, and some one,

whether in good faith or otherwise, puts on record a charge of misconduct, the person so charged is entitled to a careful examination of the charges; and, unless there is something to sustain the charges, he is entitled to a full and distinct vindication. To that vindication, Mr. Adams, on the record here, is now entitled, and the court awards it.

The proceeding is dismissed.

68 Cal. App. 151

VALENTE v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(Civ. 4921.)

(District Court of Appeal, First District, Division 2, California. July 14, 1924.)

1. Master and servant 🔑367—Workman held "independent contractor" not within Compensation Act.

One chopping wood at a certain amount per cord, who fixed his own time and hours of work, employer exercising no direction or control over work, except to designate place for cutting, and not furnishing tools, but giving him those which another had left when quitting, was an "independent contractor," not entitled to benefit of Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

2. Master and servant 🔑366—Minor compensation claimant cannot, by disaffirmance of contract, change status from independent contractor to employee.

One cannot change his status, when injured, from independent contractor to employee, so as to be within benefit of Workmen's Compensation Act, by disaffirming contract by reason of his minority.

Certiorari to Industrial Accident Commission.

Proceeding by Tony Valente, a minor, claimant, for compensation for injuries, under Workmen's Compensation Act (St. 1913, p. 279), opposed by A. O. Peterson, employer, and the State Compensation Insurance Fund, insurance carrier. Award of the Industrial Accident Commission denied compensation, and claimant applied for certiorari to annul it. Award affirmed.

Edmond E. Herrscher and Simeon E. Sheffey, both of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

LANGDON, P. J. Petitioner seeks an annulment of an award of the Industrial Accident Commission denying him compensation, which order was based upon a finding that petitioner at the time of the injury was an independent contractor.

[1] Petitioner, a woodchopper at the time of the injury, was chopping wood under respondent Peterson, who had a contract for the delivery of wood with the Albion Lumber Company. Petitioner was paid by the cord for such wood as he should chop, and was free to fix his hours of labor per day and days per week. Peterson did not furnish tools, but, as petitioner had none, Peterson gave him tools, which another man had left in camp upon quitting work. Except to designate the place where the wood was to be cut, Peterson exercised no direction or control over the work.

The decision of the Industrial Accident Commission was made upon the authority of Donlon Bros. v. Industrial Accident Commission, 173 Cal. 250, 159 Pac. 715; Fidelity & Deposit Co. v. Brush, 176 Cal. 448, 168 Pac. 890; and Parsons v. Industrial Accident Commission, 178 Cal. 394, 173 Pac. 585; in which the facts determinative of the status are substantially the same as in the instant case. We believe these cases are indistinguishable in any important aspect from the case at bar and are controlling.

[2] The contention that petitioner can change the status from independent contractor to employee by disaffirming the contract by reason of his minority, we think, is without merit.

Award of the Industrial Accident Commission affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

68 Cal. App. 117

BURROWES v. BOSWORTH et al.

(Civ. 4827.)

(District Court of Appeal, First District, Division 2, California. July 9, 1924.)

1. Landlord and tenant 🔑169(3)—Complaint by occupant against lessor for personal injuries from failure to light premises held insufficient.

Complaint by occupant, in action against landlord, based on State Housing Act, § 66, requiring artificial lights in tenement houses, alleging that defendant was owner of tenement house at time of accident to plaintiff, and that plaintiff's injuries were caused by negligence of defendant, in that hallway, toilet room, etc., at time of accident, were unlighted and dark, *held* insufficient to state cause of action.

2. Appeal and error 🔑916(1)—Rule stated as to presumptions on appeal from judgment on pleadings.

On appeal by plaintiff from judgment on pleadings entered on motion of defendant, court cannot indulge in inference regarding evidence which might have been produced, nor strain language of pleading to advantage of appellant; presumptions always being against pleader.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Rachel M. Burrowes against Josephine Bosworth and another. From judgment for defendants, plaintiff appeals. Affirmed.

Philip M. Carey, of Oakland, and Ford & Johnson, of San Francisco, for appellant. Fitzgerald, Abbott & Beardsley, and M. W. Dobrzensky, all of Oakland, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment on the pleadings entered upon motion of the defendant and respondent Eliza Hyde. The only question involved upon the appeal is: Does the complaint state facts sufficient to constitute a cause of action against the respondent?

The complaint alleged that the respondent "is now, and was at all times herein mentioned, the owner of that certain tenement house * * * in the city of Oakland," more particularly described in the complaint; that the defendant, Josephine Bosworth, was at all of the times herein mentioned the lessee, in possession of said tenement house, as such lessee; that, at the time of the accident complained of, plaintiff was an occupant of one room in said tenement house rented of the lessee by H. Polglase; that, in connection with the rooms of said apartment upon the first floor thereof, a toilet room was maintained by defendants, for the use of the occupants of said apartment. That said toilet room was located on the west side of a hallway, which said hallway connected the said toilet room with the said apartment which plaintiff was occupying as aforesaid. That, in order to go to said toilet room, it became and was necessary for her to pass along and through said hallway to the door leading from said hallway into said toilet room. That, on the 24th day of June, 1922, at the hour of about 6:30 p. m., and after sunset, plaintiff, intending to go to said toilet room, and enter the same, walked along and through said hallway to a door, which she believed and supposed to be the door leading into the said toilet room, but which, in fact, led to a public stairway to the basement of said tenement house, and opened said door for the purpose of entering said toilet room, and, in stepping forward for the purpose aforesaid, suddenly fell upon and down the said stairway, whereby she sustained great bodily injuries and shock, and was made sick, sore, and disabled. That said injuries were occasioned by the carelessness and negligence of defendants, and each of them, in this: that the said hallway, toilet room, and stairway, at the time of said accident, were and each of them was, unlighted by any means, and they were, and each of them was, dark, and plaintiff was, by reason of said unlighted and dark condition, unable to see the said stairway, or to locate said toilet room, thereby causing plaintiff to mistake the entrance to said toilet room, and to fall down the said stairway as aforesaid." Plaintiff then set forth her special items of damage, and prayed for general and special damages in the sum of $25,380.

To establish negligence, the plaintiff relies upon the violation of certain provisions of an act known as the "State Housing Act" (Stats. 1921, c. 354, p. 485, § 66), wherein it is provided:

> "In every tenement house or hotel there shall be installed and kept burning from sunrise to sunset throughout the year artificial light sufficient in volume to properly illuminate every public hallway, public stairway, fire escape egress, elevator, public water-closet compartment, or toilet room, whenever there is insufficient natural light to permit a person to read in any part thereof."

There is no question involved upon this appeal as to the sufficiency of the complaint to state a cause of action against the tenant in possession of the premises, Josephine Bosworth.

[1] It is apparent from the foregoing that the only allegations against the respondent are that she was the owner of the tenement house at the time of the accident, and thereafter, to the date of the commencement of the action, and that the plaintiff's injuries were caused by the carelessness and negligence of defendants in this, that "the said hallway, toilet room, and stairway, at the time of said accident, were and each of them was unlighted by any means, and they were, and each of them was, dark."

Appellant relies upon the case of Rider v. Clark, 132 Cal. 382, 64 Pac. 564, and asserts that the landlord is liable (1) when the nuisance occasioning the injury existed at the time the premises were demised, or (2) when the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed, and the landlord failed to repair it, or (3) when the landlord authorized or permitted the act, which caused it to become a nuisance occasioning the injury. Under these rules, relied upon by the appellant, she has failed to charge the landlord. She has not alleged that the premises were not equipped with lights, but merely that certain portions thereof were "unlighted and dark," which might have been true because existing lights were not lighted. She has not alleged that the respondent was in possession of the premises at the time of the accident, either exclusively or jointly with her tenant, but, on the contrary, has alleged that the tenant was in possession. There is no allegation that the unlighted and dark condition of the premises existed at the date of the lease, or that the respondent was the owner at the date of the lease. There is no allegation that the respondent, by the terms of the lease, was required to equip the premises with lights or to keep them lighted.

[2] We think that under no possible theory has the plaintiff stated a cause of action against the respondent. We are not at liberty to indulge in inferences regarding evidence which might have been produced, nor strain the language of the pleading to the advantage of appellant. In the language of Silvers v. Grossman, 183 Cal. 696, 192 Pac. 534, quoting a well-settled rule:

> "Presumptions are always against the pleader, and all doubts are to be resolved against him, for it is to be presumed that he has stated his case as favorably as possible to himself."

The judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

67 Cal. App. 701

CITY OF OAKLAND v. WILLIAMS et al.

(Civ. 4785.)

(District Court of Appeal, First District, Division 2, California. June 17, 1924.)

1. Eminent domain ⟹241—Damages for extension of street are finally determined in interlocutory decree.

In proceeding to extend street, under St. 1903, p. 379, § 12, as amended by St. 1909, p. 1040, § 7, compensation to which a party is entitled as damages is finally determined in the interlocutory decree; the final decree determining that compensation has been paid.

2. Eminent domain ⟹262(1) — Interlocutory decree awarding damages for street extension, not appealed from, not reviewable on appeal from final judgment.

In proceeding to extend a street, under St. 1903, p. 376, as amended by St. 1909, p. 1040, interlocutory decree awarding damages to property owners becomes final, if no appeal is taken within 30 days, under section 13, and is not subject to review on appeal from final judgment, in view of Code Civ. Proc. § 956, made applicable by St. 1903, p. 378, § 6, as amended by St. 1909, p. 1037, § 2.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Proceedings by City of Oakland against Thomas S. Williams, Isabella Thompson, and others, to condemn certain property for public street. Judgment for plaintiff, and defendant Thompson appeals. Affirmed.

H. S. Henion, of Oakland, for appellant.

Leon E. Gray, City Atty., and Bestor Robinson, Deputy City Atty., both of Oakland, for respondent.

Jesse Robinson, of Oakland, for defendants.

NOURSE, J. On May 29, 1922, the city of Oakland commenced an action under the street opening act of 1903 (Stats. 1903, p. 376) to condemn certain property for the purpose of extending a public street. Isabella Thompson was joined as a party defendant because of her interest as a lessee of a part of the premises sought to be condemned. At the trial it developed that she had entered into the lease in expectation of the condemnation proceedings, and had, contemporaneously with the execution of the lease, signed a waiver of any claim she might have against her lessor in the event the city should effect a cancellation of the lease by reason of the condemnation of the property. Upon this showing, the trial court held that she had no interest in the property entitling her to any compensation from the city. An interlocutory judgment was then entered fixing the compensation to be paid the other defendants, and awarding to the city the property in suit in accordance with the provisions of section 12 of the act of 1903, as amended. Stats. 1909, p. 1040, § 7.

This judgment was entered on January 20, 1923. Six months later a final judgment was entered in accordance with the provisions of section 31 of the act of 1903, reciting that payment of the amounts awarded to the respective parties by the interlocutory judgment had been made and confirming the award of the property to the city. No appeal was taken from the interlocutory judgment by the defendant Thompson, but on September 7, 1923, more than seven months after its entry, she gave notice of appeal from the final judgment. This is the appeal which is now before us. It is presented on the judgment roll and a bill of exceptions.

The statute under which the cause originated provides that an appeal may be taken from the interlocutory judgment within 30 days from the entry thereof. Section 13. It does not expressly provide for an appeal from the final judgment, but section 6 thereof, as amended (Stats. 1909, p. 1037, § 2), provides that an action brought under the act shall be subject to and governed by the Code of Civil Procedure except where otherwise specified. The general Code provision for appeals is found in section 956 of the Code of Civil Procedure. This section reads in part:

> "The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

By reason of these provisions of the statutory law, respondent contends that the rule must follow that the matters determined in the interlocutory decree cannot be reviewed on an appeal from the final judgment, and cites cases involving appeals from final judgments in divorce and in the partition of real property. The only difference between the cases cited and the case here is that the right of appeal from the interlocutory decrees of divorce and partition is conferred by section

963 of the Code of Civil Procedure, whereas, in this case, it is found in a special act relating to street improvements. Appellant does not contend that the provisions of section 13 of the street opening act are unconstitutional for any reason, but merely argues that section 956 of the Code of Civil Procedure must be read in connection with the other sections of the Code only, and that, so reading it, we must conclude that it does not include a decision or order from which an appeal may be taken under the provisions of an independent statute. But the Code section is general in its terms and plainly covers "any decision or order from which an appeal might have been taken." There is nothing in the context of this section of the Code, or in those following it, which would warrant the conclusion that it was meant to apply only to such a "decision or order" as is specified in section 963.

[1, 2] The compensation to which a party is entitled as damages under the street opening act in an issue which is finally determined in the interlocutory decree. The final decree determines that the compensation has been paid as awarded. If no appeal is taken from the interlocutory decree within the time prescribed in the act, it then becomes final, and is not subject to review on an appeal from the final judgment. No errors are assigned to the final judgment from which the appeal before us was taken, and it must therefore be affirmed.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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68 Cal. App. 131

PEOPLE v. GARCIA. (Cr. 791.)

(District Court of Appeal, Third District, California. July 10, 1924.)

Burglary 🔑**42(3)—Evidence held to warrant conviction.**

Defendant's conviction of burglary *held* warranted by his possession of two watches stolen, his suspicious story that he bought them on a street corner from one he knew only by name, inconsistencies in his testimony and contradictions of material parts by witnesses for prosecution, and his admission of previous conviction of robbery.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Faustino Garcia was convicted of burglary, and appeals. Affirmed.

John R. Connelly, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of burglary of the second degree. This appeal is from the judgment of conviction and the order denying a new trial. The evidence shows clearly that some person committed the burglary charged. The only ground urged for a reversal is that the evidence is insufficient to connect the defendant with the commission of the crime.

Between the hours of 8:30 in the morning and 12:30 in the afternoon of October 9, 1923, during the absence of the occupants, a Japanese residence was broken into and two watches, certain jewelry, two men's suits of clothes, an overcoat, and a valise were stolen therefrom. About the middle of the same month the defendant, by occupation a plumber, entered a restaurant and sold one of the watches to a man sitting at one of the tables therein for $15. In the early part of December, the defendant pawned the other stolen watch for $15 in a pawnshop in Oakland. No trace was discovered of the other stolen property. The defendant admitted that he sold the one watch and pawned the other as stated. Appellant correctly states that mere unexplained possession of the stolen property is not sufficient to connect the defendant with the commission of the burglary. The question is whether such possession and the defendant's explanation thereof and his acts and conduct relative thereto are sufficient proof of guilt.

When arrested, the defendant said that he had purchased the watches from a Mexican named Frank Gonzales for $30; that he had roomed with Gonzales "for some length of time"; that he did not know where Gonzales then was, or his occupation, or how he could be found. The defendant was living at the Eagle Hotel, less than three blocks from the scene of the burglary, during all of October, 1923. At the trial the defendant testified that he purchased the watches from Gonzales in the latter part of October, and that he had known Gonzales but 15 or 20 days prior to the purchase, having seen him but two or three times. In answer to questions put to him by his attorney, he testified as follows:

"Q. Now tell us, in your own words, your conversation in your meeting with this man. A. I just met him on the corner and he asked me if I want to buy those watches. * * * I asked him how much he wanted for those watches, and he said $30 for both of them. Then I asked him if those were his property—belonged to him. He said 'Yes.' * * *

"Q. Now, did he tell you how he come to have a small watch? A. All he told me was, this fellow, the two watches belong to him. The little one was his wife's, and the larger one belong to him.

"Q. Did he tell you why he wanted to sell them? A. All he said was he needed money.

"Q. Did he say anything about wanting to get the watches back after a while? A. He said if he could get the money, then, you know, if I would give it to him, or, if he couldn't, why then he would return the watches.

"Q. If he could get the money, he would return the watches, and, if not, then what? A. Then if he couldn't get the money, then this man could do whatever he wanted to with them.

"Q. Did you see Gonzales any more after you bought the watches from him? A. I saw him about three times after that.

"Q. Did he give you back the money you had paid to him? A. No, he didn't say anything in regard to that."

The defendant's testimony was given through an interpreter, who at times, instead of repeating the answers of the witness in the first person, stated them in the third person, thereby making it necessary to determine from the context whether certain pronouns relate to Gonzales or to the witness. With this explanation, it is reasonably clear that the watches were to be returned to Gonzales, according to defendant's testimony, if the money which the defendant paid for them was returned to him. A friend of defendant testified that he was present when the defendant paid for the watches.

There is much to discredit defendant's explanation of his possession of the watches. According to his own testimony, Gonzales was entitled to the return of the watches upon repayment of the $30 given him by defendant. Yet, without anything being said thereafter about repayment, the defendant sold one of them. He testified that he purchased the watches in the latter part of October. A witness for the people testified that defendant sold him one of the watches about the middle of October, about a week after the burglary. The defendant told the arresting officer that he had roomed with Gonzales "for some length of time," yet he did not know the latter's occupation, and at the trial he testified that he had known Gonzales but 15 or 20 days prior to the purchase of the watches from him, and had seen him but two or three times, and knew him "just by sight." The story of the street corner purchase of the two watches from a person of whom defendant knew nothing except his name was in itself suspicious, especially so in view of the fact that the purchase was not made in the course of any business in which the defendant was engaged. The inconsistencies in defendant's testimony and the contradictions of material parts thereof by witnesses for the prosecution justify the inference that his explanation of his possession of the stolen property is false. The defendant, on the witness stand, admitted his prior conviction of the crime of robbery. The evidence as a whole is sufficient to warrant the verdict. People v. Le Roy (Cal. Sup.) 221 Pac. 353; People v. Lang, 142 Cal. 482, 76 Pac. 232; People v. Howard, 58 Cal. App. 340, 208 Pac. 1022; People v. Cataline, 54 Cal. App. 36, 200 Pac. 1060; People v. Miller, 45 Cal. App. 494, 188 Pac. 52.

The judgment and the order are affirmed.

I concur: PLUMMER, J.

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68 Cal. App. 214

PEOPLE v. GIANELLO. (Cr. 1088.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1924.)

1. Robbery 🔑24(1)—Evidence held to sustain conviction of aiding and abetting.

Evidence *held* to sustain conviction of aiding and abetting a holdup.

2. Criminal law 🔑823(16)—Instruction as to aiding, abetting, etc., omitting criminal intent, held aided by other instruction.

Instruction that, if defendant feloniously took property, or aided and abetted and assisted, he should be found guilty, was not error, where another instruction defined "abet" as including knowledge and criminal intent.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

John Gianello was convicted of robbery, and he appeals. Affirmed.

S. S. Hahn, John L. Richardson, and T. E. Parke, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

WORKS, J. One Jesse Taylor "held up" one Clark at about noon of a certain day. Clark was at the time in charge of a "store," which was connected with a certain creamery in Huntington Park, and Taylor took money and other personal property from the place. Defendant in this action was informed against as a principal in the perpetration of the robbery actually committed by Taylor, under the statute which fastens guilt upon one who aids and abets another in the commission of a public offense. Defendant was convicted, and he appeals from the judgment and from the order of the trial court denying his motion for a new trial.

[1] Appellant contends that there was no evidence to show that he aided and abetted Taylor in the perpetration of the robbery. Taking the evidence in the order in which it went to the jury, various of the witnesses testified as follows: Mrs. Marie E. Douglass said that she went to the creamery, as a customer, around noon; that she then saw Gianello sitting in an old Ford car near the creamery; that she drove past the car in which he sat, and parked her car in the rear of it; that she alighted from her car, and, on looking toward the Ford, she observed that Gianello had turned, and was looking at her, and that he continued to

look at her; that she then walked toward the door of the creamery, and Taylor was standing there with a wire basket of eggs and butter, and appeared to be looking at Gianello; that she went into the creamery, where she saw Clark, and that she remained inside a minute or two; that when she came out the car in which Gianello had been waiting was no longer there, and that she saw neither Gianello nor Taylor. Clark testified that Taylor entered the creamery store, covered him with a "gun," took money from the cash register, which he forced Clark to open, opened a "case," and took out a tray of butter and eggs, and left the place, and that he met Mrs. Douglass at the door as he departed. Charles H. Bevan, who owned a place of business about 1000 feet from the creamery, testified that he saw Gianello in an automobile standing back of Bevan's store at about 11:30 on the morning of the day on which Taylor robbed the creamery, that Taylor was at the time in the yard back of the store among certain barrels, and that Bevan then had a conversation with his son, Charles H. Bevan, Jr., who was in the store at the time. Bevan, Jr., testified that he saw Gianello at the time and place mentioned by his father in an old dilapidated Ford car, which had its top down; that he then had a conversation with his father, and went into the yard and talked with Taylor; that the latter was then about 50 feet from the Ford in which Gianello was seated, and that the latter was near enough to hear the conversation between him and Taylor; that he asked Taylor what he was doing, stealing the barrels; that Taylor said "he had been there before, and the defendant here told him to put them back, but he had already taken barrels before, because he told me he was the garbage collector"; that Taylor then started to throw a barrel at him, but that Gianello made him stop, and Taylor threw the barrel on the ground instead; that Gianello told Bevan that he was the garbage collector, and had been there before and got barrels; and that, after the conversation with the men, Taylor got into the Ford with Gianello, and the two drove away. The wife of Clark testified that she went to the creamery store about 12 o'clock on the day of the robbery; that when she got within about 50 yards of the place she saw a man run out of the store with a tray of eggs and some butter in his arms, and that he was in a terrible hurry; that he jumped on the running board of a car that was not in front of the store, but which stood about two machine lengths from the entrance; that the car was a Ford, which had its top down, and was a rickety old-looking machine, and had no paint on it; that as the man jumped on the running board of the car it started off; and that he hadn't gotten into the machine when she last saw him. Herman Bossard, a constable and the officer who arrested Gianello, testified that he saw the latter two days after the robbery at a ranch owned by Gianello, a mile and a half distant from Huntington Park; that Taylor and a man named Beal were also present at the time; that there was then on the ranch an old Ford touring car in very poor condition, and with paint in poor condition; and that he saw broken eggs and egg shells on the right-hand side of the floor boards of the front of the car, on the right fender, and on the right running board. Gianello took the stand in his own behalf, and testified that he was on his ranch at the time the robbery was committed; that immediately preceding his going to the ranch, where he arrived at about 11:50 in the morning, he had been at Vernon collecting garbage; that he knew Taylor, but that he did not see him on the day of the robbery; that he did not drive a Ford car on that day, and that he did not know how to drive a Ford. With this array of evidence, it is futile to assert that the jury was not justified in finding that Gianello aided and abetted Taylor in committing the robbery, and that he did so with guilty knowledge.

[2] The remaining point made by appellant is that the trial court erred in giving a certain instruction to the jury, which we shorten by ellipsis, as follows:

> "If you believe from the evidence * * * that the defendant feloniously took * * * the property * * * as charged in the information, * * * or aided and abetted and assisted any other person or persons to so feloniously take * * * the property * * * as charged in the information, * * * then you should find the defendant guilty."

It is contended that the giving of this instruction was error for the reason that it omits language telling the jury that, in order to convict, its members must have found that appellant knowingly and with criminal intent aided, abetted, and assisted another person in taking the property, which was the subject of the robbery. The point is without merit, as the court gave another instruction by which the jury was informed that for one person "to abet another person in the commission of a criminal offense, simply means, to knowingly and with criminal intent, aid, promote, encourage, or instigate, by act or counsel, or by both act and counsel, the commission of such criminal offense."

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

68 Cal. App. 189

BLAU v. BLOSSER. (Civ. 4742.)

(District Court of Appeal, First District, Division 1, California. July 21, 1924.)

1. Judgment 🔑256(1)—Findings on cross-complaints held outside issues, and judgment not res judicata.

Where court excluded evidence to support cross-complaints, and sustained motion to strike them out, though no order to that effect was entered, finding that allegations of cross-complaints were untrue, and answers thereto true, were outside the issues, and, in any actions brought upon the same allegations, the judgment could not operate as res judicata or estoppel under Code Civ. Proc. § 1911.

2. Appeal and error 🔑1011(1)—Finding based on conflicting evidence not disturbed.

Where the evidence is conflicting, trial court's findings based thereon cannot be disturbed.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by G. J. Blau against Dan Blosser. Judgment for plaintiff, and defendant appeals. Affirmed.

N. Lindsay South and Geo. G. Graham, both of Fresno, for appellant.

Strother P. Walton, of Fresno, for respondent.

ST. SURE, J. This is an appeal by defendant from judgment in an action of unlawful detainer.

The premises directly involved constitute the west half of the ground floor of a building on Mariposa street, Fresno, numbered 2027. The other half of the same floor is numbered 2029. As owner of the three-story brick building, in which the premises involved are located, Lena Brownstone, on April 7, 1919, leased the entire ground floor (2027 and 2029 Mariposa street) to G. F. Blau for a term of five years from May 1, 1919. On May 1, 1919, the time of the commencement of the lease, Blau owned a barber shop at 2027 Mariposa street. He also, with Dan Blosser as a partner, operated the B & B Realty Company, at 2029 Mariposa street. Under the Brownstone lease to Blau the rental of the entire floor was $160 per month for the first three years, and $175 for the last two. The lease also contained a provision against subletting for any purposes other than those mentioned in the lease, being the businesses for which it was then used by Blau either as owner or partner. In November, 1919, Blau subleased 2027 to one Guest, for the remainder of the five-year term, and also sold to the latter the barber shop he had been conducting there. Under this sublease Guest was to pay $125 per month for two and one-half years and $140 for the two years remaining on the original lease. The B & B Realty Company paid $35 for 2029, or the balance necessary to make the full rental of $160 for the first three years. In December of the same year (1919) Blau withdrew from the partnership with Blosser, taking the money due him as a partner, and went to his ranch. Blau testified that he retained both the lease from Mrs. Brownstone and the sublease to Guest. Blosser asserts that the Brownstone lease was left with him in the B & B Company safe and the Guest sublease was turned over to him a few months after Blau had gone to his ranch. He also contends that the lease from Mrs. Brownstone was taken in Blau's name alone, but for the benefit of the realty company, and that the sublease to Guest was likewise made for the benefit of the realty company. He also says that, on the withdrawal of Blau from the real estate firm, it was agreed that the Brownstone lease was Blosser's alone, that Blau had no further interest in it, and that the same was true as to any dealings in connection with the Guest sublease. After Blau's withdrawal from the firm, Blosser, with his son, continued to occupy 2029, operating under the name B & B Realty Company, as had Blau and Blosser. Payments for the Guest sublease were made to Blosser after Blau's departure, and Blosser in turn made payment to Mrs. Brownstone's agent, Gill, for the entire floor, the receipts therefor probably being taken in Blau's name. Shortly after Blau left for the ranch (February, 1920), Blosser bought the barber shop from Guest, and with Blau's assent took an assignment of the Guest sublease. The front part of the premises (2027) was then occupied by a shoe repairing business. In February, 1923, Blosser remodeled the entire first floor, Nos. 2027 and 2029, and exchanged the position of the real estate office with the shoe repair shop (theretofore in front of the barber shop) and a bootblack stand. For these changes he testified he secured permission from Gill, agent of the building, expending in cost of labor and materials about $1,000. Soon after this, the notice upon which this action was brought was served upon him. The amount demanded as rent is the $140 per month specified as the rent for the last two years of the term under the sublease from Blau to Guest.

A special defense was made admitting the execution of the original lease to Blau alone, but asserting that Blau and Blosser were partners and agreed to take a lease on the first floor of the building in Blau's name alone, but for the benefit of the B & B Realty Company. The same contention, that the lease was made for the benefit of the B & B Realty Company, is advanced with relation to the sublease executed by Blau to Guest.

A separate defense is made that, on withdrawal from the realty partnership, Blau surrendered his entire right, title, and interest in the Brownstone lease, and also the occupancy and possession of the property thereunder, to defendant. Thereafter, according to this defense, Blau voluntarily abandoned the premises, and never thereafter, until demand in this action, asserted any interest in, or ownership thereof.

A cross-complaint alleged three causes of action which were found by the court to be unavailable in an action of unlawful detainer. This appellant conceded to be correct. Arnold v. Krigbaum, 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D, 370, is direct authority on the point.

The court made findings in favor of plaintiff's allegations setting out the elements of his cause of action in unlawful detainer, except that alleging damage suffered on account of defendant's holding over, and found against the allegations in defendant's answer based on or involved with the claim that the Brownstone lease or the Guest sublease were made for the benefit of the B & B Realty Company; that Blau had abandoned the partnership and delivered his interest in the lease to Blosser; and never thereafter asserted or retained any interest in said partnership or lease.

The trial court also found that all of the allegations of the counterclaim and cross-complaint are untrue; and that the allegations in the answer to the cross-complaint are true.

As conclusions of law the court decided that plaintiff should be restored to possession and recover the four months' rent sued for. The Guest sublease, assigned to Blosser, was declared forfeited, and the plaintiff given costs of suit.

[1] The appellant urges three points for reversal. The first of these is that the court erred in finding the allegations of the cross-complaint to be untrue, after having refused to receive any evidence thereon, and that said finding is not sustained by what evidence incidentally appears in the testimony on the subjects of said cross-complaint. Appellant's chief objection in this regard is that, though he conceded the correctness of the rule that a cross-complaint or counterclaim has no place in an action of unlawful detainer, a finding such as the one complained of, if permitted to become a final judgment, may be pleaded and operate as a defense in any action brought to recover on the items embraced in the cross-complaint. He cites no authorities on the point, merely stating that the damage is so apparent that no citation of authorities is necessary. Respondent's position is that the findings relating to the counterclaim and cross-complaint were outside the issues, and immaterial, and that the judgment does not in any way depend upon them. With the latter we agree. With his statement that the finding is not erroneous because no evidence was introduced in support of the cross-complaint or counterclaim, we do not agree. The motion to strike out the entire cross-complaint and counterclaim with the objection to any evidence being received under them, was made by respondent, and though no order striking them out appears, it was evident, by the court's refusal to allow evidence to be introduced touching them, and his stated agreement that they had no place in the action, that the order was intended, and its formal making inadvertently overlooked. Following such action, a finding that the allegations of the cross-complaint were untrue, was wholly without the issues presented. The same follows as to the finding that the allegations of the answer to the cross-complaint are true. Collins v. Gray, 154 Cal. 131, 97 Pac. 142; Thayer v. Tyler, 169 Cal. 671, 147 Pac. 979. The judgment was in no way dependent on them. The remainder of the findings fully cover all the issues necessary to a judgment in unlawful detainer, and the judgment is fully supported by them. Any action brought by defendant on the same causes of action attempted to be here set up by cross-complaint or counterclaim, and denied proof by the trial court as not proper subjects of litigation (Arnold v. Krigbaum, supra) could not be barred by the plea of res judicata, nor could the judgment of the court below operate as an estoppel on the particular items. They were not questions which might have been litigated in this action. (Chapman v. Hughes, 134 Cal. 643, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Estate of Funkenstein, 170 Cal. 594, 150 Pac. 987; Code Civ. Proc., § 1911), hence the judgment is in no way conclusive upon them. In so holding we have not overlooked the discussion and decision of Dobbins v. Economic Gas Co., 182 Cal. 616, 189 Pac. 1073, and cases there cited. The judgments there reviewed on this particular point were grounded on matters voluntarily put in issue, tried, and determined. This is not such a case. No damages accruing, the judgment is not to be reversed on this ground.

[2] The second point advanced by appellant is that the record does not support the finding that defendant is guilty of withholding the premises in default of payment of rent, and the judgment for plaintiff for restoration to possession grounded thereon. Argument on this point is based on a statement that the defendant has paid or tendered the amount of the rent for the entire first floor, of which the premises in controversy are a part, each month, and has been forestalled for the months for which rent is here found to be in default, by the action of plaintiff in collecting the rents and applying them on the Brownstone lease by payment to the agent, Gill. On this entire question there was a conflict of testimony, that is, whether the payments on the lease were made by defendant as agent for plaintiff, or on his own account under the theory of an assignment of

the lease. The court having decided in favor of Blau on this score, the argument that a lease for years is a chattel and an assignment thereof need not be in writing, is unavailing.

The same may be said for appellant's third point on the finding that plaintiff is entitled to the possession of the premises. Appellant's argument on this point is based on conclusions drawn from the evidence favorable to his theory of the case. The conflict here, regardless of the trial court's reason for the decision expounded by appellant, which does not appear in the record, was resolved in plaintiff's favor. On the oft-repeated conflict rule, interference with this finding or the judgment based on it, is forbidden this court.

[4] The main point in the case, as appellant and respondent agree, is: "Whether or not the lease was originally taken by Blau for his individual benefit or whether it was taken by Blau and Blosser for the benefit of the partnership."

The court heard conflicting evidence on the taking of the lease, and conducted an examination of the plaintiff on the point. Its findings on the issues in the case resting on the determination of this fact were adverse to defendant.

For the reasons stated, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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68 Cal. App. 195

HUGHES v. HUGHES. (Civ. 4880.)

(District Court of Appeal, First District, Division 2, California. July 21, 1924.)

1. Divorce 🔑245(1)—Jurisdiction of trial court to modify order as to alimony not divested or modified by contract of parties.

Jurisdiction of trial court to modify an interlocutory decree of divorce allowing permanent maintenance was founded on statute, and was not divested or modified by contract of the parties as to the amount, so as to prevent changing the decree.

2. Evidence 🔑215(1)—Contract between parties admissible as an admission on motion to reduce alimony.

On motion to change the amount of alimony as fixed by an interlocutory decree of divorce, a contract between the parties fixing the amount of alimony was admissible in evidence as an admission.

3. Divorce 🔑245(3)—Trial court held to have authority to determine whether contract was invalid on motion to modify alimony.

On motion to modify a decree of divorce as to alimony, trial court had authority to hear and determine whether a contract between the parties as to alimony was invalid, for fraud or any other reason, not having previously done so.

4. Divorce 🔑286—Presumed that trial court properly determined questions as to fraud in contract offered in evidence.

On appeal from an order modifying an interlocutory decree of divorce as to alimony, in absence of showing to the contrary, it is presumed that the trial court properly determined whether a contract between the parties as to alimony was invalid for fraud or any other reason.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit by Cornelia H. Hughes against Wilfred K. Hughes. From an order modifying an interlocutory decree of divorce, plaintiff appeals. Affirmed.

McKee, Tasheira & Wahrhaftig, of Oakland, for appellant.

Arthur J. Dannenbaum, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against her husband to obtain a decree of divorce. The defendant did not appear, and on the 23d day of September, 1921, an interlocutory decree was entered against him. On the 25th day of September, 1922, a final decree was entered. In her complaint the plaintiff pleaded that $150 per month was a reasonable sum to be allowed her for permanent maintenance. In the interlocutory decree the trial court awarded that sum, and it may be said in passing that the same award was repeated in the final judgment. On the 21st day of September, 1922, the defendant executed an affidavit alleging changes in his business affairs and his inability to pay more than $75 per month, and asked that the allowance be reduced to the amount last mentioned. Thereupon an order to show cause was issued, a hearing was had, and the permanent maintenance awarded in the interlocutory decree was modified as requested by the defendant. From the order modifying the interlocutory decree the plaintiff has appealed, under section 953a of the Code of Civil Procedure.

[1] The appellant makes one point and that is that the trial court was without jurisdiction to make the order. To support that contention she calls attention to the fact that on the 15th day of August, 1921, the parties made an agreement in writing settling their property rights. In that behalf she calls attention to paragraph IV of the contract, which provides as follows:

"And in further consideration of the premises said second party agrees to pay to said first party until she shall remarry the sum of $150 per month as an allowance, commencing on the 1st day of August, 1921, and payable on the 1st day of each and every succeeding month thereafter."

Thereupon she contends that the trial court had no jurisdiction to make the order appealed from. We think she has misconceived her rights, and that she confuses her contractual rights with the powers of the court. As clearly appears from the facts above stated, the contract made by the parties is not involved in this litigation. To say that the trial court had no jurisdiction to make the order appealed from has no more support than to say that the trial court had no authority to enter an interlocutory decree of divorce. The trial court in making both orders obtained its jurisdiction from the statute. That jurisdiction was neither divested nor modified by the contract made by the parties. As to what right or rights the plaintiff has to-day under her contract, this court is expressing no opinion, but that matter can be determined only in a proper action based on that contract.

[2-4] After the parties had made their contract, if it had been in all respects a valid instrument, either party could have presented the contract to the trial court in the divorce proceeding, and under proper issues made by the pleadings could have asked the trial court to have adopted the provisions made in the contract theretofore made by the parties. The record shows that in her complaint the appellant pleaded the existence of the contract; but the record does not show whether the trial court, in framing its decree in that case, adopted the contract, or rejected it, or ignored it. The fact does appear that the amount of permanent maintenance agreed upon in the contract was the same as the amount fixed in the interlocutory decree. But it does not appear that the decree adopted its figures from, or was based on, the contract. When the motion for the order appealed from was on hearing, the contract was offered in evidence by the appellant and it was admitted. The ruling was as it should be, for every admission for or against either party was admissible; but the record does not show whether either party presented evidence to the effect that the contract was invalid because it was tinctured with fraud, or for any other reason. Conceding that such contentions were made, the trial court had the authority to hear and determine all such questions as it had not previously done so. Hogarty v. Hogarty, 188 Cal. 625, 206 Pac. 79. As the record does not show to the contrary, we must presume on this appeal that the court properly determined those questions.

We find no error in the record. The order is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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68 Cal. App. 139

BARRIOS & CO., Inc., v. G. V. PETTIGREW CO., Inc. (Civ. 4793.)

(District Court of Appeal, First District, Division 2, California. July 11, 1924.)

1. Gaming 🔑49(3) — Evidence held not to show an illegal wagering sales contract.

In action for difference between purchase price of prunes and price for which they were resold to seller, evidence *held* insufficient to show intention that delivery would not be asked for or made, so as to show the sale contract an illegal wagering one.

2. Gaming 🔑12—Mutual understanding that there shall be no delivery is necessary to avoid contract.

Sales contract, under which property is sold for future delivery and repurchased by seller, legitimate on its face, could not be avoided because buyer did not intend to demand or receive the goods; but such understanding must be mutual.

3. Appeal and error 🔑909(5)—Contrary presumed legal in support of judgment for plaintiff.

In action for difference in price of prunes purchased by plaintiff from defendant, and resale price from plaintiff to defendant, innocence of intent to gamble and regularity and fairness of transaction must be presumed in favor of judgment for plaintiff, in view of Code Civ. Proc. § 1963.

4. Appeal and error 🔑1071(5)—Finding for plaintiff on count on contracts rendered additional finding on account stated, harmless.

The court having correctly found for plaintiff, on count on contracts of sale and resale, additional finding on account stated was harmless.

5. Appeal and error 🔑1050(1)—Admission of contract claimed to have been superseded by another held not prejudicial.

In action upon a sales contract, admission of earlier contract, claimed to have been superseded, where both bore all elements of a contract, sole difference being statement in the earlier one identifying the goods, and no objection to that feature having been offered, *held* not prejudicial.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Barrios & Company, Inc., against G. V. Pettigrew Company, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Glensor, Clewe & Van Dine, of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued for and recovered a judgment for $1,483.41 alleged to be owing on a sales contract. The defendant has appealed from the judgment, and has brought up the judgment roll and a bill of exceptions.

The plaintiff pleaded its cause of action in three counts. In the first count it pleaded that within two years last past, at the city and county of San Francisco, state of California, defendant above named became and now is indebted to plaintiff above named in the sum of $1,433.25, being the difference between the purchase price of five cars of Sacramento Valley prunes, purchased by plaintiff from defendant, and the resale price of said prunes from plaintiff to defendant. The second count was based on an open book account, but at the close of the plaintiff's case that count was dismissed. The third count pleaded an account stated. The defendant interposed an answer which contains specific denials, but does not plead any new matter. The trial court made findings in favor of the plaintiff in which it found on the first count and on the third count in favor of the plaintiff.

The bill of exceptions contains three memorandum contracts. By the first one, which is dated February 1, 1922, the plaintiff bought of the defendant five carloads Sacramento Valley prunes, crop of 1922, 60,000 pounds to the car, sizes ranging 40/50 to 70/80 at 6¾ cents, bulk basis, time of shipment, September, October 15, 1922. The second contract was dated August 16, 1922, and is in form slightly less formal than the first instrument. It purports to be a sale by the defendant to the plaintiff of the same quantity of the same article at 7¼ cents per pound. That paper contains this additional matter: "This is a resale of G. V. Pettigrew Co., Inc., regular dried fruit contract dated February 1, 1922." On August 18, 1922, the parties executed another instrument, which both parties conceded to be a more formal statement of the transaction dated August 16, 1922.

[1] On the trial of the case the plaintiff called as a witness, Alberto Barrios, vice president of the plaintiff corporation, and did not call any other witnesses. The defendant did not call any witness. As to what was the intention of the contracting parties at the time that the instrument dated February 1, 1922, was executed, or when either of the subsequent instruments were executed, the record is silent, except that Mr. Barrios testified that he had several conversations with Mr. Pettigrew, subsequent to the second contract of August 18, 1922, and in one of those conversations, after Mr. Pettigrew had bought the prunes from him, all the witness wanted was the difference in the price or the profit he made; in other words, it was a wash sale, and the witness was only interested in the difference between the two contracts because Pettigrew was supposed to deliver to Barrios, and Barrios was supposed to deliver to Pettigrew. The witness further stated that he did not know whether there were any prunes—any actual prunes represented by the contract. He expected prunes if he had sold to a third party. When the witness entered into the contract, August 18, 1922, the whole transaction became a wash sale, and the witness was only interested in the difference between the two contracts. That is done every day. On October 2, 1922, the plaintiff presented the defendant a bill, "To washout on five cars 60,000 pounds net each 40/70 Sacramento Valley prunes, * * * difference due us $1,433.25." The appellant contends that the whole transaction was a "washout" sale within the technical meaning of that expression as used by the trade when the trade is referring to a gambling contract. Stafford, etc., Co. v. Rock, etc., Co., 94 Kan. 360, 146 Pac. 1139.

In support of its contention in this behalf the appellant cites many authorities to the effect that a recovery cannot be had on a washout sale, which is a gambling transaction. The legal proposition, for which the appellant contends, the respondent does not deny; but the respondent contends that the evidence in the record does not show the transaction to have been a gambling transaction. The respondent concedes that some washout sales are gambling transactions, but that every washout sale is not necessarily a gambling transaction. In this behalf the respondent contends that washout sale is a gambling transaction when it is the intention of both parties that no delivery of the subject of the sale is to be made, and the respondent contends that there is no evidence in the record showing that, when the contract of February 1, 1922, was executed, it was the intention of both parties that no delivery would be asked for or made. In this contention the respondent is entirely supported by the record.

[2] The same remark can be made regarding the evidence of the intention of the parties on August 18, 1922. The utmost that can be said in favor of the appellant's position is that there is possibly slight evidence to the effect that the plaintiff Barrios did not have any intention of demanding and receiving the goods. But the intention of one party does not make a contract. In order to make such a contract illegal the intention to gamble must be mutual. In re A. B. Baxter & Co., 152 Fed. 137, 81 C. C. A. 355, 11 Ann. Cas. 437, and extended note on page 440. The burden of pleading and proving the illegality of the transaction rested with the appellant. Whipley v. Flower, 6 Cal. 630; In re A. B. Baxter & Co., supra.

[3] In the instant case every presumption is in favor of the judgment; furthermore, it is presumed that both parties are innocent of crime or wrong, and that all private transactions have been fair and regular. Code Civ. Proc. § 1963. The trial court heard the evidence and saw the witness. It

found the transaction to be legal and not illegal. The record certainly is not so clear as to show any abuse of power on the part of the trial court in finding the fact against the appellant.

[4] The appellant contends that the trial court should not have found in favor of the plaintiff on the issue of a stated account. The respondent replies that the finding is not necessarily important because the trial court found against the appellant on the first count. We think the respondent's position is correct. The appellant also contends that the trial court should have estimated the damages by following sections 3308, 3311, 3353, and 3354 of the Civil Code. A most cursory reading of those sections shows that they are not applicable to the facts above stated.

[5] Complaint is also made that the trial court erred in receiving in evidence the contract dated August 16, 1922. The point in that connection seems to be that said paper was superseded by the paper dated August 18th. To this objection there are several answers. The contract dated August 16th, as stated above, is very slightly less formal than the contract dated August 18, 1922. The appellant refers to the first as a sales memo., whereas it could have referred to either of them as a sales memo., with equal propriety. Moreover, each paper seems to contain every element to constitute a contract. The paper dated August 16th, had on its face, "This is a resale of C. V. Pettigrew, Inc., regular dried fruit contract dated February 1, 1922." That statement was not a necessary part of the contract and merely served to identify the goods. No objection to that feature was contained in the objection interposed to the paper when it was offered in evidence. Except as we have recited, the provisions of the paper dated August 18, 1922, do not differ from the provisions of the paper dated August 16, 1922, and therefore the appellant could not in any manner have been prejudiced by the ruling of the trial court admitting in evidence the paper dated August 16, 1922.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(67 Cal. App. 591)

IMPERIAL WATER CO. NO. 8 v. CAMERON et ux. (Civ. 3946.)

(District Court of Appeal, Second District, Division 2, California. June 4, 1924.)

1. Landlord and tenant ⚷110(1)—Provision that landlord should take possession on tenants' "abandonment" inapplicable, where lessees repudiated lease before it became operative.

Lease provision that, if lessee abandoned premises while in default, lessor should "take possession," relet, etc., did not apply where lessees repudiated lease before it became operative, since "abandonment" meant of the premises, and not of the lease, and "take possession" meant retake possession.

2. Landlord and tenant ⚷49(3)—Lessor's measure of damages for repudiation of executory contract for lease stated.

Lessor's measure of damages for repudiation of executory contract for lease, before lessee takes possession, is difference between agreed rent and sum for which lessor could have relet the premises by exercise of reasonable diligence.

3. Landlord and tenant ⚷49(3)—Lessor's damages for repudiation of lease commencing in future, before lessee takes possession, are rents as they accrue.

Under lease in præsenti, though for a term commencing in future, lessor's damages for repudiation before lessee takes possession are the agreed installments of rent, as and when they accrue.

4. Landlord and tenant ⚷71—Lease, leaving spaces for date of commencement of term to be filled in when lessor finished building, held valid lease in præsenti for future term.

Lease containing words of present demise, and nothing to indicate contemplation of other or further instrument, though spaces for date when term should commence were left blank, to be filled in on completion by lessor of a second story on the rented building, constituted a valid lease in præsenti for term commencing in future.

5. Landlord and tenant ⚷49(3)—Lease held to authorize recovery of accrued rent notwithstanding lessees' repudiation and failure to take possession.

Under executed lease to commence in future, lessor could recover accrued rent, notwithstanding lessees' failure to take possession and repudiation of the lease before it became operative.

6. Landlord and tenant ⚷230(3)—Lessee must plead recoupment of value of lessor's occupancy.

In action to recover accrued rent under lease giving lessor right of re-entry and reletting on lessees' abandonment, lessees' right to deduction of value of lessor's occupancy, subsequent to accrual of re-entry right, was rendered unavailing by failure to plead it in answer.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Imperial Water Company No. 8 against H. A. Cameron and wife. Judgment for defendants, and plaintiff appeals. Reversed.

James L. Allen, of Santa Ana, for appellant.

C. L. Brown, of El Centro, for respondents.

FINLAYSON, P. J. This is an action to recover rent alleged to be due under the terms of a written lease. Judgment passed for defendants and plaintiff appeals.

The facts are these: Plaintiff owned a lot in the city of Brawley, upon which stood a one-story building, then occupied by plaintiff, and to which it was about to add a second story. Defendants, husband and wife, desired to rent the ground floor upon the completion of the contemplated improvement. On December 22, 1920, the parties executed a written instrument wherein plaintiff is designated as the party of the first part and "lessor," and defendants are designated as parties of the second part and "lessees." That document, so far as it is material to our inquiry, reads:

"The said lessor * * * have leased, demised and let, and by these presents do lease, demise and let unto the said lessees, and the said lessees do hire and take of and from the said lessor, all of the following described premises, * * * to wit: The entire ground floor of that certain building located on lot fifteen * * * for the term of three (3) years, commencing on the —— day of ——, 19—, and ending on the —— day of ——, 19—, at a rental of sixty-three hundred dollars ($6,300.00) for said term, which said rental shall be paid in monthly installments of one hundred and seventy-five dollars ($175.00) each, the first installment on the —— day of ——, 19—, and a like installment in advance on the —— day of each and every month thereafter during the full term hereof, it being understood and agreed herein that the said party of the first part is about to erect a second story upon the building now on said lot and to occupy the same, and that this lease shall commence upon the day of the occupancy by said parties of the second part, after the completion thereof and the vacating of the entire first floor by the said party of the first part; and by reason thereof the dates of the commencement and ending of this lease are at this time left blank, and both parties hereto agree that the same may be filled in at the time the parties of the second part are to occupy said premises. Said real property is so demised and let upon the conditions and restrictions following, to wit: * * *." Then follows a number of paragraphs, of which the seventh is as follows: "7. If the lessees should abandon said premises while in default in the payment of rental, the lessor shall take possession thereof, and relet the same upon such terms and rental as may reasonably be obtained, and any amount so received, less the expense of said reletting, including agent's commission, shall be applied in reduction of the rental to be paid by the lessees hereunder, and the lessor may recover from the lessees any deficiency, or at the option of the lessor this lease may, in such event, be canceled."

On February 14, 1921, plaintiff completed the construction of the second story, vacated the first story formerly occupied by it, notified defendants that the ground floor was ready for their use and occupancy, tendered them the keys thereto and demanded payment of the first monthly installment of rent. Defendants refused to enter into possession or to pay any rent. Indeed, prior to plaintiff's tender of possession, i. e., on January 12, 1921, and again on January 24, 1921, defendants notified plaintiff in writing that, for financial reasons, they would be unable to occupy the premises and that they would not do so. Defendants never have entered into possession. This action was brought to recover the stipulated rent for each of the three months commencing, respectively, February 14, March 14, and April 14, 1921. Defendants answered, denying that any rent was due.

The trial court found that plaintiff made no effort to, and in fact did not, relet the premises. There is no question as to the sufficiency of the evidence to support this finding. The court below, so we are informed, gave judgment for the defendants upon the theory that, by reason of the seventh paragraph of the contract, plaintiff's sole remedy, if it did not choose to cancel the lease, was to relet the premises and to sue for the difference between the rent so obtained and the rent agreed to be paid by defendants.

[1] We agree with appellant that the seventh paragraph of the contract means that, if the lessees should actually take possession upon the commencement of the term and should abandon the premises *after* having thus entered into possession, and while they were in default in the payment of rent, then, and only then, would the lessor be put to an election to cancel the lease or to re-enter and relet the premises and sue for any deficiency which there might be between the agreed rent and the rent obtained by such reletting. We think, therefore, that this paragraph of the lease is not applicable to the facts of this case, since respondents repudiated their lease *before* the commencement of the term provided for therein, and they never did enter into possession of the premises. As will be recalled, the language of the seventh paragraph is: "If the lessees should abandon said premises while in default in the payment of rental, the lessor shall take possession thereof and relet the same," etc. This language has reference to an abandonment of the premises, not to an abandonment of the contract. As here understood, an abandonment of the premises by the lessees implies a previous possession by them. This is made clear by the provision that, if the lessees shall abandon the premises while in default in the payment of rent, "the lessor shall take possession." This provision that the lessor "shall take possession" can only mean that it shall *retake* possession, which it could do only after its original possession had been interrupted by the assumption of possession on the part of the lessees. But the lessor's possession was never interrupted; it was continuous. There was no possession for it to retake. Moreover, this paragraph of the lease is to be applicable when and only when the lessees shall abandon the premises "while in default in the payment of rental." But respondents repudiated their contract before

any installment of rent could accrue or become payable, and not "while in default in the payment" thereof.

[2, 3] It only remains to consider whether, independently of paragraph seven of the lease, appellant's remedy is limited to a recovery of damages, measured by the difference between the agreed rent and the actual value of the premises, or whether it was entitled to the rent as and when it accrued. That is to say: Does the written instrument evidence an executory contract—an agreement to give a lease—or is it a lease in præsenti? For, if it be the former, appellant's right of recovery will be limited to damages measured by the difference between the rent fixed in the agreement and the sum for which the premises could be rented by the exercise of reasonable diligence (Cooper v. Aiello, 93 N. J. Law, 336, 107 Atl. 473); whereas, if the contract be a present lease, even though it be the lease of a term to commence in futuro, appellant will be entitled to recover the agreed installments of rent as and when they accrue (see authorities cited infra).

[4] The instrument contains words of present demise, and there is nothing to indicate that the parties contemplated the execution of any other or further instrument. It is true there is no fixed day named or expressed when the three-year term shall commence. But the day when it was to commence and the day on which respondents were to have the right to take possession was capable of being made certain. It was the day when the building should be completed and the ground floor should be ready for defendants' occupancy. Id certum est quod certum reddi potest. We think, therefore, that the instrument in question was a valid lease in præsenti, for a term to commence in futuro—that is to say, on the 14th of February, 1921, that being the day when the building was completed and the leased premises were ready for occupancy by respondents. See Hammond v. Barton, 93 Wis. 183, 67 N. W. 412; Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836; Becar v. Flues, 64 N. Y. 518; and note to Johnston v. Carson, etc., Min. Co., 15 L. R. A. (N. S.) 1079.

[5] Since the contract was an executed lease, i e., a demise in præsenti of a term to commence in futuro, appellant is entitled to sue for and to recover the accrued rent, notwithstanding respondents' failure to take possession. The rule is correctly stated by Mr. Tiffany, who says:

> "Apart from any question of the exclusion of the lessee from the demised premises, the cases are generally to the effect that the mere failure of the lessee to take possession is no defense to the claim for rent, since his liability is fixed by the reservation of rent or by his covenant to pay rent, and he cannot escape this liability by failing to utilize the premises." Tiffany on Landlord and Tenant, vol. 1, p. 1154.

As was said by the New York court of appeals in Becar v. Flues, supra, "it [a lease in præsenti to commence in futuro] is like a sale of specific personal property to be delivered." In the case of such a sale the title passes to the vendee, and he is liable for the purchase price. Lassing v. James, 107 Cal. 348, 358, 40 Pac. 534. The following cases, among others, support Mr. Tiffany's statement of the rule: Becar v. Flues, supra; Douglass & Easton v. Branch Bank, 19 Ala. 659; Tully v. Dunn, 42 Ala. 262; Bonfils v. Ledoux, 266 Fed. 507, 16 A. L. R. 430. In the case last cited the court says: "It is the general rule that the failure of the lessee to take possession is no defense to a claim for rent, because that liability is fixed, not by the fact of possession, but by the covenant to pay rent." In Tully v. Dunn, supra, the Alabama Supreme Court says:

> "The appellant [lessee] having committed a breach of the contract, by a failure to enter upon its performance, the appellee [lessor] was not bound to suffer the premises to remain vacant during the term. In such case, the landlord may let the premises lie idle *and recover rent for the whole term*, or he may put an end to the contract of lease by entry." (Italics ours.)

[6] If it be assumed that respondents may be entitled to any deduction from the full amount of the accrued rent, they can avail themselves of such right to recoupment only by setting up in their answer a claim thereto, based upon an allegation of the value to appellant of its occupancy of the premises subsequent to the accrual of respondents' right of entry. Fitzhugh v. Baird, 134 Cal. 570, 66 Pac. 723. Respondents' answer presents no such issue.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

(68 Cal. App. 226)

ADAMS & McKEE LAND CO. v. DUGAN et al. (Civ. 4208.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1924.)

1. Appeal and error 🔑110—Order denying new trial nonappealable.

An order denying a new trial is nonappealable.

2. Vendor and purchaser 🔑101—After waiver of clause making time of the essence, reasonable notice required for vendor to declare forfeiture.

Where course of dealing between vendor and purchaser has amounted to waiver by vendor of clause making time of the essence, the vendor may not declare a forfeiture, unless the purchaser be given reasonable notice and reasonable time and opportunity to comply with the contract.

3. Vendor and purchaser 🔑299(4)—Question of reasonable time for purchaser to conform to contract of purchase one of fact for court.

Question of what is a reasonable time to be given by a vendor, who has waived a clause making time of the essence, to purchaser, to conform to the contract or have a forfeiture declared, is primarily one of fact for the trial court.

4. Vendor and purchaser 🔑101—Thirty-six days' notice to purchaser to pay installments due or have rights forfeited held reasonable.

Where a vendor had waived a provision of a contract of sale making time of the essence, 36 days' notice to the purchaser, who lived in another state, to pay installments due or his rights would be forfeited, was reasonable.

5. Vendor and purchaser 🔑186—Difficulty of borrowing money no excuse for failure of purchaser to comply with notice of vendor requiring payment of overdue installments.

Where a vendor had waived a provision of a contract making time of the essence, and notified the purchaser to pay certain installments within 36 days or the contract would be forfeited, the fact that the purchaser found it difficult to borrow money was no excuse for failure to comply.

6. Vendor and purchaser 🔑101 — Notice to purchaser to pay installments held sufficient, despite inclusion of assessments.

Where vendor waived provision in contract making time of essence, notice to purchaser to pay certain installments or her rights under contract would be forfeited was not rendered ineffective by including therein demand for payment of street assessments, where purchaser never tendered amount of installments due.

7. Vendor and purchaser 🔑101—Purchaser held estopped to claim demand for payment of installments was ineffective, because it included street assessments.

Where vendor notified purchaser to pay installments due by certain day or her rights would be forfeited, and included therein street assessments, to which purchaser offered to pay $60, to be applied on assessments, and did not object because demand included assessments, she was estopped to set up that demand was ineffective, because it included the assessments.

8. Vendor and purchaser 🔑101 — Requirements of notice to forfeit purchaser's rights stated.

The purpose of a notice to forfeit a purchaser's rights, after waiver of a clause making time of the essence, is to warn that the vendor intends to restore the conditions of contract, and any conduct on the part of the vendor and purchaser suffices, if both parties understood the conditions regarding forfeiture were to be treated as restored and in force.

9. Vendor and purchaser 🔑170—Refusal of offer of less than amount due held not to prevent forfeiture of rights under contract to purchase.

Where purchaser under contract of sale owed installments amounting to $70, refusal of offer of $60 unless full amount claimed, including certain assessments, were paid, did not prevent forfeiture of rights under contract, in pursuance of the vendor's notice reviving a provision that time should be of the essence.

10. Tender 🔑12(2)—Party making tender must see that amount tendered is large enough.

As a rule, party making tender acts at his peril, and must see that the amount tendered is large enough, where correct amount is not within exclusive knowledge of the tenderee.

11. Vendor and purchaser 🔑170—Mistaken demand by vendor for payment of street assessments held not to necessarily indicate bad faith.

Mere fact that vendor may have been in error in supposing and declaring that, unless a purchaser paid the amount of street assessments, in addition to past-due installments, it would consider the purchaser's rights foreclosed, does not necessarily show bad faith.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Suit by the Adams & McKee Land Company against Laura Fulton Dugan and husband. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Benno M. Brink, of Los Angeles, for appellants.

Walter M. Campbell, of Los Angeles, for respondent.

FINLAYSON, P. J. [1] This action, though in form a suit to quiet title, is in effect one whereby it is sought to forfeit the rights of the defendant Laura Fulton Dugan under a contract for the sale of real property. W. J. Dugan and Laura Fulton Dugan are husband and wife, and it is for that reason that the former was joined as a party defendant.

Plaintiff recovered judgment. Defendants have appealed from the judgment, and likewise from an order denying them a new trial —a nonappealable order.

By the contract of sale, which was executed on September 6, 1909, Mrs. Dugan, as the vendee, agreed to buy, and one Thomas McClelland, plaintiff's assignor, agreed to sell, certain real property in the city of Los Angeles for the sum of $1,350, payable $25 upon the execution of the contract, and the balance in monthly installments of $10 each, on the 6th day of each and every month, the first installment to be paid October 6, 1909. It also was agreed that the vendee should pay all taxes and assessments which might be levied upon or assessed against the property. Time was expressly made of the essence of the contract. There was a provision to the effect that if the vendee should fail to comply with the terms of her contract she should forfeit all rights thereunder, and all right to such moneys as may have been paid by her, and that the vendor should be relieved from all obligation to convey. Mrs Dugan entered into possession under the contract and paid $433.05 on account of the principal and a further sum on account of interest. The vendor and his assignee, the plaintiff in the action, repeatedly and habitually, and without objection, accepted payments from the vendee when they were past due. Wherefore the lower court found that the clause of the contract making time of the essence was waived both by McClelland and by plaintiff. But it was further found, in substance and effect, that the time clause was revived and reinstated before the action was commenced. Whether the provision making time of the essence was so revived is the vital question in the cause. The facts bearing upon this aspect of the case are, in brief, these:

On May 20, 1920, plaintiff's attorney mailed to Mrs. Dugan, at El Paso, Texas, a letter, the substance of which is hereinafter stated. At the date of that letter there was due and unpaid on the contract six monthly installments of $10 each. A further installment of $10 would fall due, under the terms of the contract, on the 6th day of June following. Subsequently to the execution of the contract, the property was assessed for work done on Brooklyn avenue. Instead of paying the assessment, the vendee permitted a street assessment bond to be issued for the amount thereof. The bond was issued December 15, 1916. The vendee paid all installments of principal and interest which accrued on the bond prior to May 13, 1920, on which date plaintiff, in order to relieve the property of the lien, paid the sum of $39.87. At the same time plaintiff paid the further sum of $199.96, the amount of an assessment which had been levied against the property for work done on Lorena street and which would have become delinquent on May 19, 1920. The two sums thus paid by plaintiff aggregate $239.83. On April 13, 1921, which was after the action had been commenced, the proceedings under which the Lorena street assessment had been levied were abandoned, and thereupon the city returned to plaintiff the amount which it had laid out in payment of that assessment.

On May 20, 1920, plaintiff's attorney, as already stated, caused a letter to be deposited in the United States post office at Los Angeles, addressed to Mrs. Dugan at El Paso, Tex., wherein the latter was specifically notified that she was in arrears in the payment of the six past-due monthly installments on the purchase price, that another installment of $10 would become due on June 6th following, and that plaintiff had paid the sums of $39.87 and $199.96, respectively, to relieve the property from the street assessment liens. The letter, after giving this information, then proceeds as follows:

> "You will please take notice that you are required to pay all of said items on or before the 25th day of June, 1920, and that by making said payment your contract will be considered as restored to good standing and you can then continue to make your payments of $10 per month. You will, however, be expected to make them promptly every month, as called for by the contract. Please let me know whether or not it is your intention to comply with this demand. You will, of course, understand that if the same be not complied with your contract will be forfeited and the Adams-McKee Land Company will take possession of the property and will not be under further obligations to convey the property to you."

This letter was received by the vendee in due course. On June 17, 1920, at Los Angeles, Mrs. Dugan, through an attorney acting for her in the matter, offered by letter to pay to plaintiff the sum of $60. In this letter Mrs. Dugan, or her attorney for her, specifically stated that the $60 was to be applied *on the assessments*. Plaintiff, through its attorney, refused to accept this offer of $60, stating that it was "unwilling to accept a partial payment on account of past-due indebtedness." Mrs. Dugan never made any other tender or offer to pay. Judgment was given for plaintiff upon the theory that, by the letter of May 20, 1920, Mrs. Dugan was given sufficient notice of plaintiff's intention to revive the provision of the contract making time of the essence thereof, and to terminate the contract unless all amounts past due were paid on or before June 25, 1920.

The principal grounds of appeal are: (1) That the notice to Mrs. Dugan, given to her by the letter of May 20, 1920, did not afford her a reasonable time within which to make the payments under the terms of her contract; and (2) that plaintiff had no right to repayment of the amounts which it had laid out in order to relieve the property of the assessment liens.

[2] Undoubtedly it is the rule that, where

the entire course of dealing between the parties to a contract of sale of real property has amounted to a waiver on the part of the vendor of the clause making time of the essence, the vendor may not declare a forfeiture, unless the vendee be afforded reasonable notice of the former's determination and election to terminate the contract. The vendee should be given notice, in some form, that, if the overdue payments are not made on or before a date fixed therefor, far enough in the future to give the purchaser reasonable time and opportunity to comply with his contract by making the payments, the contract will be terminated and a forfeiture will take place.

[3-5] The question of what is a reasonable time is primarily one of fact for the determination of the trial court. Hoppin v. Munsey, 185 Cal. 684, 198 Pac. 398. In cases such as this there cannot, in the nature of things, be any fixed rule as to what constitutes a reasonable time. It must depend upon the facts of each particular case. Here respondent did not summarily insist upon immediate performance of the vendee's obligations, but gave her practically a month within which to secure the money wherewith to make the payments. The time fixed by the notice was 36 days from the date of the letter written by respondent's attorney. The simple act required to be done was the payment of a sum of money. True, appellant lived in Texas and respondent had its residence in California. We cannot, however, close our eyes to what is a matter of common knowledge, that the facilities afforded for communication between different states of the union, and for the transmission of money from one portion of the country to another, have practically annihilated distance and time. If we deduct from the time fixed by the notice for performance the few days necessary for respondent's letter to reach appellant and for the latter to mail her reply, a month or thereabout would still be left appellant within which to raise the money, if, in fact, she did not already possess it. If she found it difficult to borrow money, that fact would afford her no excuse. Skookum Oil Co. v. Thomas, 162 Cal. 546, 123 Pac. 363. She knew what contract she had entered into and what obligations she had assumed; and she likewise knew that, though the time clause had been waived and the matter set at large, respondent, nevertheless, could at any time fix another date for performance by giving notice thereof. Under all the circumstances of the case we think the limitation of time fixed in the notice was a reasonable one. For a closely analogous case see Chabot v. Winter Park Co., 34 Fla. 258, 15 South. 756, 43 Am. St. Rep. 192.

[6] Coming now to the claim that respondent was not entitled to demand repayment of the sums which it paid to the city in order to relieve the property of the assessment liens: Appellants contend that, notwithstanding Mrs. Dugan had covenanted to pay all assessments which might be levied against the property, she could rightfully permit street assessment bonds to issue for such assessments, and that her only obligation was to pay the principal and interest on such bonds as and when they accrued. It also is suggested that respondent could not rightfully demand from Mrs. Dugan the sum of $199.96 which it had paid to satisfy the Lorena street assessment, because the subsequent abandonment of the proceedings which culminated in that assessment indicates that there never was a valid assessment lien under those proceedings. We do not find it necessary to decide either of these questions. Assuming, without deciding, that, by its reference to the assessments, the letter which respondent's attorney mailed to Mrs. Dugan included sums which, under the terms of her contract, she could not be required to pay, nevertheless, the letter was notice to the vendee sufficient to lay the foundation for a forfeiture of her rights. Mrs. Dugan's offer to pay $60 on account of the assessments, the only offer of payment ever made by her after she received the notice from respondent's attorney, was made on June 17, 1920. On that date seven installments of the purchase price had become due and payable under the terms of the contract. Mrs. Dugan's offer to pay $60 therefore fell short of an offer to pay the amount then due and payable by her, even if she was not obligated to pay the amounts which respondent had laid out on account of the assessments. Unless, therefore, respondent's notice of May 20, 1920, was abortive simply because it contained a demand for sums to which respondent was not entitled, it must be held to have been sufficient as a basis for the forfeiture of the vendee's rights under the contract.

[7] Each of the items which made up the total amount demanded by respondent was specifically set forth in the notice to Mrs. Dugan, and the latter knew, as well as respondent, that at least $70 was due and payable by her before the expiration of the time limit fixed in respondent's notice. If, therefore, Mrs. Dugan believed that the notice included items which she was not obligated to pay on or before the expiration of the date fixed in the notice, it was her duty to have said so at the time. See Kimball v. Bellows, 13 N. H. 58, where the court, on pages 69, 70, says:

> "The demand made of the defendant for payment of these claims, is excepted to for the reason that it included a claim of William Cooper. * * * A sufficient reply to this objection is that no exception was taken to the demand at the time, and no specification was asked. Where claims are taken up for the benefit of another, and, on demand of payment, a mere general refusal is given, without any cause assigned, or inquiry made, we hold the demand to be good, notwithstanding it included a claim which the party is not bound to

pay, and though no precise sum is named as the amount due."

In her offer to pay the $60 Mrs. Dugan specifically stated that it was "to be applied on assessments." It is quite probable that this language led respondent to believe that Mrs. Dugan recognized an obligation to pay the full amount demanded of her, the assessments included. This furnishes additional reason why Mrs. Dugan, having failed to object to respondent's demand when it was made, should not now be heard to claim that it was for an excessive amount. Having led respondent into a sense of security, she should not now be heard to say that the demand made upon her was ineffective because it included the assessments.

[8] The essential purpose of a notice to forfeit a vendee's rights, after a waiver of the clause making time of the essence, is to let the vendee know that, though there has been a waiver of the time clause, the vendor intends that the conditions of the contract from thenceforth shall be treated as restored. For this purpose, any conduct on the part of the vendor and vendee will suffice, if it is such as to justify the inference that both parties understood that the conditions regarding forfeiture were to be treated as restored and in force. Hoppin v. Munsey, supra, page 688 (198 Pac. 398). The inclusion in the notice to Mrs. Dugan of the amounts paid by respondent on the assessments does not detract from the fact that the notice was sufficient to apprise her that unless she paid the seven installments on the purchase price, aggregating $70, her rights under the contract would be forfeited.

[9, 10] Because respondent refused to accept the $60 unless the full amount demanded by it was paid, it is argued that Mrs. Dugan was excused from making a tender of the amount conceded to be due—$70. The general rule is that the party making a tender acts at his peril, and must see to it that the amount tendered is large enough, where, as here, the correct amount is not within the exclusive knowledge of the tenderee. 5 A. L. R. 1232, note to Graves v. Burch. By demanding more than was due from the vendee, if it did demand more than was due, respondent may have waived the formal requisite of a tender, such, for example, as the actual production of the money, but it did not waive an existing capacity and willingness to perform. That is to say, though the refusal of respondent to accept less than the full amount demanded by it may have excused the actual production by Mrs. Dugan of $70 in money, it did not make an offer to pay but $60 the equivalent of a tender of $70, the amount which it is conceded was necessary to be paid by the vendee in order to comply with the terms of her contract. Respondent's refusal to accept less than the full amount demanded by it did not influence Mrs. Dugan to forbear making a tender of what she now claims was the only proper amount payable by her. It cannot be said that respondent waived a tender which it had no reason to expect. Neither party seems to have thought, when the offer to pay $60 was made, that respondent's demand included any improper item; and there is quite as much reason to hold that respondent would have accepted the sum legally demandable, assuming that that amount was $70, as that Mrs. Dugan would have paid it. See Loewenberg v. Arkansas, etc., Ry. Co., 56 Ark. 439, 19 S. W. 1051; Bolton v. Gifford & Co., 45 Tex. Civ. App. 140, 100 S. W. 210, and Lamar v. Sheppard, 84 Ga. 561, 10 S. E. 1084.

[11] There is no evidence of bad faith on respondent's part. The mere fact that it may have been in error, in supposing and declaring that unless it were repaid the amount of the assessments it would consider the rights of the vendee foreclosed, does not necessarily indicate bad faith.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

194 Cal. 344

ENGEL v. DAVENPORT et al. (S. F. 10816.)

(Supreme Court of California. Aug. 25, 1924.
Rehearing Denied Sept. 22, 1924.)

On Rehearing.

1. Admiralty ⚷20—State courts held to have jurisdiction of actions for personal injuries to seamen.

State courts have jurisdiction of actions for personal injuries to seamen arising under maritime transactions, including those arising out of maritime torts, in view of federal Judiciary Act 1789 (1 Stat. 73; Judicial Code, §§ 24 and 256 [U. S. Comp. St. §§ 991 and 1233]), saving to suitors in all cases right of a common-law remedy where common law is competent to give it.

2. Admiralty ⚷20—State court's jurisdiction over seaman's action for injuries not affected by Merchant Marine Act.

State court's jurisdiction over a seaman's action for injuries because of unseaworthiness of his vessel was not affected by Merchant Marine Act, § 33 (U. S. Comp. St. Ann. Supp. 1923, § 8337a), such statute not conferring exclusive jurisdiction upon United States District Court of district in which employer resides, but merely defining venue of an action instituted in district court.

3. Limitation of actions ⚷2(4)—Seaman's action for injuries rightfully instituted in state court held barred by state statute of limitation.

Seaman's action for injuries due to unseaworthiness of his vessel, originally and rightfully instituted in a state court, is governed and barred by state statute of limitations, notwithstanding that federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) providing that actions commenced thereunder must be commenced within two years, may have been incorporated by reference into Merchant Marine Act, and would be applicable when action was brought in a federal court.

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4. Limitation of actions ⟹2(1)—Limitation statute of jurisdiction where suit is brought will govern.

Generally, limitation statute of a jurisdiction where suit is brought will govern and control with reference to time within which a suit may be brought in that particular jurisdiction.

5. Limitation of actions ⟹2(1)—Question of limitations referred to law of forum if shorter than period prescribed by statute of other jurisdiction creating liability.

Limitation prescribed by statute of another jurisdiction, which creates a right of action, and constituting a condition of the right so that latter is extinguished when time so prescribed has expired, does not exclude operation of shorter statute of limitation of the forum.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by E. B. Engel against J. O. Davenport and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. W. Hutton, of San Francisco, for appellant.

Farnham P. Griffiths, McCutchen, Olney, Mannon & Greene, and J. B. McKeon, all of San Francisco, for respondents.

LENNON, J. This is an appeal by the plaintiff from a judgment rendered and entered by the superior court in and for the city and county of San Francisco in favor of the defendants, based upon an order sustaining the demurrer of J. O. Davenport, one of the defendants, to the plaintiff's complaint. The action, which was instituted in the superior court of the city and county of San Francisco, was brought against J. O. Davenport and the other defendants jointly, as the owner and the operators of the steamship Davenport. The complaint alleged in substance that the plaintiff had suffered injuries because of the unseaworthiness of the vessel's appliances, and in this behalf alleged that the vessel was unseaworthy when she left San Francisco, her home port, for Hoquiam, Wash., by reason of a defective pelican hook which broke at Hoquiam, Wash., fracturing plaintiff's skull. For this injury plaintiff claimed damages in the sum of $50,000. Said complaint was filed in said superior court on the 18th day of January, 1923, 21 months after the injury to the plaintiff, which forms the basis of the action.

The defendant J. O. Davenport demurred upon two grounds: (1) That the complaint did not state facts sufficient to constitute a cause of action; and (2) that the alleged cause of action was barred by the provisions of section 340, subdivision 3 of the California Code of Civil Procedure, which provides that actions based upon personal injury must be commenced within one year. It is apparent that if the state statute of limitations is applicable, the demurrer was properly sustained.

It is plaintiff's contention that the plaintiff's cause of action is brought under the provisions of the Merchant Marine Act of June 5, 1920, § 33 (41 Stats. at Large, 1007 [U. S. Comp. St. Ann. Supp. 1923, § 8337a]), which amended section 20 of the Seaman's Act of March 4, 1915 (38 Stats. at Large, 1164); that section 33 of the Merchant Marine Act incorporates therein by reference the federal Railway Employers' Liability Act of 1908 (35 Stats. at Large, 65) as amended in 1910 (36 Stats. at Large, 291 [U. S. Comp. St. § 8662]); that this last-mentioned act provides a two-year limitation for the commencement of actions brought under it; and that, therefore, such limitation applies to actions brought by seamen under the Merchant Marine Act (41 Stat. 988).

Section 33 of the Merchant Marine Act, upon which plaintiff relies, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. *Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.*"

Section 6 of the federal Employers' Liability Act, claimed by plaintiff to be incorporated by reference into the Merchant Marine Act, provides that:

> "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It is the defendants' contention that: (1) If brought under section 33 of the Merchant Marine Act, the state court was without jurisdiction to entertain the action; and (2) whether brought under the Merchant Marine Act, as plaintiff contends, or under the general maritime law, as defendants contend, the one-year state statute of limitations is applicable.

In the former opinion rendered by this court it was held that, if the action was brought under section 33 of the Merchant Marine Act, the state court was without jurisdiction, and, if brought under the general maritime law, the state statute of limitation was applicable, so that in either event the demurrer was properly sustained. The holding that the federal court had exclusive jurisdiction of all actions brought under section 33 of the Merchant Marine Act was based upon the theory that Congress plainly indicated an intention to vest exclusive jurisdiction of all cases arising under said section in a court in the district in which the defendant employer resided, by the provision of said section previously quoted, that "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." This theory was sustained by decisions of the Supreme Court of New York (Nox v. U. S. Shipping Board Emergency Fleet Corporation [Sup.] 193 N. Y. Supp. 340; Prieto v. U. S. Shipping Board Emergency Fleet Corporation, 117 Misc. Rep. 703, 193 N. Y. Supp. 342), and of the District Court of Washington (Wenzler v. Robin Line S. S. Co., 277 Fed. 812).

However, the Supreme Court of the United States in a very recent decision (Panama Ry. Co. v. Johnson, 264 U. S. 375, 44 Sup. Ct. 391, 68 L. Ed. —), held, in effect, that this provision of the Merchant Marine Act did not confer exclusive jurisdiction upon the particular District Court of the district in which the defendant employer resides, and thereby by implication divest all other courts, previously having jurisdiction of such actions, of jurisdiction, but merely defined the venue of an action instituted in a District Court. The court in that case held that a complaint having been filed in a District Court of a district other than the one in which the defendant employer resided or had its principal office, and no objection having been made at the outset on a special appearance, any objection to the venue was waived by the general appearance and the court where the complaint was filed had jurisdiction. The court in this behalf said:

> "A reading of the provision now before us * * * makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the District Courts * * * but only to prescribe the venue for actions brought under the new act of which it is a part."

It follows that if this provision merely defines the "venue" of an action, the theory that such provision conferred "jurisdiction" upon a particular court is no longer tenable; and, in the absence of any other provision purporting to divest of jurisdiction, those courts, both state and federal, which prior to the enactment of the Merchant Marine Act had jurisdiction of such actions, such jurisdiction may be presumed to continue.

[1] We are satisfied that the state courts have always had the right to enforce rights of action for personal injuries to seamen, arising under maritime transactions, including those arising out of maritime torts, since the federal Judiciary Act of 1789, which provided that District Courts should have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." 1 Stats. at Large 73; Judicial Code, §§ 24 and 256 (Comp. Stats. §§ 991 and 1233); The Hamilton, 207 U. S. 398, 404, 28 Sup. Ct. 133, 52 L. Ed. 264; Steamboat Company v. Chase, 83 U. S. (16 Wall.) 522, 534, 21 L. Ed. 369; Garcia y Leon v. Galceran, 11 Wall. 185, 20 L. Ed. 74; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921. In enforcing a liability falling within the admiralty and maritime jurisdiction, the state court was, however, bound to apply the maritime law. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171.

[2] The present action is based, not upon negligence, but upon the alleged unseaworthiness of the vessel Davenport, by reason of a defective pelican hook, and there can be no question but that the state courts, prior to the enactment of the Merchant Marine Act, did have and did exercise jurisdiction in such cases. This was definitely decided in the case of Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 Sup. Ct. 475, 66 L. Ed. 927, and is, in fact, conceded by the defendants. This being so, it follows that the state courts still have jurisdiction over such an action and that the plaintiff could at his election institute the action in the state court unless such jurisdiction has been divested by the adoption of the Workmen's Compensation provisions of our Constitution and statutes, a question which we shall not now undertake to decide.

It is the plaintiff's theory, as hereinbefore indicated, that section 33 of the Merchant Marine Act incorporates therein, by reference, the federal Railway Employers' Liability Act, which latter act provides a two-year limitation for the commencement of actions brought thereunder, and that therefore the two-year limitation for the commencement of actions applies to this action irrespective of whether it was commenced in a state or federal court. In other words, it is plaintiff's contention that the statute of limitation embodied in the federal Employers' Liability Act applies to every cause of action stated thereunder, or under the Merchant Marine Act, regardless of the jurisdiction in which such action is brought. Plaintiff's theory that the federal Employers' Liability Act was incorporated by reference in the Merchant Marine Act was upheld in the case of Martin v. United States Emergency Fleet Corporation, a recent decision of the United States District Court of New York, rendered June 6, 1924. However, in the case of Lorang v. Alaska S. S. Co. et al., 298 Fed. 547, a recent decision of the United States District Court of Washington rendered May 14, 1924, this contention was expressly repudiated.

[3, 4] Conceding, however, for the sake of argument, that the provision of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) fixing the period of time within which actions brought thereunder must be commenced at two years was incorporated by reference into the Merchant Marine Act, and would be applicable when the action was brought in a federal court, we are of the opinion that the instant action having been originally and rightfully instituted in the state court, is governed and barred by the state statute of limitations. It is the general rule that the lex fori, i. e., the limitation statute of the jurisdiction where suit is brought, will govern and control with reference to the prescribed period of time within which a suit may be brought in that particular jurisdiction. Plaintiff, however, contends that when a time limit appears in a statute creating a right, that time limit is exclusive of all others. Plaintiff also insists that it is not essential that the limitation be incorporated in the same section or even in the same statute, providing the limitation embodied in another statute is so specifically directed to the newly created liability as to warrant the conclusion that it qualifies the right.

It is true that there is an exception to the general rule that the law of the forum controls to the effect that, when a statute which creates a new liability limits the time within which the right may be enforced, an action seeking to enforce such right can be maintained only within the time limited by the statute creating the right, regardless of the jurisdiction in which the action was instituted. Davis v. Mills, 194 U. S. 451, 454, 24 Sup. Ct. 692, 48 L. Ed. 1067. The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; Vaught v. Virginia & Southwestern Railroad, 132 Tenn. 679, 179 S. W. 314. Such exception to the general rule is not, in our opinion, applicable to the instant case.

[5] The exception to the general rule that the law of the forum governs is based upon the reasoning that, when the liability and the remedy are created by the same statute, time is made of the essence of the right, and when the time prescribed by the statute has expired, the cause of action itself is extinguished. The lapse of time prescribed by the statute creating the new right, having operated to extinguish the right, no right remains thereafter to support the action and consequently no action can be thereafter maintained in *any* jurisdiction. Obviously this reasoning applies only when the period prescribed by the statute creating the liability is *shorter* than the period provided by the law of the forum. There is no logical reason why the doctrine that the limitation prescribed by the statute of another jurisdiction, which creates a right of action, is a condition of the right of action so that the latter is extinguished when the time so prescribed has expired, and will not thereafter sustain an action anywhere, should exclude the operation of the general rule which refers the question of limitation to the law of the forum, if the period prescribed by the statute of the other jurisdiction creating the liability has not expired. 46 L. R. A. (N. S.) 687. The exception to the general rule being based upon the theory of the extinguishment of a right by the lapse of time, if the time prescribed by the statute creating the right is *longer* than the time provided by the law of the forum, such actions will not fall within the exception but will be governed by the general rule that the law of the forum—in the instant case, the state statute of limitations—will prevail. Weaver v. Baltimore & O. R. Co., 21 D. C. (10 Mackey) 499; Hutchings v. Lamson, 96 Fed. 720, 37 C. C. A. 564; Wharton on Conflict of Laws (3d Ed.) § 540B, vol. 2, p. 1261. The reason for the exception ceasing to exist, the exception itself ceases to exist.

The judgment is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; RICHARDS, J.; LAWLOR, J.; WASTE, J.; SHENK, J.

68 Cal. App. 235

HENNESSY v. TITLE INS. & TRUST CO. et al. (Civ. 4358.)

(District Court of Appeal, Second District, Division 1, California. July 24, 1924.)

1. Limitation of actions ⚷82—Administratrix held precluded from quieting title as against grantees of deceased's husband, holding property for 12 years prior to wife's death.

Under Code Civ. Proc. § 318, limiting time for actions to recover realty, where property purchased with wife's money was taken in name of husband, who recorded declaration of homestead and held it for 12 years prior to his wife's death, wife's administratrix was barred from quieting title as against subsequent grantees of the husband.

2. Limitation of actions ⚷80—Statute does not toll as against successors of person dying while having cause of action to recover realty.

Where a person having cause of action for recovery of realty dies, the statute of limitations does not cease running as against those to whom property descends.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Suit by Ellen Hennessy, administratrix of Bridget Cassidy, deceased, against the Title Insurance & Trust Company, executor (substituted in place of Mary M. W. Devan, deceased), and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Loewenthal, Collins & Loewenthal and Erwin P. Werner, all of Los Angeles, for appellant.

S. F. Macfarlane, Clair S. Tappaan, Earle M. Daniels, Stephens & Stephens, and Albert M. Stephens, all of Los Angeles, for respondents.

HOUSER, J. The suit here involved was brought for the purpose of quieting title to certain real property situated in the county of Los Angeles. Plaintiff appeals from a judgment entered in favor of the defendants.

On the trial it was stipulated that on May 8, 1873, the common source of title was in a certain named person, at which time the property was conveyed to one Patrick Cassidy, who was a married man, and who, on October 8, 1878, made and recorded a declaration of homestead covering the property, and in which declaration his wife, Bridget Cassidy, did not join. Seven years later the wife died. Within three years after the wife's death Patrick Cassidy conveyed all of said property in different parcels to defendants' predecessors, and of such property, ever since such respective conveyances, they, with the defendants herein, have been in continuous possession, and have paid all taxes levied or assessed thereon. No administration was ever had on the estate of Bridget Cassidy, deceased, until more than 35 years had elapsed after her death, at which time plaintiff herein was appointed, qualified, and at all times here involved was the administratrix of the estate of Bridget Cassidy, deceased.

As a part of plaintiff's case a tender and offer of proof were made of the following facts: That Bridget Cassidy inherited money from her parents; that with said money she purchased the property which is the subject of this action; that at the time of the signing and recording of the declaration of homestead hereinbefore referred to, Patrick Cassidy and Bridget Cassidy were husband and wife, and that they, together with their family of four children, actually resided on said property; and that the actual value of said property did not exceed the sum of $5,000. Plaintiff further offered to prove each and all of the several facts set forth in said declaration of homestead.

Defendants objected to the evidence so offered and to each and every part thereof on the grounds that the same was incompetent, irrelevant, and immaterial; that plaintiff was not a proper party plaintiff; and that it affirmatively appeared that plaintiff's rights, if any, had been barred by laches, as well as by the provisions of each of sections 318, 319, 320, and 322 of the Code of Civil Procedure. The court sustained said objections, and each of them, whereupon plaintiff rested her case.

The only error claimed by appellant is that the trial court erred in sustaining defendants' said objections. Appellant contends that, because she could have established the ultimate fact that the money with which the property was purchased was the separate property of Bridget Cassidy, and because she did not join in the declaration of homestead thereon, notwithstanding the fact that for more than 12 years Patrick Cassidy held title to the property in his own name, and during that time made and recorded a declaration of homestead thereon, the actual title to the property was in Bridget Cassidy at the time of her death.

[1, 2] The principal question in the case relates to the statute of limitations. Section 318 of the Code of Civil Procedure provides that:

> "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."

The property was purchased in 1873, and, whether purchased with Patrick Cassidy's money or with Bridget Cassidy's money, the title was taken in the name of Patrick Cassidy, and it was he who had the declaration of homestead recorded. If the money with which the property was purchased belonged to Bridget Cassidy, even assuming that the statutes then in force otherwise permitted the maintenance by her of an action to quiet title to the property (which proposition is denied by respondents), she had 5 years within which to commence such an action, if she desired so to do. The admitted facts show that for 12 years before her death no action was commenced. From a reading of the statute, to which reference has been had, as well as to other related sections set forth in the objections to which we have referred and upon which respondents rely, it would seem clear that the action was barred at the time of Mrs. Cassidy's death. The fact that there was no administration upon her estate does not affect the matter. Even had she died before the lapse of 5 years after the property was purchased, the statute would not have been tolled, either pending the appointment of an administrator of her estate or after an administrator had been appointed. The principle is clearly announced in the leading case of McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814; where it is held that, where a person in whose favor a cause of action for the recovery of real property exists, and which person dies, the statute of limitations does not cease running as against those to whom the property would descend; and the same rule is laid down in the following cases: Alvarado v. Nordholt, 95 Cal. 116, 30 Pac. 211; Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; Anderson v. Superior Court, 187 Cal. 95, 200 Pac. 963; Westphal v. Arnoux, 51 Cal. App. 532, 197 Pac. 395.

Without reference to other questions raised on the appeal, it follows that the trial court properly sustained the objections to which we have referred, and that the judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

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68 Cal. App. 218

ANDERSON v. ANDERSON. (Civ. 4718.)

(District Court of Appeal, First District, Division 1, California. July 22, 1924. Petition for Rehearing and Modification of Decision Denied Aug. 21, 1924. Hearing Denied by Supreme Court Sept. 16, 1924.)

1. Divorce 🔑150(2), 186—Findings held hopelessly inconsistent; decree reversed where findings hopelessly inconsistent.

Findings in divorce suit *held* in clear conflict, and incapable of being harmoniously construed, requiring reversal.

2. Trial 🔑398—Hopeless inconsistency of findings requires reversal.

Clear and hopeless inconsistency of findings requires reversal.

3. Appeal and error 🔑931(1)—Findings to be reconciled if possible.

In support of the judgment, findings are to be construed liberally, and reconciled if possible.

4. Divorce 🔑27(2)—Single act of cruelty may justify divorce.

A single act of cruelty, though consisting of unfounded charges, may be of such a nature as not only to inflict grievous mental suffering, but to render impossible the subsequent living together of husband and wife, justifying divorce.

5. Divorce 🔑27(8)—False charges, while parties are living apart by consent, may constitute extreme cruelty.

Action for divorce on the ground of extreme cruelty will lie for false charges made by one spouse against the other, while living apart by mutual consent.

6. Divorce 🔑49(6)—Husband could stand on completed cause of action for extreme cruelty and refuse subsequent offer of reconciliation.

Where, before wife sought reconciliation, husband had a completed cause of action for divorce on the ground of extreme cruelty, because of her false charges while they were living apart by mutual consent, her offer came too late, and he could refuse it and stand on his cause of action.

7. Appeal and error 🔑1122(2)—Appellate court cannot change conflicting findings.

Though conflict in findings of the trial court is no doubt due to inadvertence or oversight, the appellate court cannot change them.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for divorce by Emil Anderson against Mary Anderson. From an adverse judgment, plaintiff appeals. Reversed.

Dozier & Dozier, of San Francisco, C. F. Kimball, of Redding, and Dozier, Kimball & Dozier, of San Francisco, for appellant.

Reisner & Honey, of San Francisco, for respondent.

ST. SURE, J. Plaintiff and defendant were married on April 10, 1920, separated four days thereafter, and never again lived together. Plaintiff brought an action for divorce on the ground of extreme cruelty. Defendant specifically denied the averments of cruelty on her part, alleged willful desertion, willful neglect, and extreme cruelty as recriminatory defenses, and willful neglect and willful desertion by way of cross-complaint for separate maintenance, without asking for a divorce. In both her answer and cross-complaint the defendant alleged that plaintiff deserted her on April 10, 1920. There is no issue of the marriage and there are no property rights involved.

The trial court found specifically that all of the allegations of the complaint charging extreme cruelty against the defendant are true, and that all of the defenses and allegations of the answer and cross-complaint are false. The trial court also found that the parties lived separate and apart by mutual consent from April 14, 1920, until July 7, 1921, when "a reconciliation and restoration were, in good faith, sought by defendant and refused by plaintiff," and that "on or about the 7th day of July, 1921, the said plaintiff disregarded the solemnity of his marriage vow, and willfully and without cause, and with intent to desert and abandon defendant, separated himself from defendant and ever since said date has, and still continues so to willfully desert and abandon defendant and to live separate and apart from her, without any cause or reason, and against her will and without her consent." The trial court decided that plaintiff should not be granted a divorce from said defendant upon the ground of extreme cruelty, because of the showing of recrimination consisting of his willful desertion of said defendant, and also that defendant should not be awarded separate maintenance.

[1] Plaintiff appeals from the judgment upon the judgment roll alone. Plaintiff urges several grounds why the judgment should be reversed, but we think the one of vital importance is that there is in the findings a clear conflict, incapable of being harmoniously construed. The trial court found:

> "(VI) That since the said marriage the said defendant, in utter disregard of her marriage vows, and without any just cause or provocation, has treated plaintiff in a cruel and inhuman manner, and has wrongfully inflicted upon plaintiff great and grievous mental pain, humiliation, and suffering, and more particularly as follows: (1) That ever since the 13th day of May, 1921, the said defendant has, on divers and numerous occasions, and wrongfully and without any cause or reason therefor, falsely accused said plaintiff of marital infidelity and adultery. * * *
>
> "(VII) That by reason of her acts, language, and conduct, the said defendant has been guilty of extreme cruelty to said plaintiff and plaintiff has thereby suffered and still suffers great and grievous mental pain, humiliation, and anguish, wrongfully inflicted upon plaintiff by defendant as aforesaid."

The findings of the trial court which plaintiff claims present an irreconcilable conflict with those above quoted are as follows:

> "(XIV) It is true that from the 14th day of April, 1920, until the 7th day of July, 1921, plaintiff and defendant lived separate and apart from each other by mutual consent, and that on said 7th day of July, 1921, a reconciliation and restoration were, in good faith, sought by defendant and refused by plaintiff.
>
> "(XVIII) It is true that on or about the 7th day of July, 1921, the said plaintiff, disregarding the solemnity of his marriage vows, and willfully and without cause, and with intent to desert and abandon defendant, separated himself from defendant, and ever since the said plaintiff has and still continues so to willfully desert and abandon defendant and to live separate and apart from her, without any cause or reason, and against her will and without her consent."

[2-4] We are in accord with the contention of plaintiff that these findings are hopelessly inconsistent. In considering them we have in mind the rule that the findings are to be liberally construed in support of a judgment; that all the findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on material points; and that, unless the conflict is clear and the findings incapable of being harmoniously construed, the judgment will not be reversed on the ground of a conflict in the findings. The findings show that (ever since the 13th day of May, 1921) the defendant had, for two months prior to the date when the desertion commenced (July 7, 1921), constantly and falsely accused plaintiff of marital infidelity and adultery. It is manifest that a single act of cruelty may be of such a nature, even where the act consists solely of the making of unfounded charges and cruel imputations, as not only to inflict the most grievous mental suffering, but also to render impossible the subsequent living together of husband and wife upon any such terms as are essential to the accomplishment of the legitimate ends and objects of matrimony, if marriage is to be viewed from a different standpoint than as a mere physical relation. MacDonald v. MacDonald, 155 Cal. 665, 669, 102 Pac. 927, 25 L. R. A. (N. S.) 45.

[5, 6] While it is true that the parties separated by mutual consent, it has been held that an action for divorce on the ground of extreme cruelty will lie for false charges made by one party to the marriage against the other, after they are living apart. MacDonald v. MacDonald, supra. And while it is also true that the defendant wife in good faith attempted a reconciliation and restoration, neither a husband nor wife can claim a right to continue the marriage relation while falsely charging the other with unchastity. Smith v. Smith, 8 Or. 100, cited with approval in MacDonald v. MacDonald, supra. The law does not enforce condonation. The findings show that plaintiff had a completed cause of action for divorce against defendant upon the ground of extreme cruelty before she sought reconciliation. Thus it appears that the offer came too late, and under such circumstances plaintiff had the right to refuse to accept it, and to stand upon his cause of action for divorce. Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037; Benkert v. Benkert, 32 Cal. 467, 471; Vosburg v. Vosburg, 136 Cal. 195, 204, 68 Pac. 694.

[7] Of course, the trial court did not intend to make conflicting findings. The embarrassment is no doubt due to inadvertence or oversight, but we manifestly are powerless to change the findings of the lower court.

That may be done only by the trial tribunal. Johnstone v. Gloster, 49 Cal. App. 750, 755, 194 Pac. 504.

Believing, as we do, that, because of the conflicting findings, this cause must be remanded for a new trial, we refrain from reviewing other points for reversal made by the plaintiff.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

(68 Cal. App. 83)

HUCKABY v. NORTHAM et al. (Civ. 2662.)

(District Court of Appeal, Third District, California. July 3, 1924.)

1. Appeal and error 🔑2—On appeal from order granting new trial in 1918 no presumption that the order was not based on insufficiency of evidence.

Code Civ. Proc. § 657, as amended by St. 1919, p. 141, providing that, unless an order granting a new trial specifies that it is for insufficiency of evidence, it will be presumed not based on that ground, does not apply to order made July 3, 1918.

2. Appeal and error 🔑933(4)—If sufficient evidence to support judgment for defendants, order granting new trial based on insufficiency of evidence affirmed on appeal.

In ejectment in which defendants' motion for new trial on the ground among others of insufficiency of evidence to justify the verdict was sustained, generally in July, 1918, if there was sufficient evidence to support a judgment in favor of defendants, the order must be affirmed.

3. New trial 🔑70—In presence of sufficient evidence to sustain contrary finding, court not bound by finding of jury.

A trial court, in passing on a motion for new trial on the ground of insufficiency of evidence to justify the verdict, is not bound by findings of the jury, if there is sufficient evidence to sustain a contrary finding.

4. Appeal and error 🔑1015(2)—On substantial conflicting evidence, grant of new trial not disturbed.

Where evidence is substantially conflicting, grant of a new trial will not be disturbed on appeal.

5. Mines and minerals 🔑20(1)—Marking mining claim held sufficient.

Marking a mining claim by driving stakes extending 18 inches above the surface at both ends and middle of the center line, and at the four corners of the claim, and piling rocks around them, and posting notices on the center-line stakes, *held* a sufficient compliance with Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620).

6. Mines and minerals 🔑20(1)—Marking on ground and notice held sufficient to put subsequent locator on inquiry.

Marking a mining claim by driving stakes extending 18 inches above the surface at both ends and the middle of the center line, and at the four corners, and piling rocks around them, and posting notices on the stakes, and causing a copy of notice to be recorded, *held* sufficient to put a subsequent locator upon inquiry as to the nature and extent of the claim.

7. Mines and minerals 🔑34—Failure to make payments held to forfeit rights under option making time of essence.

Where an option to purchase a mining claim made time of the essence, failure by the assignee thereof to make the required payments forfeited all its rights under the option.

8. Sales 🔑24—Vendor and purchaser 🔑18(3)—Time of essence of option to purchase.

Time is generally of the essence of an option to purchase, whether so expressed or not.

9. Bankruptcy 🔑268—Deed of trustee in bankruptcy purporting to convey mining claim in which bankrupt had no interest held to pass no title.

Where a bankrupt corporation, in possession of a mining claim under an option to purchase, had forfeited its rights under the option before the bankruptcy proceedings, if the claim was valid, deed of the trustee in bankruptcy, purporting to convey an overlapping claim, passed no title to the overlap.

10. Mines and minerals 🔑38(22)—Question whether mining location was sufficiently marked held one of fact.

In ejectment for a portion of a mining claim, the question of whether the location was sufficiently marked on the ground was one of fact.

11. Appeal and error 🔑931(4)—Finding that mining claim was sufficiently marked must be presumed in support of order granting new trial.

In ejectment for portion of a mining claim, in which an issue was whether the location of defendants' claim was sufficiently marked, it must be presumed, in support of an order granting defendants' motion for a new trial, that the court found that the location of the claim was sufficiently marked.

12. Appeal and error 🔑1024(5)—Finding of trial court on conflicting evidence conclusive on appeal.

Finding of specific fact by trial court on motion for new trial on conflicting evidence is conclusive on appeal.

13. New trial 🔑7—Granting new trial as to defendants having no interest in property held error.

In ejectment for part of a mining claim, where some defendants had no interest in the property, granting a new trial as to them after judgment for plaintiff was error.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Vernon Huckaby against Elizabeth Northam and others. From an order granting a new trial, plaintiff appeals. Affirmed as to the named defendant, and reversed as to other defendants.

Theodore A. Bell, Sidney Rhein, and Frank J. Golden, all of San Francisco, for appellant.

C. K. Bonestell, of San Francisco, and W. D. Crichton, of Fresno, for respondents.

FINCH, P. J. [1, 2] Plaintiff sued in ejectment to recover possession of certain mining ground alleged to be included in an unpatented claim known as the Durable. The answer denied the allegations of the complaint. The jury returned a verdict in favor of plaintiff for the restitution of the premises. Judgment was entered accordingly, and the defendants moved for a new trial on the ground, among others, of "insufficiency of the evidence to justify the verdict." On the 3d of July, 1918, the court made an order granting the motion without specifying the ground upon which the same was granted. This appeal is from the order so made. The amendment of section 657 of the Code of Civil Procedure in 1919 (Stats. 1919, p. 141), providing that, unless the order granting a new trial shall specify that it is made upon the ground of insufficiency of the evidence to sustain the verdict, it will be presumed on appeal that the order was not based upon that ground, can have no application to this appeal. If there is sufficient evidence, therefore, to support a judgment in favor of defendants, the order must be affirmed.

Appellant's opening brief was filed March 17, 1923. The attorneys for respondents have filed no brief, although they have been given every opportunity to do so. "In the absence of any brief on the part of the respondent, the appeal may be determined upon those portions of the record printed in appellant's brief." Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 404, 177 Pac. 158, 159. The appellant's opening brief contains 241 printed pages, made up principally of the testimony taken at the trial.

Defendant Elizabeth Northam introduced evidence tending to show that she was the owner of a mining claim known as the Powder House; that it overlaps the Durable claim some 500 feet, and was located prior to the location of the Durable. This controversy is as to the overlapped territory. The jury answered in the negative the following special interrogatory:

> "Did A. R. Wortham mark the boundaries of the Powder House claim sufficiently clear to enable them to be readily traced at the time such marking was made, considering the surface of the land on which the location was made, and the country surrounding it at the time?"

Appellant says in his brief:

> "This finding of the jury entirely eliminated any question as to whether or not the Durable overlaps the Powder House, for, according to the verdict of the jury, no such claim as the Powder House has ever existed."

[3, 4] This argument would be logical if the appeal were from the judgment, but the trial court, in passing on a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict, is not bound by the findings of the jury, where there is sufficient evidence to sustain a contrary finding. Where the evidence is substantially conflicting, the action of the trial court in granting a new trial will not be disturbed on appeal.

[5, 6] A. R. Wortham testified that he located the Powder House claim in the year 1907; that the center line of the claim followed the course of the mineral ledge, the point of discovery being at the middle of the center line; that he marked the claim on the ground by driving square stakes, 4 inches in diameter and extending 18 inches above the surface, at both ends, and the middle of the center line, and at the four corners of the claim, and piling rocks around them, and that he posted notices on the center line stakes, and subsequently on the corner stakes, and caused a copy thereof to be recorded, reading as follows:

> "Notice of Location. Quartz Claim.
>
> "Notice is hereby given that the undersigned citizen of the United States over the age of 21 years has, in compliance with the requirements of the Revised Statutes of the United States, this day located a claim 1,500 linear feet along the course of this lead, lode, or vein of mineral-bearing quartz, and 300 feet in width on each side of the middle of said lead, lode, or vein, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges, thereon or appurtenant thereto, situate in the Fresno mining district, and more particularly described as follows, to wit: Commencing at a stake in canon due south 1,500 feet to stake marked P. C.
>
> "This claim shall be known as the Powder House quartz claim.
>
> "Located this 30th day of August, 1907.
>
> "A. R. Wortham.
>
> "Witness: J. Norrish.
> "S. B. Brogan."

No reason is shown why the foregoing is not a sufficient compliance with the statute requiring that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." U. S. Rev. Stats., § 2324 (U. S. Comp. St. § 4620); McKinley Creek Mining Co. v. Alaska United Mining Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331. In any event, such marking on the ground and notice were sufficient to put a subsequent locator upon inquiry as to the nature and extent of Wortham's claim. Stock v. Plunkett, 181 Cal. 193, 194, 183 Pac. 657.

September 23, 1911, a corporation known as the Mercy Mining & Development Company, of which Wortham was a director, for a valuable consideration, gave one S. D. Chittenden an option to purchase the Powder

House claim and other property for $50,000—$300 cash, $9,700 at the end of 7 months, $10,000 in 13 months, $10,000 in 19 months, and $20,000 in 25 months. The option agreement required Chittenden to erect a "furnace of at least 20-ton daily capacity" at a convenient place on the property. The agreement expressly made time of its essence, and provided that, upon the failure of Chittenden to make the payments therein provided, or to perform any "other terms and conditions" thereof, "then this contract shall terminate and be at an end." The final clause reads as follows:

> "This contract runs in favor of, and is binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto; it being understood, however, that no personal obligation is imposed upon the party of the second part to buy; it being understood that, if the payments are not made, all rights are forfeited, including all payments and improvements up to the forfeiture."

On the 26th of October, 1911, Chittenden transferred all of his rights under the option agreement to the Pacific Quicksilver Company, a corporation. The Mercy Mining & Development Company delivered possession of the property to the Pacific Quicksilver Company, and pointed out to the superintendent of the latter company one of the stakes of the Powder House claim. There was at that time on the ground in dispute an experimental rotary furnace, two concrete condensers, and "cars and tools necessary for work," all of which were delivered with the mining claim. The Pacific Quicksilver Company made the first deferred payment of $9,700, but no further payments were made on the option. The company expended about $30,000 in making improvements on that part of the Powder House claim, which is overlapped by the Durable. May 26, 1914, E. A. Waldron located the Durable claim. October 7, 1914, a petition in involuntary bankruptcy was filed against the Pacific Quicksilver Company, and on the 1st day of March, 1915, it was duly adjudged a bankrupt. After the filing of the petition, and prior to such adjudication, on the 24th of December, 1914, Waldron conveyed the Durable claim to the corporation. May 14, 1915, pursuant to a sale theretofore made in the bankruptcy proceedings, the trustee in bankruptcy executed a deed purporting to convey the Durable claim, described by courses and distances, which include the overlapping strip, and certain other property to the plaintiff for the sum of $1,500. The deed was recorded May 17, 1915.

April 23, 1912, the Mercy Mining & Development Company joined with A. R. Wortham in a conveyance of the Powder House claim and the other property described in the Chittenden option to E. F. Northam. Thereafter E. F. Northam died, and on the 22d day of May, 1914, all the property of his estate was distributed to defendant Elizabeth Northam. July 7, 1914, Mrs. Northam commenced an action against the Pacific Quicksilver Company to quiet her title to the Powder House claim and other property covered by the Chittenden option. No lis pendens was filed. May 26, 1915, judgment was entered quieting Mrs. Northam's title to the property described in her complaint. August 6, 1915, by virtue of a writ of possession issued by the superior court, the sheriff placed Mrs. Northam in possession of the property in dispute.

[7-9] It is clear from what has been stated that the Pacific Quicksilver Company had forfeited all its rights under the Chittenden option long prior to the insolvency proceeding. That option, by the express provisions thereof, had come to an end. Time was expressly made of the essence thereof. Time is generally of the essence of an option to purchase whether so expressed or not. Rice Lands, etc., Co. v. Blevins, 61 Cal. App. 536, 541, 215 Pac. 402. Since the bankrupt had no interest in the property in dispute, if the Powder House claim is valid, the trustee's deed purporting to convey such property passed no title to plaintiff. Cramer v. Wilson, 195 U. S. 409, 25 Sup. Ct. 94, 49 L. Ed. 256, 258.

It may be conceded that plaintiff made out a prima facie case by proving his peaceable possession of the premises, and his ouster therefrom under the writ of possession.

[10-12] The question then of Mrs. Northam's right to a new trial is dependent upon the validity of the Powder House location. Appellant correctly states that whether the location was sufficiently marked on the ground is a question of fact. It must be presumed in support of the order granting a new trial that the court found, upon the conflicting evidence, that the location of the Powder House was sufficiently marked. That finding is conclusive on appeal.

[13] The evidence shows clearly that the other defendants have no interest in the property. The order granting a new trial was therefore erroneous as to such defendants.

The order is affirmed in so far as it grants a new trial to defendant Elizabeth Northam, and reversed as to the other defendants; appellant to recover costs of appeal from respondents other than Elizabeth Northam.

I concur: PLUMMER, J.

68 Cal. App. 134

AYRES et al. v. LIPSCHUTZ. (Civ. 4816; S. F. 10451.)

(District Court of Appeal, First District, Division 2, California. July 11, 1924. Rehearing Denied Aug. 8, 1924. Hearing Denied by Supreme Court Sept. 8, 1924.)

1. Appeal and error 🔑854(2)—Ground assigned by trial court for decision not material, if judgment otherwise correct.

Ground assigned by trial court for its judgment is not material, if judgment is correct for other reasons.

2. Attorney and client 🔑134(1)—Client liable for reasonable value of services of attorney discharged in violation of contract.

Under Civ. Code, § 2356, client may discharge attorney at any time, but, if by doing so he breaks contract, he is liable in quantum meruit for value of services rendered.

3. Attorney and client 🔑166(3)—Agreed fee held some evidence of reasonable value of services of attorneys on plaintiff's dismissal of action without their consent.

Where husband, under contract to pay attorneys certain fee for securing divorce by default and contingent fee dependent on success in case of contest, dismissed action without attorneys' consent, *held*, that agreed fee for default was some evidence of reasonable value of services of attorneys down to discharge, sustaining judgment for that sum, less payments against husband.

On Petition for Rehearing in Supreme Court.

4. Contracts 🔑111—Contract to pay contingent fee dependent on success of divorce action held void as against public policy.

Contract to pay attorneys $2,500 if they obtained divorce in contested action, and $2,000 if they were unsuccessful, *held* void as against public policy, in that under it attorneys were financially interested in preventing reconciliation; contingent provision, being portion of inducement, was not severable.

5. Work and labor 🔑10—Where contract for attorneys' fees void, as against public policy, recovery for services must be on quantum meruit.

Contract to obtain divorce for contingent fee dependent on success, void as against public policy, afforded no basis for recovery against client which could be had only on quantum meruit.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Albert D. Ayres and another, copartners, doing business under the name of Albert D. Ayres and W. M. Gardiner, also commonly and generally known as Ayres & Gardiner, against Benjamin Lipschutz. Judgment for defendant, and plaintiffs appeal. Affirmed.

Gillogley, Crofton & Payne and Irvin W. Ayres, all of San Francisco, for appellants.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, for respondent.

NOURSE, J. Plaintiffs, who were attorneys at law, with offices in the city of Reno, Nev., entered into an oral contract with the defendant, wherein the defendant agreed to pay the plaintiffs $300 and costs for legal services to be performed by them, provided they were able to secure for him a divorce from his wife by default. Two hundred dollars of this agreed price was paid, and plaintiffs commenced the divorce action. While still acting as attorneys for the defendant, the plaintiffs prepared and entered into a written contract with the defendant, fixing their fees in the event of a contest. This contract called for the payment of $2,500 for their services if they succeeded in procuring a divorce, and for $2,000 if unsuccessful. The wife filed a demurrer to the divorce complaint, which was promptly overruled, and immediately thereafter filed her answer, and then the defendant herein dismissed his action. Plaintiffs thereupon sued to recover the sum of $2,500 upon the written contract, $100 upon the oral contract, and for costs expended by them.

The complaint was in the usual form upon an express contract—merely alleging the execution of the contracts, plaintiffs' part performance and willingness to perform, and defendant's prevention of complete performance by dismissing the action. The answer alleged that the written contract was composed and drafted by plaintiffs while they were acting as attorneys for the defendant, and that he relied upon the confidential relation existing between them, and did not have any independent, legal, or other advice.

The trial court found that the defendant agreed to pay the plaintiffs under the oral contract $300 for their legal services, and to reimburse them for the costs which they expended. It also found that the written contract calling for a larger fee was against public policy and void. Upon these findings, judgment was rendered in favor of plaintiffs for $101.65, representing the balance of the fee due under the oral contract and the amount of costs outlayed by plaintiffs. The appeal is from the judgment upon the judgment roll and upon a bill of exceptions.

In support of the judgment, respondent relies wholly upon the finding of the trial court that the written contract was against public policy and void. No authorities are cited in support of this position; the respondent being content to rest upon the simple statement that—

"It is hardly necessary to say that considerations of public policy, founded upon the sanctity of the home and the marital state, differentiate a divorce case from the rule and reasoning relied upon by appellants."

They do refer to 3 Cal. Jur. pp. 691–693, and quote the following:

> "Contracts for contingent fees for attorneys were not tolerated at all at common law, but are unquestionably valid in California. This is on the ground that otherwise a party without the means to employ an attorney to pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights."

They also cite, in support of the quoted text, Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548, Parsons v. Segno, 187 Cal. 260, 201 Pac. 580, and several other cases which are so plainly inapplicable to the point under discussion that further consideration of them is unnecessary.

Both the Newman and Parsons Cases involved contracts executed between an attorney, who appeared in a divorce action in behalf of the wife. In both cases the contract between the attorney and his client called for a payment to the attorney out of the alimony or property which the wife might secure from her husband by order of court or a judgment in the divorce action. In the Newman Case the Supreme Court held (page 292 [61 Pac. 910]) that the contract was void as against public policy because the attorney "was directly and greatly interested, not only in preventing any reconciliation, but in bringing about a divorce." In the Parsons Case it was conceded that a similar contract between an attorney and his client was void upon the authority of the Newman Case.

The contract in the instant case was between the attorneys and the husband. It called for the payment of $2,500 in the event that the attorneys should be successful in procuring a divorce for their client, and for the payment of $2,000 if they should be unsuccessful. It was not, like those in the cited cases, a champertous contract, in which the attorneys would participate directly in the funds of the litigation. We have not been cited to any authority which denounces a contract for legal fees of this character, and, without having the point more fully briefed or argued, we are not prepared to agree with the conclusion of the trial court that the contract under consideration is against public policy and void.

[1-3] However, the ground assigned by the trial court is not material, if the judgment is correct for any other reason. We are satisfied that such is the situation here, and that the judgment must be affirmed. The appellants alleged that they were employed as the attorneys of the respondent to maintain an action for divorce; that their fee was agreed upon if they obtained a judgment by default; that thereafter the defendant in the divorce case appeared and interposed a demurrer; that about that time appellants and their client agreed upon a contingent fee dependent upon success in the contested litigation; that, after the demurrer had been presented, the respondent employed other attorneys to dismiss the divorce case, and thereby prevented appellants from performing further services; and appellants thereupon asked judgment for the contract price. The appellants did not plead the value of the services rendered by them, nor ask judgment for the reasonable value of the services rendered before their discharge. The respondent had the power to discharge appellants at any time. Civ. Code, § 2356. However, if, in doing so, he breached his contract, he would have been liable on a count in quantum meruit for the reasonable value of the services rendered by his attorneys down to the date of their discharge. McConnell v. Corona, 149 Cal. 64, 65, 85 Pac. 929, 8 L. R. A. (N. S.) 1171. That was not an action between attorney and client; nevertheless the rule is the same. 6 C. J. 745, § 321; Louque v. Dejan, 129 La. 519, 56 South. 427, 38 L. R. A. (N. S.) 389.

It is true that some testimony was offered that $2,000 was the reasonable value of the legal services performed by appellants prior to their discharge. But this was not in response to any issue before the court, and the court did not find thereon. The oral contract was some evidence that $300 was the reasonable value of such services without a contest, and the trial court could accept this evidence. The judgment based upon the oral contract is thus free from legal objection.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4, 5] We are of the opinion that the contract herein comes within the rule announced and applied in Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548, and referred to in Parsons v. Segno, 187 Cal. 260, 201 Pac. 580, for the reason that under it the attorneys were directly and financially interested in preventing a reconciliation, and in bringing about a divorce. The contingent provisions of the contract appear to have been a portion of the inducement which led to its execution, and therefore cannot be deemed a severable portion thereof. The contract, being void as against public policy afforded no basis for a recovery which could have been had only upon a quantum meruit, and we agree with the conclusion of the District Court of Appeal that, in the absence of any allegation or finding as to the reasonable value of the services rendered, the judgment of the trial court was correct.

The petition for a transfer, and hearing by this court, is denied.

68 Cal. App. 145

PIKE v. PSIHOGIOS. (Civ. 4013.)

(District Court of Appeal, Second District, Division 1, California. July 11, 1924. Rehearing Denied Aug. 8, 1924. Hearing Denied by Supreme Court Sept. 8, 1924.)

1. Landlord and tenant 🔑79(2)—Purchaser of interest of lessor in sublease held not entitled to deposit made with lessor by subtenant.

Where defendant purchased business and lease of building in which it was carried on from plaintiff for agreed price, sale including interest of plaintiff in sublease of part of building, *held*, that defendant was not entitled to have agreed price reduced by amount of deposit made with plaintiff at execution of sublease, pursuant to its terms, to secure performance of its conditions, though defendant did not know of such provision in sublease until after consummation of sale; it being his duty to examine sublease before agreeing to accept it.

2. Sales 🔑283—Purchaser enjoying peaceful possession held not entitled to recover on account of defect of title.

In action for price of fixtures, defendant could not recover on account of fact that title of plaintiff was only that of conditional purchaser, where at time of trial conditional vendor had asserted no rights, and defendant enjoyed peaceful possession.

3. Brokers 🔑42—License as real estate broker not required to entitle to recovery for selling personal property or lease of real estate.

Under St. 1919, p. 1252, § 2, enumerating acts which can be done by duly licensed real estate broker only, *held*, that license was not required to enable broker to recover commissions for selling personal property or lease of real property.

Houser, J., dissenting.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Peter Pike against James Psihogios. Judgment for plaintiff, causes of action set out in complaint, and from the judgment in defendant's favor on three counterclaims, plaintiff appeals. Reversed in part, affirmed in part, and remanded, with directions.

A. L. Hubbell, of Calexico, for appellant.
F. H. Smith, of Calexico, for respondent.

CURTIS, J. This action was instituted to recover the purchase price of certain personal property sold by plaintiff to defendant, also to foreclose a chattel mortgage given to plaintiff by defendant. The defendant set up as a defense to said action certain so-called affirmative defenses and counterclaims. Judgment was rendered in favor of plaintiff upon the two causes of action set out in his complaint, and the court also rendered judgment in favor of the defendant upon four of the counterclaims set out in his answer, and deducted the amount found due on these four counterclaims from the amount found due plaintiff upon his two causes of action, and rendered judgment in favor of plaintiff for the difference. Plaintiff concedes that the action of the trial court in its finding upon one of said counterclaims was proper, but has appealed from that portion of said judgment in defendant's favor, upon the other three counterclaims, and contends that the evidence was not sufficient to justify the court in finding in defendant's favor upon these three counterclaims.

The three counterclaims, the allowance of which is objected to by plaintiff on this appeal, are designated as follows in defendant's answer: Third affirmative defense and counterclaim, defendant's fifth defense, and sixth affirmative defense and counterclaim. We will discuss them in the order named.

[1] *Third Affirmative Defense and Counterclaim.* Plaintiff sold to defendant a certain pool hall in the city of Calexico, together with the fixtures and furniture contained therein, and the lease of the building in which the business was carried on. The consideration thereof was $15,000. Prior to said sale, plaintiff had leased to a subtenant, to be used as a barber shop, a portion of the building covered by his lease. This fact was well known to defendant at the time of the purchase, and a copy of the lease from the plaintiff to the subtenant, assigned by plaintiff to defendant, in accordance with the agreement between the parties, was, at the time the sale was agreed upon, placed in escrow with a bill of sale of the property sold, and other papers necessary to consummate the sale. This lease in favor of the subtenant contained the following provision:

> "It is agreed at the time of the execution of this lease that the sum of $300 shall be deposited with said first party as a guaranty of faithful performance of the terms and conditions of this lease by said second party. In the event the said second party complies with the terms and conditions of this lease, then said deposit of $300 shall apply as payments of the last three months of said term, otherwise it shall be forfeited to said first party as liquidated damages for a breach of this agreement."

Under this provision of the lease there had been paid by the subtenant to the plaintiff, at the time of the execution of the lease to the subtenant, the sum of $300. Defendant by this counterclaim now seeks to compel plaintiff to pay this sum to him. The claim of defendant is resisted on the part of the plaintiff, upon the ground that the property sold, including the interest of plaintiff in the lease to the subtenant, was sold to the defendant for an agreed price, and, as nothing was said or done regarding this sum of $300, it must be assumed that it was taken into consideration by the parties at the time they agreed upon the price, and was included in and covered by the purchase price. As we have already seen, defendant knew of the lease to the subtenant, and either knew the terms thereof, or at least had ample opportunity to acquire this information. In his agreement to purchase the property, he had agreed to accept it subject to the terms of the lease to the subtenant. He agreed to pay for this property a certain fixed sum. If he expected this purchase price to be reduced to the extent of $300 on account of the above provision in the lease and the deposit of money thereunder with the plaintiff, then, in all fairness, he should have made known his claim at the time he agreed to the terms of the sale. Failing to do so, he must be held to have agreed to accept the property in the condition in which it was at the time of its delivery to him by the plaintiff, and for the price agreed upon at the time of delivery. His claim that he did not know of this provision in the lease until some eight days after the sale was consummated, and the property delivered to him does not help his situation. He not only had every opportunity to examine the lease and know of its terms, but it was his duty to do so before he agreed to accept it as a part of the property he was purchasing from the plaintiff. His failure to do so was gross negligence on his part, and if any one is to suffer on account of this negligence it should be defendant rather than the plaintiff. This is especially true, when we take into consideration the fact that the evidence shows that the plaintiff was perfectly frank and honest in the whole transaction, and did nothing to conceal from the defendant any information to which he was entitled, or to prevent him from learning all the facts regarding the property he was purchasing. In our opinion, the evidence fails to sustain the finding of the court in defendant's favor upon this counterclaim.

[2] *Defendant's Fifth Defense* was based upon the following facts: The furniture and the fixtures, sold by plaintiff to defendant, included a soft drink bar. The evidence, however, shows that plaintiff was not the absolute owner of this bar, but held it under a conditional sale from the Maier Brewing Company. The conditions set forth in this contract of sale had never been performed by the plaintiff. The brewing company, up to the time of the trial, however, had not taken possession of said bar, nor had the defendant ever paid to the company anything on account of the purchase price of said bar. The defendant went into possession of said bar immediately upon the consummation of said sale, and has had the quiet and peaceable possession thereof ever since its purchase. Defendant therefore had not, at the time of said trial, sustained any damage, and was not entitled to any recovery against plaintiff on account of his defect of title to said bar.

> "To recover damages for defect of title to personal property it must be alleged and shown that plaintiff has suffered damages thereby. The rule is the same where the claim for damages is based on breach of agreement to furnish good title as it is where the action is for breach of warranty of title. Indeed, an agreement to furnish a good title followed by a bill of sale of the property is in effect a warranty of title. This rule that the vendee cannot recover on such warranty while still retaining undisputed possession of the property has been frequently recognized in this state." Barnum v. Cochrane, 143 Cal. 642, 645, 77 Pac. 656, 657.

[3] *Sixth Affirmative Defense and Counterclaim.* This cause of action was based upon a claim assigned to defendant by one A. Katugios. The court found that Katugios acted as agent for the plaintiff in the sale of said poolroom, furniture, and lease to defendant for the sum of $15,000, and that plaintiff agreed to pay him a commission of five per cent. or $750, for said services. While the evidence is conflicting, we think it is sufficient to sustain such finding. It is admitted that Katugios had no license to act as a real estate broker, as required by section 2 of chapter 605, Statutes of California 1919, page 1252. Plaintiff therefore claims that no recovery can be had for his services in effecting such sale. In support of this claim plaintiff relies upon said section 2 and section 20 of said act. Section 2 enumerates the acts which may be performed only by a duly authorized and licensed real estate broker or salesman, and section 20 provides that no action shall be brought or maintained by any such person for the collection of compensation for the performance of any of the acts enumerated in said section 2, without alleging and proving that such person was a duly licensed real estate broker or salesman. The services, on account of which it was sought by said counterclaim to recover, were performed by Katugios in acting as agent of the plaintiff in the sale of personal property, and of a lease to real property. It will be observed that section 2 of said act, in its enumeration of the acts which only a duly licensed real estate broker may perform, does not specify either the sale of personal property, or the sale of a lease to real property. It was therefore not necessary for Katugios to obtain a license under said section 2 to perform the services rendered by him to the plaintiff, and which form the basis of this counterclaim. Katugios therefore had a good cause of action and the right to maintain the same against the plaintiff for his said services, and could, of course, assign it to the defendant. The action of the court, therefore, in awarding the defendant judg-

ment on this counterclaim, was proper and legal, and the judgment herein, in so far as it relates to defendant's sixth affirmative defense and counterclaim, is affirmed.

On account of the error of the court in awarding judgment in favor of the defendant on his third affirmative defense and counterclaim, and on defendant's fifth defense, as set out in his answer, that portion of said judgment in defendant's favor upon said two last-named counterclaims is reversed, and the case is remanded to the trial court, with directions that a new trial be had, but only as to the issues involved in defendant's third affirmative defense and counterclaim, and on defendant's fifth defense.

I concur: CONREY, P. J.

I dissent: HOUSER, J.

68 Cal. App. 166

McCARTHY & MEYER v. BANK OF ITALY et al. (Civ. 4240.)

(District Court of Appeal, Second District, Division 1, California. July 17, 1924.)

1. Landlord and tenant 🔑32—Facts held not to show ratification of lease, tendered as fulfilling condition of escrow agreement.

Where lessor sold lessee certain equipment, subject to escrow agreement by which purchase money was to be delivered by escrow holder to lessor when latter tendered new lease, containing certain renewal clause, *held* that defendant's continued possession of premises and equipment after expiration of old lease did not, under facts, show ratification of new lease tendered by lessor not containing stipulated clause.

2. Escrows 🔑9—Holder of escrow agreement held to have right to insist on fulfillment of condition not illegal, though not enforceable.

Where, under escrow agreement for purchase of fixtures by defendant from plaintiff, his lessor, escrow holder was to deliver purchase money when plaintiff tendered lease carrying "renewal option for two or three years," at rent to be mutually agreed upon, *held* that, even if such condition was not enforceable, not being illegal, plaintiff could not, without defendant's consent, compel escrow holder to deliver purchase money without fulfilling condition.

3. Escrows 🔑9—Rule stated as to necessity of showing strict performance of conditions of escrow agreement in action against escrow holder.

Where property is sold subject to terms of escrow agreement, in action by seller to compel escrow holder to deliver purchase money, plaintiff can recover only upon showing of full and strict performance by him of terms and conditions of escrow agreement.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action to compel specific performance by McCarthy & Meyer against the Bank of Italy and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

John W. Carrigan, of Los Angeles, for appellants.

Andreani & Haines and John L. Bisher, Jr., all of Los Angeles, for respondent Bank of Italy.

Smith & Breslin, of Los Angeles, for respondent Mina.

CONREY, P. J. On or about the 21st day of February, 1921, the defendant Mina, as tenant of the plaintiffs, went into possession of a certain meat market, with its fixtures and equipment, at 1102 West Seventh street, in the city of Los Angeles, and continued in possession thereof during a period extending some months beyond the 31st day of August, 1921. Said entry was made under a written lease for a term commencing on said date of entry and ending on the 31st day of August, 1921, at a monthly rental of $70. On or about the 10th day of May, 1921, the plaintiffs sold said meat market, fixtures, and equipment to the defendant Mina for the agreed price of $2,600, of which sum said Mina then paid $150; it being further agreed that leases should be executed as hereinafter stated.

Said sale was made subject to the terms of their agreement as contained in escrow instructions on said 10th day of May delivered by the plaintiffs and Mina to the defendant Bank of Italy. Said escrow instructions were signed by Mina and at the same time were accepted and approved over the signature of the plaintiffs. The agreement as contained in said escrow instructions provided for the payment of the unpaid balance of the purchase price, amounting to $2,450, as follows: Mina delivered to the bank the sum of $1,850 and a promissory note payable to the plaintiffs in the sum of $600. The bank was instructed that it was to hold said money and said note until August 31, 1921, or before said date, provided the following conditions were complied with. The bank was instructed to hand said money and note to the plaintiffs when the plaintiffs delivered to the bank for Mina a bill of sale to said fixtures and equipment of the meat market stall, and also a lease to said stall and market premises for the term commencing February 21, 1921, and ending August 31, 1921, at the stated rental, and when they further delivered to the bank for Mina a lease to said meat market stall and premises, commencing August 31, 1921, for the period of two years, at a monthly rental not exceeding $70 per month—

> "which said new lease shall also carry a renewal option for two or three years from and after August 31, 1923, at a rental to be mutually agreed upon; the understanding of the undersigned being that said purchase price of $2,600 be paid to said McCarthy & Meyer, if on or be-

fore August 31, 1921, they obtain for and deliver to the undersigned lease to said market stall and premises for at least two years, and possibly five years, to said premises, commencing on August 31, 1921. Should said lease, commencing August 31, 1921, for the term of two years or longer, at a rental of $70, be not so delivered for the undersigned, the above-said money is to be returned to the undersigned."

On some day during the month of August, 1921, the plaintiffs tendered to the bank, for delivery under said escrow, a bill of sale and a lease, which they claimed were in full accordance with the requirements of said escrow agreement. The defendant Mina, claiming that said lease commencing August 31, 1921, tendered by the plaintiffs, did not comply with the requirements and conditions of the escrow, refused to accept said documents, and instructed the bank to withhold from plaintiffs the said money and note deposited by him with the bank. The bank thereupon refused delivery of the money and the note to the plaintiffs, who thereupon commenced this action. Judgment was entered in favor of the defendants. The plaintiffs appeal therefrom.

The controversy turns upon the contention of the defendants that the lease tendered by the plaintiffs did not comply with that part of the escrow instructions or agreement which provided that "said new lease shall also carry a renewal option for two or three years from and after August 31, 1923, at a rental to be mutually agreed upon." It does not appear that at the time of making the sale and escrow agreement, or subsequently thereto, the parties ever entered into any agreement or attempted to make any agreement settling the amount of rental to be paid during the period covered by said proposed option. The lease tendered by the plaintiffs in purported compliance with said sale agreement contained no reference to said proposed option other than the following:

> "Provided, however, there is hereby given said second party an option of renewal of this lease at a monthly rental to be mutually agreed upon at its termination, subject, however, to all the rights and interests said lessor herein may then have or have acquired in said demised premises."

If the lease thus offered, containing said quoted clause (which does not state any period of time of such renewal), and not otherwise providing for the renewal option, is not a sufficient compliance with the agreement as made, it must follow that the judgment in favor of the defendants should be affirmed.

[1] Appellants contend, first, that defendant Mina, by continuing in possession of the premises and personal property, ratified and confirmed the terms of the lease which was tendered to him by the plaintiffs. Certainly this result did not follow at the time, early in August, when the two-year lease was tendered. For the defendant Mina was in possession under a prior lease, which by its terms would not expire until the end of that month; and if, after that month (as appellants assert that the fact is), Mina remained in possession and continued to pay rent of $70 per month to plaintiffs, then he became a tenant for one month at the time of each one of such renewals. Civ. Code, § 1945. Plaintiffs knew, before the end of August, that Mina had refused to accept the proffered lease. This must be so, since this action was commenced on August 17, 1921, to enforce the alleged contract of sale by compelling the bank to deliver to plaintiffs the note and money which had been placed in escrow.

[2, 3] Appellants further contend that defendant Mina's claim of right to have the lease carry a renewal option, as specified in the escrow instructions, is not enforceable, because the clause in question, according to "the construction placed upon the agreement by the defendant," is inoperative, indefinite, unreasonable, and not capable of being carried into effect. Let it be conceded that, for said stated reasons, defendant Mina could not have compelled the plaintiffs to execute a lease carrying a renewal option at any stated rate of rent to be paid. It does not follow that the plaintiffs, without offering to execute a lease conforming to the terms of their agreement, can specifically enforce the contract. On the contrary, it would seem that both parties, equally, are unable to obtain specific performance of their agreement. The condition specified in the escrow instructions, in relation to the option, even if not enforceable, was not illegal. Since the defendant Mina, at the time of giving his escrow instructions, thought that the provision in question was of sufficient importance to be included in the proposed lease, the other party was not entitled to change the terms in that respect any more than in any other detail of the lease, without Mina's consent. Yore v. Bankers' Association, 88 Cal. 609, 615, 26 Pac. 514. And in an action to compel the escrow holder to deliver the consideration for the lease, "the bank would be compelled to deliver the papers in controversy to the plaintiffs, only upon the showing of a full and strict performance by them of the terms and conditions of the escrow agreement." Bartley v. Fraser, 16 Cal. App. 560, 565, 117 Pac. 683, 685.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

(68 Cal. App. 153)

PEOPLE v. SOUTHERN PAC. R. CO. et al. (Civ. 4107.)

(District Court of Appeal, Second District, Division 1, California. July 14, 1924.)

1. Dedication 🔑44—That public map shows land laid out as street not evidence of dedication.

That a public map shows land laid out as a street is not in itself evidence of dedication.

2. Dedication 🔑44—Mention in deed of center of street as boundary line not alone sufficient to prove dedication.

Fact that in deeds center line of street was mentioned as boundary line of conveyed land was not alone sufficient to prove dedication of anything to public, or that offer of dedication had been accepted.

3. Dedication 🔑19(5)—Making sales with reference to supposed street lines held not to constitute dedication.

As between a landowner and public, making sales with reference to supposed street lines does not constitute a dedication.

4. Dedication 🔑44—Reference to map and to blocks delineated thereon held insufficient to prove acceptance.

Evidence showing references as contained in deeds and quitclaims, to map, and items of evidence showing similar references to blocks delineated thereon, *held* insufficient to prove acceptance of any offer of dedication for street purposes.

5. Dedication 🔑29—Filing map showing street held not effective as against owners acquiring title, under conveyance ignoring existence of street.

Where map showing location of street was filed as public record 11 years after it was made, such filing was too late to be effective as dedication against owners who had acquired title under conveyances which ignored existence of any street or supposed street and disposed of entire area as private property.

6. Dedication 🔑29 — Conveyances ignoring street designated on map held withdrawal of any offer of dedication.

Where map of land showed street, subsequent conveyances prior to recording map, ignoring existence of street or supposed street and disposing of entire area as private property, *held* withdrawal of offer of dedication, if any, made by map.

7. Dedication 🔑19(1)—Map failing to show boundary of street held not to give notice thereof.

Where map as recorded did not show westerly boundary of street south of certain point, its recording did not give notice to any one of existence of such a street south of designated point, so as to amount to dedication thereof.

8. Evidence 🔑230(3)—Testimony of former owner, after selling land, as to dedication held not admissible as against successor in title.

In action by city to compel removal of obstruction from land contended to have been dedicated to street purposes, testimony of predecessor in title of defendant in another action, after former had sold land, that he did not claim it, was not admissible against defendant.

9. Trial 🔑60(1)—Attempt to accept land for street inadmissible, in absence of evidence of offer of dedication.

In action to compel removal of obstruction from land claimed to be street, in absence of evidence tending to show offer of dedication of land from owners, proceedings of city council attempting to accept land as public street were inadmissible as evidence of acceptance.

10. Municipal corporations 🔑654 — Evidence held sufficient to show existence of street by adverse use.

In action to compel removal of obstruction from land claimed to be street, evidence *held* sufficient to sustain finding that land had been used openly, continuously, adversely, and exclusively for many years as street, with claim of right and with knowledge of owners, so as to make land street by adverse use.

11. Municipal corporations 🔑657(3)—Placing fence in street held not to prove abandonment.

That fence was placed at or near middle of street, on order of member of board of city trustees, *held* not proof of abandonment by city, acting through its board of trustees or any competent authority.

12. Estoppel 🔑62(5)—City held not estopped to sue to remove obstruction from street.

Relocation of fences, placing them in center of street, on order of member of city board of trustees, without proof that city itself acted by board or any competent authority, *held* not to estop city to maintain action to remove obstruction therefrom.

Appeal from Superior Court, Ventura County; Merle J. Rodgers, Judge.

Action by the People of the State of California against the Southern Pacific Railroad Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Frank Thunen, of San Francisco, for appellants.

Bowker & Sheridan and H. F. Orr, all of Ventura, for the People.

CONREY, P. J. In the name of the people of the state, the city of San Buenaventura brought this action to compel defendants to remove certain obstructions from an alleged public street named Kalorama street. Judgment went for the plaintiff, and the defendants appeal.

The complaint is in two counts. The first count claims under a dedication of land for the street, and acceptance thereof by the public. The second count claims through adverse use of the described land, with claim of right so to do; such claim being known to the owners of the land and to the public generally. The answers of the defendants deny the dedication, deny the acceptance, and deny the adverse use. Appellants contend that the evidence is insufficient to sustain the findings of the court upon these issues.

The disputed strip of land is included in what is alleged to be that part of Kalorama street which extends south from the intersection of that street with an east and west street called Front street. That Front street and Kalorama street north from Front street exist as public streets is not denied. Beach street, as shown on the map, Exhibit 1, parallels Front street, one block south from Front street. The block of land bounded on the north by Front street, on the south by Beach street, on the east by Laurel street, and on the west by the alleged Kalorama street, is known as block 21. The Southern Pacific railroad station is located in block 21, where the right of way runs in a direction extending northwesterly toward and across and beyond the alleged Kalorama street. As conveyed by Robert Sudden to Pacific Improvement Company (predecessor of the defendants) in April, 1887, for railroad and warehouse purposes, the premises described in that deed included the land which is the subject of the present controversy. The right of way parallels the shore of the Pacific Ocean, which at that point is only a short distance (apparently 400 feet, more or less) from the right of way.

In July, 1893, the Pacific Improvement Company conveyed to Southern Pacific Railroad Company the premises acquired by said deed from Robert Sudden. The Southern Pacific Company is lessee of property rights of the Southern Pacific Railroad in and to the same property. The Associated Oil Company is the lessee in possession (under said Southern Pacific Railroad Company and said Southern Pacific Company) of a part of said land, which is also a part of the land in dispute. In the findings, the land occupied by the Associated Oil Company is described as "a parcel of land approximately 30 feet wide and 100 feet long, lying on the easterly side of Kalorama street in the city of San Buenaventura, and on the south side of the right of way of said Southern Pacific Company." It is on this parcel of land that the warehouse and other structures exist, placed and maintained thereon in the year 1918 by the Associated Oil Company, and of which the plaintiff claims that they are an obstruction to the street, and that they constitute a public nuisance.

The findings declare that the city now is, and for more than 20 years prior to the commencement of this action has been, the owner, for street purposes, of the parcel of land described in the complaint; "that the said parcel of land was dedicated and abandoned by the owners thereof to the public prior to the acquisition of any interest therein, or in or to contiguous lands, by any of said defendants, and was accepted by the public as and for a public street."

At the trial the court first received in evidence, as plaintiff's Exhibit 1, a map entitled "Map of the Addition to Town of San Buena Ventura, Surveyed by John T. Stow, Town Surveyor, under Instructions from the Board of Town Trustees, May, 1876." On this map there appears a statement, over the purported signatures of the town trustees and clerk, as follows: "Approved and declared to be the official map of the Addition, Town of San Buena Ventura, by resolution of the board of trustees passed June 5, 1876." There is also thereon the recorder's certificate: "Recorded at request of board of trustees, May 2, 1887, at 9 a. m. L. F. Eastin, Recorder."

This map shows Kalorama street, with its sidelines, north of Front street. According to the copy of this map as contained in the transcript of the bill of exceptions (duly certified to be a copy of the map introduced in evidence), the map shows the west line of block 21 and of block 27 (south of 21) in direct line with the east line of Kalorama street, but does not show any west line of Kalorama street between Front street and the bluff overlooking the ocean beach. In this particular, the map as shown by the transcript differs from its delineation of the neighboring north and south streets, in all of which both of the side lines are extended all the way to the beach or bluff. It appearing likely that there was some error in the copy of the map as contained in the transcript, we have proceeded under section 953, Code of Civil Procedure, and have examined the original map. Counsel have also filed a certified copy of a part of the map as recorded in the recorder's office. We find that the original map shows the west line of Kalorama street south of Front street all of the way to the ocean bluff in direct line with the west line of Kalorama street north of Front street. The condition of the map indicates that this line was always there. But it appears that, when the map was recorded in 1887, the copyist in the recorder's office erroneously omitted said west line of Kalorama street south of Front street. The map also shows certain barrancas running back from the ocean across the strip that would be Kalorama street on the extension south from Front street. No barrancas or other obstructions appear across said other streets. On said map there also appears a note which, among other things, states that the streets are 60 feet wide, with exceptions not applicable to Kalorama street or to any street parallel therewith.

The court next received in evidence certain minute entries of the board of trustees of the town of San Buenaventura, of its meeting held on the 5th day of June, 1876. Plaintiff's Exhibit 2. These entries first recite the submitting to the board, by the town surveyor, John T. Stow, of a map which, by its description in the minutes, appears to be the said map, Plaintiff's Exhibit 1. "It was then ordered by the board that the town clerk, after the absent members shall have approved and signed their approval of said map, that he have the said map recorded in the office of the county recorder of Ventura county."

The court next received in evidence minutes of said board of trustees, dated May 13, 1895 (Plaintiff's Exhibit 3), containing a committee report relating to the matter of extending Laurel and Kalorama streets as open streets to the south line of the railroad right of way. The board ordered the town attorney to draft an ordinance concerning said matter.

The court next received in evidence (Plaintiff's Exhibit 4) an ordinance of said town, dated May 20, 1895, marked "Ordinance No. 78," which on that day was approved and adopted and ordered filed of record. This ordinance is entitled "Ordinance Accepting That Portion of Kalorama Street from Front Street to the Southern Boundary Line of the Right of Way of the Southern Pacific Railroad." Section 1 of the ordinance reads as follows:

> "Kalorama street from the south line of Front street to the south line of the 300 feet right of way of the Southern Pacific Railroad having heretofore been dedicated and having heretofore been traveled and for more than five years used by the public as a highway and public street, it is hereby accepted as a street and by this board of trustees declared to be a public street and opened to the public as such."

To the offer in evidence, of plaintiff's Exhibits 1 and 2, defendants objected on the grounds: (a) That the plat was neither made nor filed by or with the consent of the owner of the land platted; (b) that no evidence was offered to prove that any offer had been made, or ever was made, to dedicate the streets thereon, and particularly the portion of Kalorama street involved in this action. Appellants now contend, on the same grounds, that said exhibits, and the evidence relating thereto, are insufficient to prove that there ever was any dedication, or offer and acceptance of dedication, of said land for street purposes.

[1] It is an established rule that the fact that a public map shows land laid out as a street is not, in itself, evidence of dedication. Cook v. Sudden, 94 Cal. 443, 29 Pac. 949. Not denying this rule, respondent asserts that in this case additional evidence of dedication is found in the record, consisting of: (a) The filing of the map; (b) evidence of continuous user; (c) reference to the map in deeds and other instruments; (d) conveyances by reference to the blocks laid out and delineated on the map; (e) an explicit statement under oath, made by the owner of the premises, that he did not claim Kalorama street.

[2] It is true that in certain deeds executed prior to the deed of Robert Sudden to the Pacific Improvement Company, descriptions had been written which referred to Kalorama street. In June, 1884, Carpentier and Steinbach (the original owners of all of the land shown on said map) conveyed to Snodgrass a parcel, by metes and bounds, wherein the description commenced "at the point where the south line of Front street intersects the center line of Kalorama street," and closed with courses running northwesterly along the beach "to said center line of Kalorama street, thence northerly along said center line of Kalorama street to point of commencement." In June, 1885, Snodgrass conveyed to Robert Sudden by the same description. The title of the defendants deraigns under these deeds. The deed of Sudden to the Pacific Improvement Company and the subsequent deed and leases deal with lands, including Kalorama street, all as private property, and do not mention Kalorama street, although they designate the described land as "being a portion of the Eastern addition to said town." The inscriptions on the map, Exhibit 1, do not describe it as an "Eastern Addition."

[3] The fact that in the deed to Snodgrass, and in the deed to Sudden, "the center line of Kalorama street" is mentioned as a boundary line of the conveyed land is not alone sufficient to prove that the grantor had dedicated anything to the public, or that any offer of dedication of land for such street had been accepted. As between an owner of land and the public, the mere making of sales with reference to supposed street lines does not constitute a dedication to the public. "An acceptance must be had either by user or by some formal act." County of Inyo v. Given, 183 Cal. 415, 420, 191 Pac. 688, 690.

[4-7] The evidence showing references (as contained in deeds or quitclaims) to the map, and the items of evidence showing similar references to the blocks delineated on the map, are alike insufficient to prove acceptance, by the public, of any offer of dedication of this land for street purposes. And when at last, after eleven years from the time when the map was made, it was filed as a public record of the county, that act was too late to be effective as against owners who had acquired title under conveyances which ignored the existence of any street or supposed street, and disposed of the entire area as private property. Such conveyances were a withdrawal of the offer of dedication, if any such offer had been made. "A deed in solido, without reservation of easements or streets, * * * itself operates as a revocation." City of Oakland v. Oakland Water Front Co. 162 Cal. 675, 684, 124 Pac. 251, 255. Moreover, as we have pointed out, the map as recorded does not show the westerly line of Kalorama street south of Front street, and therefore we think that such recording did not give notice to any one of the existence of such street south of Front street.

[8] Concerning respondent's claim that the evidence shows an explicit statement made by the owner of the premises that he did not claim Kalorama street, this refers to testimony given by Robert Sudden at the trial of the action of Cook v. Sudden, supra. From the record in that case, said testimony was read in evidence at the trial of this action. It is apparent that at that time Sudden had ceased to own the land, for his testimony referred to the fact that the railroad had "got the land down there." Therefore his testimony in that action was not admissible as evidence, nor as an admission against interest, against the defendants in this action. Also, his statement was not to the effect that he had offered to dedicate this land for street purposes. The objections of appellants to the testimony of Sudden should have been sustained.

[9] From the foregoing, we conclude that the court erred in overruling the objections of appellant to the admission in evidence of said Exhibits 1 and 2. Also, we think that Exhibits 3 and 4, showing action of the city council in the year 1895, attempting to accept as a public street land including the land in controversy in this action, should have been excluded from the evidence. In the absence of any evidence tending to prove that at that time there was any existing offer of dedication by the owners of the property, such proceedings of the city council could not be effective as an acceptance. From the views hereinabove expressed, it follows as a necessary conclusion that there is no sufficient competent evidence to sustain the cause of action stated in the first count of the complaint, which rests wholly upon a claim of dedication and acceptance.

[10-12] The court further made findings favorable to the plaintiff on the second count of the complaint, which seeks to establish the creation of a public street, including the land here in controversy, by adverse use thereof by the public under claim of right for a period of time sufficient to maintain this cause of action. It is necessary to review some of this evidence. The testimony of James McGlinchey relates to conditions along the line of the alleged street at and after the year 1878. He testified in substance that at that time he traveled over the land where the south extension of Kalorama street from Front street crosses the Southern Pacific right of way; that to get down to the beach they went down and crossed where the railroad tracks are now, "and went on down to the foot of the bank, and then we came along by the south side of the station and went down on the east side down on the trail there." In this testimony, the phrase "the foot of the bank" is indefinite, but apparently it means the bluff next to the beach. This is so, because later on the witness stated that "the tide always drifted up to the bank." The witness, with his father, made trips across this land to the beach for the purpose of gathering driftwood on the beach and hauling it back up to a place where they would dump the wood "at the station at the end of Kalorama street." He gives no explanation of the phrase "the station," but it must have been south of the present railroad right of way, because he says that from that point, "the station at the end of Kalorama street," they traveled north across what is at the present time the Southern Pacific right of way, to Front street. This witness further stated that there was other travel upon the street at that time. This witness stated that at one time there was a fence along there and a gate, but he does not say that the fence or gate ran across the street. On the contrary, from this testimony, the fence and the gate appear to have run north and south, and probably were maintained by Captain Sudden, owner of block 21. The witness said that after the railroad was constructed he helped to farm the land to the east of Kalorama street for Captain Sudden. "We went right across the railroad track and turned to the left and opened the gate to get inside." Referring to the suggestion that the travel might have been through a barranca, the witness said that some people went down through the barranca, but that he and his father went down to the beach on high ground, and not through the barranca. "We went down on this road. From the bluff we went down to the next barranca to the east, * * *" etc.

Robert K. Morgan testified to the fact of travel down Kalorama street prior to the time the railroad came through. "I used to go down on Front street and then south on Kalorama, I should judge about halfway, possibly paralleling the railroad tracks by the beach; and there was a road across the Sudden field where they traveled to haul up produce and stuff." While this testimony does not carry the used road along Kalorama street all the way to the beach, it does carry it south of the railroad right of way. This witness further testified: "The fences have always been along Kalorama street on both sides as far back as I can remember." Referring to another instance of use of the street, he said: "We went down Kalorama street to the south line of the Southern Pacific right of way and then went east. * * * The fence stood on the east line of Kalorama street, and in hauling the refined products from the refinery they came over this road in Kalorama street and came north on Front street, crossing the railroad right of way. There was no gate there; nor was there any sign reading 'Private Way, or Right to Pass through Revocable,' or any signs of such nature."

Without reciting the testimony of other witnesses, we deem it sufficient to say that, notwithstanding some conflict in the evidence, there is evidence sufficient to sustain the finding of the court that the land in question was for many years prior to the commencement of this action (the findings say for more than 40 years) continuously and adversely used by the public in general for the purposes of travel thereon as a part of Kalorama street, with claim of right so to do, with knowledge of the owners of the land, and with general knowledge of such claimed use, and has been generally recognized as and acknowledged to be a public street. This is our conclusion, notwithstanding the fact that there are two fences running down near the center of the street parallel to each other. Morgan said that one of these fences was put there by the Standard Oil Company when it put up its tank "10 years ago." These fences are about two or two and one-half feet apart. At about the same time the other fence, the western of these two fences, was erected by employees of the city under the orders of a city officer. The witness Hamilton testified that he was a city trustee about 1910 or 1911; that at that time the city acquired the Beach Park property, "which is the property lying south of the Southern Pacific Company's right of way to the west of the extension of Kalorama street." He further testified:

> "The road to the park at that time was down through Kalorama street across the Southern Pacific Company's tracks. * * * At that time there was what was called a panel fence on the east boundary of the city park. It was on the west line of Kalorama street. That fence was removed along in 1910. I ordered the work done. I ordered the fence on the Sudden side of the street and on the city side of the street put together south of the Southern Pacific right of way."

But while it is thus proved that a fence was placed at or near the middle of the street, on the order of a member of the board of trustees of the city, in the year 1910, this does not prove that the city itself, acting by its board of trustees or any competent authority, abandoned the street. If the evidence is sufficient to prove that the street had become established by adverse use prior to 1910, it did not cease to become a street merely because obstructions were then placed therein by city employees or officers not legally authorized so to do.

The witness Robert C. Sudden, son of the Capt. Sudden who formerly owned block 21, gave testimony which locates the fence on the east line of the alleged Kalorama street. "We had a right of way fence on the west line of our land, that would be the east line of Kalorama street. That fence was there at the time the railroad came through." This indicates that Capt. Sudden maintained a fence line along this east front line, notwithstanding that the description of the land in his deed included the east half of the street. On cross-examination, this testimony was somewhat weakened by the admission by the witness that he could not swear to the fact whether the fence was on the line or not, and by his statement that "our westerly line fence was supposed to be on the westerly line of the tract of land described in the deed to my father." But he also said that the city's fence on the other side "was supposed to be 60 feet from the west line running north and south." He also said that "our fence went down to the bluff, and the point where we left Kalorama street to go to the beach was, I suppose, not over 200 feet from the edge of the present bluff."

Counsel for appellant have referred to numerous decisions holding that, in order to establish a public road by adverse use, the use must have been adverse to the rights of the owner, open, notorious, and hostile, continuous and exclusive, and must have continued for the statutory period, which in this state is five years. Among these cited cases are Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448; Coburn v. San Mateo County (C. C.) 75 Fed. 520; Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 Pac. 62; San Diego v. Hall, 180 Cal. 165, 168, 179 Pac. 889. Also see Elliott on Roads and Streets (3d Ed.) § 194.

Accepting these authorities as correct statements of the law, we are of the opinion that the evidence is sufficient to sustain the court's findings, under which the adverse use of the land in question for street purposes was sufficient to comply with the law as thus established.

Counsel for appellants further contend that the people are estopped to maintain this action for the reason that, if the public ever did claim the right now asserted, that claim never was so open and unequivocal as to charge the owner of the property with notice; that the city of Ventura itself was unaware of that claim, but, on the contrary, it has always exercised proprietary rights in the fee on its half of the street, so called, and as the agent of the public is estopped now from denying its proprietorship and a like proprietorship in these appellants in the adjacent half of the street, so called. We do not think that the relocation of the fences, placing them down the center of the street in the manner to which we have referred, or any other facts in the record are sufficient to establish this claim of estoppel.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

68 Cal. App. 239

MULLER v. UNION TRACTION CO.
(Civ. 4714.)

(District Court of Appeal, First District, Division 1, California. July 26, 1924.)

1. Appeal and error ⟹1191—Plaintiff held to have waived irregularities in issuance of remittitur.

Plaintiff, who caused remittitur to be entered by the clerk of the trial court under Code Civ. Proc. § 958, and who made written request for entry of judgment in second action, in which judgment had been stayed pending determination of appeal in first action, waived irregularities in issuance of remittitur.

2. Appeal and error ⟹1222—Respondent held precluded from recalling and vacating remittitur, when irregularities waived.

Where appellant filed dismissal of appeal, and requested that remittitur issue forthwith, and respondent waived irregularities by causing remittitur to be entered, and by request for entry of judgment in second action, in which entry of judgment had been stayed, respondent could not recall and vacate remittitur because of such irregularities, in view of Civ. Code, § 3513.

3. Appeal and error ⟹1222—Failure to insert in remittitur judgment for costs on appeal held not fatal omission.

Failure to insert in remittitur judgment for recovery of respondent's costs on appeal is not such a fatal omission as to demand a recall of remittitur, where appellant stands ready to pay maximum amount allowed respondent as prevailing party, under Code Civ. Proc. § 1027.

4. Appeal and error ⟹776—Appellant has absolute control over appeal, in absence of cross-appeals or counter demands.

In absence of cross-appeals or counter demands, appellant has absolute control over its appeal, and can terminate proceedings by dismissing appeal and offering to immediately pay full amount of judgment, with maximum amount of interest and costs allowed by law.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mildred Muller against the Union Traction Company. Judgment for plaintiff, and defendant appeals. On motion to recall and vacate remittitur. Denied.

Leo H. Susman, Thos. J. Straub, John W. Preston, and Heller, Ehrman, White & McAuliffe, all of San Francisco, and James L. Atteridge, of Sacramento, for appellant.

Ford & Johnson, of San Francisco, for respondent.

PER CURIAM. Respondent's motion to recall and vacate remittitur. On April 6, 1922, plaintiff, Mildred Muller, obtained a judgment, after verdict by jury, against defendant, Union Traction Company, a corporation, for $38,000 as damages for personal injuries. Defendant appealed. Subsequently, plaintiff, in another action, recovered a verdict for $118,000 against the Coast Counties Gas & Electric Company, the principal stockholder of said Union Traction Company, upon the same cause of action previously declared upon against said Union Traction Company. A stay of entry of judgment and of further proceedings was granted in the second action until the appeal in the first action was heard and determined. On June 26, 1924, after the transcript and briefs on appeal in said first action were filed, but before said cause was placed on the calendar for argument, appellant Union Traction Company filed herein a dismissal of said appeal and a request that the remittitur issue forthwith, and the presiding justice of this court signed and caused to be filed an order to that effect. The remittitur was issued forthwith accordingly and was immediately transmitted to the clerk of the court from which the appeal was taken. On the morning of the following day, June 27, 1924, the attorneys for the respective parties appeared before Hon. D. C. Deasy, judge of the superior court of the city and county of San Francisco, department No. 13, before whom the second cause of action was tried, and thereupon, the attorneys for the defendant and appellant requested further stay of proceedings in that case, which request was opposed by the attorney for the plaintiff and respondent. The court indicated that upon proper entry of the remittitur in the records of the action in which the remittitur was issued, further stay of entry of judgment in the second action would be denied. Thereupon the attorney for the plaintiff and respondent personally wrote in a book denominated "order book" kept by the county clerk, the following:

> "June 27. Please enter remittitur on minutes of court—Dept. 15. Geo. K. Ford, Atty. for Plaintiff."

The county clerk then, pursuant to section 958 of the Code of Civil Procedure, attached said remittitur to the judgment roll and made proper entry thereon in the docket. Later, on the same day, said attorneys again appeared before Judge Deasy and the attorney for plaintiff and respondent, in opposition to the request made by defendant and appellant for further stay, offered in evidence said remittitur, and, according to the affidavit filed on behalf of defendant and appellant, insisted that judgment be entered in said second action. Thereafter, on the same day, said attorney for plaintiff and respondent made further entry in said "order book" requesting entry of judgment in said second action. Whether or not judgment was so entered is not made certain by the record before us. It further appears that on said June 27, 1924, and again on June 28, 1924, said defendant and appellant, Union Traction Company, duly tendered plaintiff the full amount due on said first judgment, together with interest, costs, and all other moneys due, expressly including the sum of $100, the total amount allowed by law as costs on appeal, which tenders were by plaintiff and respondent refused. Said tender was renewed, in writing, at the time of the hearing of this motion.

Respondent's motion herein, to recall and vacate the remittitur is made upon eleven separate grounds, which briefly stated and in substance are that said remittitur was issued prematurely, inadvertently and irregularly and did not provide for judgment for costs on appeal. In this respect respondent contends, first, that an appeal may be dismissed only "by the court" and then only upon motion, after notice, except on stipulation; secondly, that the dismissal of an appeal is in effect a judgment of affirmance and as such does not become final until the expiration of thirty days, and that only after it becomes final may the remittitur issue, unless otherwise ordered or stipulated.

[1] Irrespective of the merits of the legal points urged by respondent bearing upon the irregularities which she claims underlie the issuance of said remittitur, we are of the opinion that any such irregularities were waived by her when she caused said remittitur to be entered by the clerk of the trial court in accordance with section 958 of the Code of Civil Procedure, and particularly in view of the fact that afterwards she took advantage of such entry by making written request for entry of judgment in the second action, which request was doubtless made, as respondent contends, upon the ground that the appeal in the first action had been determined and the judgment therein had become final. Whether, as appellant claims, such first entry was made in said "order book" at the suggestion of the trial court, or was made upon respondent's own initiative, makes little difference, since, in either event, said remittitur was actually entered by the clerk pursuant to the written request.

[2] The constitutional and statutory provisions, and also the rules of court providing for a lapse of time and stay after rendition of opinion by the appellate jurisdiction, were doubtless designed for the benefit of the losing party. "Anyone may waive the advantage of a law intended solely for his benefit. * * *" Section 3513, Civ. Code. And since the appellant waived the right to any such time, and respondent afterwards treated and acted upon the remittitur, which was issued forthwith as a result of appellant's waiver, as valid, by causing it to be entered in the records of the action, it constituted, we believe, an acceptance by appellant of such waiver, and a ratification of any irregularity in the proceedings under which such remittitur may have been issued.

[3] The failure to insert in the remittitur a judgment for the recovery of respondent's costs on appeal is not such a fatal omission as to demand a recall of the remittitur, for the reason that section 1027 of the Code of Civil Procedure allows respondent, as the prevailing party, her costs on this appeal, and appellant stands ready to pay the maximum amount thereof. The cases relied upon by respondent in support of this point arose prior to the amendment of 1913 to that Code section, except the case of Morgrage v. National Bank of Cal., 25 Cal. App. 133, 142 Pac. 1124, and in the latter case it does not appear, as here, that the losing party stood ready to pay the costs in full, consequently we do not consider the cases cited by respondent in point. Moreover, we are entirely unable to perceive wherein respondent has been harmed by the irregularities complained of, or in what manner her interest will be prejudiced if said remittitur is not recalled. If, as she claims, she has the right to elect which of the two judgments she will execute, the present status of the instant proceeding cannot interfere with the exercise of that right.

[4] There are involved no cross-appeals or counter demands, and certainly under those circumstances appellant has absolute control over its own appeal. Obviously respondent has been waiting over two years to obtain an affirmance of her judgment so that she might collect the money due thereon. Appellant now comes forward and obviates further delay by consenting, in effect, to an affirmance of said judgment, and offers to immediately pay the full amount thereof, together with the maximum amount of interest and costs allowed by law. If the appeal were heard and determined in respondent's favor, she could not in this action recover any greater amount, except, perhaps, in the matter of interest, than appellant is now ready to pay, and when, as here, the appellant, in apparent good faith, desires to abandon its appeal, end the litigation, and pay the full amount of the judgment, we see no reason why the respondent should be allowed to prolong the litigation because of irregularities which, if in fact they do exist, do not in the slightest manner prejudice the right of the respondent, but which, on the contrary, would seem to operate to her advantage.

The motion is denied.

(68 Cal. App. 186)

PEOPLE v. COOK. (Cr. 1104.)

(District Court of Appeal, Second District, Division 1, California. July 18, 1924.)

1. Criminal law 🔑661, 666(1)—State not required to call all possible witnesses or introduce all possible exhibits.

In a prosecution for larceny, the prosecution was not required to call all persons present or appearing to have some knowledge of the matters on trial, or to produce as exhibits all objects or documents referred to, or the existence of which may have been suggested by the testimony.

2. Criminal law 🔑824(9)—In absence of request, failure of court to give further instruction on circumstantial evidence not error.

In prosecution for larceny, failure to instruct that, if prosecution relied on circumstantial evidence alone, it must show beyond reasonable doubt that the alleged facts and circumstances were true, and that they must be absolutely incompatible on any reasonable hypothesis other than guilt, was not error, in absence of request for such instruction or modification of those given.

3. Criminal law 🔑938(1), 1156(3)—Refusal of new trial for newly discovered evidence not disturbed, in absence of showing of abuse of discretion.

Motion for new trial on the ground of newly discovered evidence was addressed to the sound discretion of the trial judge, and his decision thereon will not be disturbed, in absence of showing of abuse of discretion.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Arthur Cook was convicted of grand larceny, and he appeals. Affirmed.

E. R. Simon and C. B. Conlin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CURTIS, J. The defendant was found guilty of the crime of grand larceny. He bases his appeal, from the judgment and order of court denying his motion for a new trial, upon the action of the court in giving certain instructions offered by the people, and in denying his motion for a new trial made on the ground of newly discovered evidence.

[1] The first instruction objected to by defendant was as follows:

> "The court instructs the jury that the prosecution is not required to call as its own witnesses all persons who are shown to be present, or who may appear to have some knowledge of the matters here on trial, nor is the prosecution required to produce as exhibits all objects or documents which have been referred to in, or the existence of which may have been suggested by, the testimony in the case."

The law is correctly stated in this instruction. People v. Robertson, 67 Cal. 646, 8 Pac. 600; People v. Johnson, 13 Cal. App. 776, 110 Pac. 965; 16 Cor. Jur. 845, § 2132. While it may be that the facts in the record did not make it necessary to give such instruction, the giving of it is not shown to have been a prejudicial error.

[2] The court gave two instructions upon the subject of circumstantial evidence. No objection is made to either of these instructions or to any statement of the law contained therein, but defendant contends that the court should have gone further, and should have either stated in those instructions or given a separate instruction to the effect—

> "that, where the prosecution relies for conviction upon circumstantial evidence alone, the prosecution must show by the evidence, beyond a reasonable doubt, that the alleged facts and circumstances are true, and that they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused."

Defendant does not claim that he proposed any modification of the instructions as given by the court, nor that he proposed any instruction embodying the statement of law which he now complains the court omitted from the instructions given, but contends that the court, inasmuch as it attempted to instruct the jury upon the subject of circumstantial evidence, should have fully covered the subject and, of its own motion, should have instructed the jury fully upon the weight and effect to be given to circumstantial evidence. This contention of the defendant cannot be maintained. If he desired the jury further instructed upon the weight and effect to be given circumstantial evidence, it was his duty to request the court to so instruct the jury. In the absence of a request on his part, for such an instruction, he cannot complain of the failure of the court to so charge the jury. 8 Cal. Jur. p. 310; People v. Balkwell, 143 Cal. 259–264, 76 Pac. 1017; People v. Williams, 184 Cal. 590–594, 194 Pac. 1019. The precise question was before the court in the case of People v. Balkwell, supra, and was disposed of in the following language:

> "Complaint is made that the court did not instruct upon the nature and value of circumstantial evidence; but as defendant asked for no instruction upon this point, she cannot be heard to complain."

[3] Defendant's motion for a new trial, upon the ground of newly discovered evidence, was addressed to the sound discretion of the trial judge, and his action thereon

will not be disturbed unless the record shows an abuse of discretion on his part. We have examined the record in this case, and we discover nothing therein which would lead us to hold that the trial judge abused the discretion with which the law invests him.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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68 Cal. App. 198

WESTERVELT v. McCULLOUGH
(Civ. 4403.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1924.)

1. Damages 🔑23 — Generally damages for breach of contract are only those reasonably contemplated by parties.

In general, under Civ. Code. § 3300, damages for breach of contract are only such as may reasonably be supposed to have been within the contemplation of the parties at time of making the contract as the probable result of the breach; other damages being too remote.

2. Damages 🔑32—Impairment of health held element of damages for ouster of mortgagor from her home contrary to agreement.

Where aged mortgagor contracted to provide a home for defendant and relatives, and, after living together some time, defendant bought in the home at foreclosure sale, and promised to continue the original contract, if mortgagor would refrain from redeeming, injury to her health, resulting from subsequent ouster, *held* damage proximately caused by the breach, within Civ. Code, § 3300.

3. Damages 🔑32—Recovery for physical suffering or illness as damages for breach allowable when.

Whenever the terms of a contract relate to matters directly concerning the comfort, happiness, or personal welfare of one of the parties, or the subject-matter is such as directly affects or moves the affections, self-esteem or tender feelings of that party, he may recover for physical suffering or illness proximately caused by breach.

4. Appeal and error 🔑768—Statement in brief that action was not tortious held to prevail.

In action for breach of contract to furnish a home for plaintiff with defendant, where court found that defendant "ousted" plaintiff, statement in briefs that ouster was not tortious precludes a holding that it was tortious so as to allow plaintiff to maintain an independent tort action thereon.

5. Damages 🔑153—Recovery of amount prayed permissible, notwithstanding inclusion of improper item.

The prayer of a complaint for damages is equivalent to statement that the amount stated is the damages suffered, and, though the complaint in itemizing damages includes improper item, recovery is not limited to amount of other items.

6. Judgment 🔑393 — On motion to vacate court considers no facts except those embraced in findings.

On motion, under Code Civ. Proc. §§ 663, 663a, to set aside judgment based on findings of facts, court can consider no facts except those embraced in the findings.

7. Appeal and error 🔑931(1)—Uncertainty in findings resolved against appellant on appeal from denial of motion to set aside judgment.

On appeal from denial of motion under Code Civ. Proc. §§ 663, 663a, to set aside judgment based on findings of facts, uncertainty in the findings must be resolved against appellant and most strongly construed for respondent.

8. Appeal and error 🔑1004(1)—Damages for refusal to permit mortgagor to continue living in her house as agreed not disturbed.

In action for breach of contract to permit mortgagor to continue living in her home after foreclosure sale, where court found right to reside there had peculiar value, judgment including less than $100 a month for plaintiff's life expectancy for loss of such right will not be disturbed on appeal from order denying motion to vacate.

9. Judgment 🔑393—Motion to set aside judgment based on findings of fact must be considered in light of pleaded issues.

Motion, under Code Civ. Proc. §§ 663, 663a, to set aside judgment based on findings of facts must be considered in light of issues made by the pleading.

10. Action 🔑22—Judgment 🔑249—Action held one for damages, barring recovery on trustee theory.

Though complaint pleading fraud and deceit by purchaser at foreclosure sale in contracting to permit mortgagor to continue living in her mortgaged home authorized recovery under Civ. Code, § 2224, against purchaser as involuntary trustee, prayer for damages, court's conclusions, and judgment *held* to stamp it as one for damages, barring recovery on trustee theory.

11. Judgment 🔑776—Court may not decree judgment for damages to be equitable lien upon property.

Neither at common law, nor under Civ. Code, § 2224, may the court decree judgment for damages to be an equitable lien upon specific property and direct its sale under execution to enforce such lien, especially in view of Code Civ. Proc. § 671.

Appeal from Superior Court, Los Angeles County; Thos. O. Toland, Judge.

Action by Emma J. Westervelt against Nora McCullough. Judgment for plaintiff, and from denial of motion for another and different judgment, defendant appeals. Affirmed as modified.

Walter M. Campbell and Peyton H. Moore, both of Los Angeles, for appellant.

William Hazlett and Merton A. Albee, both of Los Angeles, for respondent.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WORKS, J. Plaintiff and her husband were the owners of a residence in Los Angeles county which they had possessed for nearly ten years. In it they contracted with defendant to provide a home for the latter and her three female relatives. Under the contract defendant agreed to pay to plaintiff $100 the month for the board and lodging agreed in the contract to be furnished thereunder. At the time of the making of the contract plaintiff was past 60 years of age, and her husband was past 70. At that time the place of residence of plaintiff and her husband was incumbered by a mortgage. The arrangement contemplated by the contract was consummated, and the parties for some time dwelt together in peace and amity, and with mutual trust and confidence. The mortgage on the property fell due, and was foreclosed. Defendant purchased it at the foreclosure sale, and at the time, as found by the trial court, she "stated, promised, and represented to plaintiff that plaintiff could and should continue to have her home in said premises as before, so long as she should desire." Before the expiration of the time for the redemption of the property from the foreclosure sale plaintiff had an opportunity to sell it for a sum largely in excess of the amount necessary to redeem, and made defendant acquainted with the fact. The trial court found that defendant then "stated, offered, represented, and promised plaintiff that, if plaintiff should not sell said property, and should not redeem the same from said foreclosure sale, but should permit defendant to obtain a sheriff's deed therefor under said sale, the agreement and arrangement" theretofore entered into by the parties "should continue so long as plaintiff should live or should desire, and that the plaintiff and her husband could and should have their said home just as they were then having it so long as they lived or should desire, and defendant urged plaintiff to continue to make her home with defendant as before." Plaintiff assented to this proposal, relinquished all attempt to sell the property or to redeem it from the foreclosure sale, and permitted defendant to take her sheriff's deed. Defendant complied with her agreement until about six months after procuring the deed, when she ousted plaintiff and her husband from the common place of residence, and they were compelled to seek shelter elsewhere. This action was then commenced for the purpose of recovering the damages occasioned by defendant's breach of her agreement. Plaintiff was awarded judgment for $6,300, and the judgment also charged the property in question with an equitable lien as security for the payment of the amount. Defendant moved for another and different judgment upon the findings of the court, under the terms of sections 663 and 663a of the Code of Civil Procedure. The motion was denied, and the present appeal is prosecuted from the order denying it. We have already determined that the order is appealable. See Westervelt v. McCullough (Cal. App.) 221 Pac. 661.

The prayer of the complaint contains a general demand for damages in the sum of $6,300. The body of the pleading exhibits allegations of damages in the amount of $5,300, because appellant refused to permit respondent and her husband to remain in "said home on said property," and because she "ousted them from said property," whereby it was lost to respondent, and she and her husband were deprived of their home, and compelled to seek and did seek other lodgings, and were compelled to depend upon the charity of friends and relatives for support; in the sum of $500 upon allegations that respondent's husband died two months after the ouster, and that his life was shortened thereby; and in the sum of $500 because of the impairment of the health of respondent which resulted from the ouster.

We now state the findings of the trial court which are material to a consideration of the points presented on the appeal. It was found that appellant paid $3,700 for the property involved in the litigation at the sheriff's sale; that the amount for which respondent could have sold the property shortly before the expiration of the redemption period was $9,000, which amount was then the fair market value thereof; that respondent could have saved $15 each month out of the $100 per month agreed to be paid for board and lodging by appellant prior to the death of her husband, and $20 per month thereafter during her own life; that at the time of the ouster the life expectancy of respondent was eleven and one-half years, and that of her husband seven and one-half years; that during the year allowed by law for the redemption of the property from the foreclosure sale appellant paid on the property the total sum of $268.31 for taxes, principal and interest on street assessment bonds, and repairs, which amount "plaintiff would have been required to pay to defendant, in addition to said sum of $3,700, * * * and in addition to interest at 1 per cent. per month on said sum of $3,700, in order to redeem said property from said foreclosure sale"; that the fair rental value of the property at the expiration of the redemption period was $125 the month; and that respondent, at all times after the original arrangement between the parties for board and lodging, was and is unable to earn a living except in the manner contemplated by that arrangement. The court also found that it was unable to determine that the life of respondent's husband was shortened as a result of the acts of appellant, but it was found "that said acts of defendant caused great shock to plaintiff's nerves, and caused plaintiff to become sick and ill, and impaired her health for a period of six months thereafter." Certain other findings of the court are of especial interest in the consideration of the points presented by the appeal. It was found that appellant made the "statements, representations, promises, and agreements" whereby she induced respondent to refrain from redeeming from the foreclosure sale "without intending to keep, fulfill, or perform the same, or any of them, and for the purpose and with the intent on her part of thereby inducing plaintiff to refrain from selling said property during said year of redemption and from redeeming the same from under said foreclosure sale, and for the purpose of thereby securing said real property and the title thereto for herself without consideration to plaintiff, and of cheating and defrauding plaintiff out of the same." It was further found that "the right to live in said premises, and to continue to make her home therein as theretofore," that is, before the ouster, "was of a special and peculiar value to plaintiff, as defendant at all of said times well knew, over and above the actual moneys received from defendant and in addition to the cost of maintenance of said property."

If we take these findings specifically and without thought of establishing more than a foundation upon which to discuss the points presented by the appeal, measuring them with great strictness by the prayer of the complaint, we adopt the tentative idea that they call for a judgment of at least $5,124.69. The amount stated is arrived at thus: Add to $3,700, the amount paid by appellant at the foreclosure sale, the sum of $268.31, paid out by her as found by the court, or in all $3,968.31, and the further sum of $407, interest at 1 per cent. per month on the sum of $3,968.31 to the date upon which respondent could have sold her property, and the result is $4,375.31. Deduct this sum from $9,000, the amount for which respondent could have sold, and the remainder is $4,624.69. Add to this latter figure the sum of $500, the amount of the damages asked for the impairment of respondent's health, and the result is $5,124.69, the amount above stated. Is there anything in the findings, upon a proper application of the law to them, which requires this sum to be lessened or to be increased to $6,300, the amount for which the trial court rendered judgment?

[1] It is contended by appellant that the award of any damages for the impairment of the health of respondent was improper. It is provided by section 3300 of the Civil Code that—

> "For the breach of an obligation arising from contract, the measure of damages * * * is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

The rule upon the subject is stated in somewhat different language in Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913:

> "It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote."

[2] Was it proper to allow damages for the impairment of the health of respondent under these rules? A mention of a few of the circumstances of the case will serve to clarify the point thus presented. Respondent and her husband, well advanced in life, had lived together in the residence for eight or ten years before appellant and her relatives appeared on the scene, and respondent's right there to reside was of a peculiar value to her, a circumstance well known to appellant. After the original arrangement between respondent and appellant on behalf of the latter and her relatives all the parties resided together for some months practically as one family, thus naturally creating the feeling of trust and confidence which the trial court found that they reposed in each other. Notwithstanding this feeling, and in utter disregard of the warm-heartedness which should characterize the relations between those in a family circle, appellant entered into the arrangement which secured the home of respondent to her without intending to perform her own obligations under the arrangement. This was a detestable exhibition of wickedness and bad faith. Finally, it is to be observed that the arrangement was one the practical effect of which was to provide a home for respondent and her husband and to secure their maintenance through the remainder of their age and until death, whereas its breach thrust them into the street as outcasts, and compelled them to resort to the charity of friends and relatives for subsistence and shelter. Under such a chain of circumstances was not an impairment of the health of respondent a "detriment proximately caused" by the breach, "or which in the ordinary course of things," under such a state of facts, "would be likely to result therefrom?" Was not damage to the health of respondent such an outcome "as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach?" If respondent could have foreseen these untoward events at the time of the making of the contract, would she not have feared an impairment of her health as a result of the last event, the breach? Appellant did foresee the events which followed after the making of the arrangement, for, as in effect found by the trial court, she contemplated in the beginning the specific evil which she wrought in the end. Did she not necessarily contemplate an

injury to the health of respondent as a possible result of her calculated breach of the contract between them? It seems that upon reason and principle alone all these interrogations must be answered adversely to the claim of appellant. There is to be found, however, authority which bears upon the question.

"The element of bad faith would clothe a court, upon plain principles, with the power to fix damages according to the detriment shown by the existing special circumstances of the case. * * * The damages, therefore, would be those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances which were known to both parties." Kline v. Guaranty Oil Co., 167 Cal. 476, 140 Pac. 1.

"One who in bad faith violates his contract is liable for all damages traceable to the breach, including even those which could not be foreseen at the time of making the contract." Overstreet v. Merritt, 186 Cal. 494, 200 Pac. 11.

These California opinions establish general principles within which the present case would seem to find an abiding place, but we must look to other jurisdiction for authority more specifically applicable to it. Let us say first, however, that there are many cases which announce the general rule that in actions for the breach of contracts of employment or of contracts relating to property there can be no recovery of damages for mental suffering or for physical disability or ill health resulting from "nerves." A fair sample of these authorities is Smith v. Sanborn State Bank, 147 Iowa, 640, 126 N. W. 779, 30 L. R. A. (N. S.) 517, 140 Am. St. Rep. 336. It was there said:

"But no case has been called to our attention, nor do we think one can be found, which holds that damages are recoverable for mental anguish growing out of the violation of a contract for the payment of money. To so hold would be to open the door to a ruinous flood of litigation. Occasions will arise when it would seem that such a recovery is demanded in the interests of justice, but it is better that the exceptional wrong should sometimes go unrequited than to abrogate a rule which in the vast majority of cases has a salutary effect. Generally speaking, failure to pay or deliver money according to agreement gives rise to no recoverable damages beyond the sum wrongfully withheld with interest during the time payment is delayed. Special circumstances may sometimes justify the recovery of special damages, but these do not include compensation for mental suffering."

We are satisfied that the rule of cases of this class has no application to controversies like the one now before us, and that other adjudications are readily to be found which do govern it. In a case in which undertakers had breached an agreement safely to keep the body of a deceased person until the time when a belated interment was to occur it was said:

"The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part." Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249.

Authority of a similar character on the facts is to be found in Loy v. Reid, 11 Ala. App. 231, 65 South. 855. An interesting case arose upon the breach of a dressmaker of an agreement to furnish dresses to a prospective bride. It was said in the opinion:

"Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain, to the party. When the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. A contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule. * * * In computing the damages the allowance must be restricted to what may reasonably be held to have been within the contemplation of the parties in entering into the contract. The contract was to furnish the dresses in time for the wedding on the 19th. D. H. Holmes must be held to have known that, if the dresses were not finished by that day, the bride would be keenly disappointed. Also that the bride would need the dresses for the festivities incident to her wedding and immediately following, for which it is customary for brides to provide themselves with a trousseau. In gauging this disappointment of the bride the surrounding circumstances must, as a matter of course, be considered. And one of these is the fact that entertainments were planned, and that for want of the dresses these entertainments would have to be given up; and another is her humiliation in going to her husband unprovided with a suitable trosseau. We do not think that the amount of $575 fixed by the district judge is excessive." Lewis v. Holmes, 109 La. 1030, 34 South. 66, 61 L. R. A. 274.

Another decision of a similar character to the one last noted was based upon the breach of a contract to furnish a conveyance for the purpose of transporting a bridegroom to the scene of his approaching wedding. Because of the breach the bride was kept "waiting at the church," this and other circumstances moving the groom to sue for damages for mental suffering, physical pain, humiliation, and mortification. The view of the case which the appellate court took is sufficiently shown by the syllabus which precedes the opinion in an unofficial report in which it is printed:

> "Where a contract is entered into under special circumstances known to both parties at the time, the damages recoverable for a breach are measured not only by the actual loss sustained naturally resulting as the ordinary consequence of the breach, but includes consequences which may under the special circumstances be presumed to have been in the contemplation of the parties as the probable result of a breach. * * * Mental anguish is an element of actual damages for breach of contract." Browning v. Fies, 4 Ala. App. 580, 58 South. 931.

[3, 4] It will be observed that in all these cases it was determined that recovery could be had for mental anguish, humiliation, and the like. In the present action, however, the disability suffered by respondent was physical, for she was caused by the acts of appellant to become ill, and her health was impaired for the period stated in the findings. In considering the cases to which we have just pointed, the nature of the injury to respondent is distinctly worthy of note, as the courts have often been disinclined to allow damages for mental anguish in cases in which physical pain or impairment of health were an undoubted basis for relief. Forgetting therefore the matter of mental anguish, and reducing the doctrine of the cases which we have cited, and of others which we have examined, to the terms of the present controversy, we have no doubt that a correct rule of law may be stated thus: Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject-matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach. In the statement of this rule, expressly limited to physical suffering or illness as it is, we rely upon authority as to mental anguish for the reason that cases showing physical disability as the result of the breach of contracts are unusual, to say the least. We do not rely upon Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, because that case sounded in tort, although the Supreme Court says in its opinion that the plaintiff, with propriety, might have founded it upon contract. This statement leaves it open to conjecture whether the court would have applied the same measure of damages if the action had been based upon the defendant's contract of carriage, and whether, even so, the case would then have been in point, relating, as it does, to the obligation of a common carrier. Finally, in applying the rule which we have formulated above, it is to be observed that respondent is without remedy for the impairment of her health if she cannot recover in this action. We can conceive of no theory upon which she could sue as upon a tort. The trial court found that she was "ousted" from her old home it is true, and, under ordinary circumstances, having in mind the sanctity with which findings are invested upon a motion under sections 663 and 663a of the Code of Civil Procedure, we might possibly deem the ouster to have been forcible and therefore tortious. This we cannot do in the present instance, however, as it is stated in the briefs that the ouster was not of that character, a statement to which we are bound to pay regard. On the whole, the damage to respondent's health, under the authorities, was in contemplation of the parties when they made their contract, and it resulted proximately from the breach. We are clearly of the opinion that she was entitled to recover. There is nothing to interfere with this conclusion in the cases cited by appellant: Newman v. Smith, 77 Cal. 22, 18 Pac. 791; Fox v. Oakland Con. St. Ry., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Westwater v. Grace Church, 140 Cal. 339, 73 Pac. 1055; and Bond v. United Railroads, 24 Cal. App. 157, 140 Pac. 982.

[5] Appellant contends that the findings do not support the judgment for $6,300 by reason of the fact that the body of the complaint specifically alleges damages, in money, only to the extent of $5,300 for the loss of respondent's property, and $500 for the impairment of her health, if we lay aside, as we must, the allegation of $500 damage for the shortening of the life of respondent's husband. It is said that the prayer for damages in the sum of $6,300 is controlled by the allegations mentioned. The point is without merit, as it is well settled that the amount stated in the prayer of a complaint for damages is equivalent to an allegation that the amount thus stated is the damage suffered by the plaintiff. See Tucker v. Cooper, 172 Cal. 663, 158 Pac. 181.

[6-8] In addition to the amount which we have tentatively stated above as the least sum for which judgment should have been rendered in favor of respondent, that is, the sum of $5,124.69, she insists that the findings support various other items of damage which, when added to the amount named, will produce a result showing a much greater total than the sum for which judgment was given. We are satisfied that most of these claims are not well founded, for the reason that they cover matters for which respondent is compensated by the damages allowed her for the loss of her property. There are, however, some general findings of the court which to our minds support that part of the judgment which is in excess of $5,124.69. The difference between that sum and the total amount of the judgment is but $1,175.31. The court found that, as well known to appellant, the right of respondent to reside in her home was of a special and peculiar value to her, and that her life expectancy was

eleven and one-half years. We cannot know what was the evidence upon which the finding that respondent's right was of unusual value was based, for on a motion under sections 663 and 663a of the Code of Civil Procedure no facts can be considered except those which are embraced in the findings of the court. Dahlberg v. Girsch, 157 Cal. 324, 107 Pac. 616; Hole v. Takekawa, 165 Cal. 372, 132 Pac. 445; Akley v. Bassett, 189 Cal. 625, 209 Pac. 576. Moreover, upon an appeal from an order denying such a motion "any uncertainty in the findings must be resolved against the appellant, and they are to be most strongly construed in favor of the respondent." Spotton v. Dyer, 42 Cal. App. 585, 184 Pac. 23. Under these rules of law we are bound to assume that the trial court allowed judgment for as much as $1,175.31 upon the findings last above stated. Granting, for the purpose of argument, what we need not now decide, that in a proper case under such a motion as is now before us a court of review may reduce a judgment as excessive under the findings, no such case appears here. The judgment awarded to respondent for her loss of the right to continue to reside in her home amounts to but about $100 the year for the period of her life expectancy. It is quite possible that the evidence heard by the trial court was of such a character as to have justified a larger allowance as to this item, and that the total amount of the judgment was limited to $6,300, for the reason that the prayer of the complaint demanded that sum. It is clear to us that the judgment for $6,300 must stand.

[9-11] The sole remaining point presented in the briefs makes necessary a statement showing the unusual character of the complaint, and in making the statement we have in mind the well-settled rule that a motion under sections 663 and 663a of the Code of Civil Procedure is to be considered in the light of the issues made by the pleadings in the action. See Dahlberg v. Girsch, 157 Cal. 324, 107 Pac. 616; Akley v. Bassett, 189 Cal. 625, 209 Pac. 576. The complaint in the present action pleads with particularity the facts showing the fraud and deceit practiced by appellant upon respondent, in connection with the allegations of damage to which we have already referred. If, then, the averments as to damages be regarded as surplusage, the pleading appears to state a complete cause of action for relief under section 2224 of the Civil Code, which reads:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

The prayer, however, in addition to and immediately following the demand for damages in the sum of $6,300, asks that "it be decreed that defendant holds said real property as trustee for plaintiff to the extent of plaintiff's said claim," and the conclusions of law and judgment follow this dual demand for relief. The former recite that defendant is and by the judgment shall be "declared to be an involuntary trustee of said real property for plaintiff to the extent and in the sum" of the money judgment, "which interest of plaintiff in said real property is and shall be by way of security to plaintiff for the payment of said judgment, and shall cease and terminate upon and by full payment and satisfaction of said judgment." It is then recited that "plaintiff is entitled to further judgment that said real property be sold by the sheriff * * * on execution" for the purpose of satisfying the judgment for damages. As already remarked, judgment passed accordingly.

Appellant's last point is that the findings afford no support for the portion of the conclusions of law and judgment which attempts, in effect, to fasten upon the real property a lien for the payment of the judgment for damages. Respondent contends that she is entitled to that relief under the terms of section 2224 of the Civil Code, but the contention surely is without merit. The section merely provides that one gaining a thing in the manner denounced by its provisions holds that thing in trust for the person wronged, with the result that the latter may recover it, or force a reconveyance of it, or quiet his title to it. This view of the effect of the section has prevailed, ever since its enactment, in the twoscore opinions of the Supreme Court and of the District Courts of Appeal in which it is cited, all of which we have examined. By this we do not mean to say that the courts have in express terms declared the effect of the section so to be, for they have not, but that they have invariably been called upon in such manner to enforce its salutary mandate. The enactment has never before been resorted to in an attempt to fasten upon a "thing," to employ the word used in it, an involuntary trust to secure the payment of damages or to secure the satisfaction of any other money obligation or claim. The very language of the section would seem to preclude its use for the attainment of such an end.

Is there any other basis upon which a court may decree a judgment for damages to be a lien upon specific property and direct its sale under execution for the purpose of foreclosing the lien? We know of none. In an endeavor to uphold the portion of the judgment now in question, and in addition to her contention as to the bearing of section 2224 of the Civil Code upon the point before us, respondent cites 21 C. J. pp. 118, 119, tit. "Equity," § 96; Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125; and Greil v. City of Montgomery, 182 Ala. 291, 62 South. 692, Ann. Cas. 1915D, 738. We can see in these authorities nothing to aid respondent. We cannot regard the attempt of the trial court to fasten a lien upon the real property as a successful exercise of equitable jurisdiction. While the body of the complaint exhibits the dual character to which we have referred, the prayer with which it concludes, and, especially, the view which the trial court took of it as evidenced by the conclusions of law and judgment, stamp it for our consideration as a complaint for damages. The judgment in its essence is one for damages, and to that judgment the attempt to charge the property with a lien is a mere incident. In our opinion the incident cannot stand, and the judgment must be reduced to its essence.

We have made disposition of appellant's last point because it is presented by the motion, and because it is argued in the briefs, not because we regard it as important. The judgment of the trial court, in essaying to give to respondent a lien for the enforcement of her judgment for damages, could, if valid, secure to her no greater right than the law has expressly provided for her protection. The purpose of the court's attempt was in effect to impound the real property until it could be sold on execution. This same right exists for her under section 671 of the Code of Civil Procedure, not only as to the property described in the judgment, but as to all real property of respondent within the jurisdiction of the trial court, if other real property she has, or may later acquire. The section provides in part:

> "Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him, * * * and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases."

The existence of this section furnishes an added argument against the portion of the judgment attempting to create a lien on specific real property of appellant. In making the attempt the trial court performed a futile act.

The conclusions of law are amended by striking therefrom all that part thereof which follows the paragraph numbered "I," and which precedes the paragraph commencing "Let judgment be entered," and the judgment is modified by striking therefrom all that part thereof which follows the paragraph commencing "First" and which precedes the paragraph commencing "Fourth," and by changing the said word "Fourth" to the word "Second." As so modified the judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

68 Cal. App. 121

BRAUN v. DALLIN et al. (Civ. 4261.)

(District Court of Appeal, Second District, Division 2, California. July 9, 1924.)

1. Frauds, statute of 🔑128—Parol agreement made subsequent to written agreement for purchase of land held not to bring transaction within statute.

Where defendant went into possession under written contract to purchase from plaintiff, building house and residing on premises, and subsequently on foreclosure of deed of trust given to plaintiff by third person plaintiff bid in premises pursuant to oral agreement to sell to defendant if latter would not bid, *held*, that defendant's asserted right to purchase could not be defeated on theory that oral agreement brought transaction within statute; position of parties not having changed, except as to amount of debt due from defendant, and real contract, being written one, which remained alive, measuring rights of parties.

2. Frauds, statute of 🔑161—Findings held to sufficiently state that claimed right to purchase based upon written as well as verbal agreement.

In suit to quiet title, findings as whole *held* to sufficiently state that defendants possessed right to purchase, based upon written contract between parties as well as upon subsequent verbal agreement.

3. Frauds, statute of 🔑161—Rule stated for determining from facts presented whether asserted right to purchase land based upon written or oral agreement.

In determining whether an asserted right of litigant to purchase land was based on written or oral agreement, court must construe whole transaction from facts presented, irrespective of name by which designated or any particular isolated feature of it.

4. Appeal and error 🔑931(1)—On facts authorizing different inferences, presumed inference by trial court was one upholding rather than defeating judgment.

Whenever facts found might authorize different inferences, it will be presumed that inference made by trial court was one upholding rather than defeating its judgment, and an inference will not be drawn contrary to that which might have been drawn by trial court for purpose of rendering its judgment.

5. Appeal and error 🔑1071(6)—Proper judgment not reversed because of erroneous finding or failure to make finding upon issue.

Where judgment is justified by facts shown from entire record, reversal will not be granted because of erroneous finding or failure of trial court to make finding upon any issue.

6. Quieting title 🔑47(2)—Finding that defendant entitled to possession held decision that plaintiff not so entitled.

In a suit to quiet title, finding that defendant was entitled to possession was decision on issue whether plaintiff was entitled to possession.

7. Quieting title ⚷52—Judgment held not erroneous because not following decision, "including interest."

In suit to quiet title, where findings, conclusions of law, and judgment required defendants to pay plaintiff $1,150 in amounts of $50 per month, "and interest," on deferred payments, judgment was not erroneous because specifying "$1,150, including interest," while the decision specified "$1,150 and interest"; meaning not being doubtful.

Appeal from Superior Court, Los Angeles County; T. N. Harvey, Judge.

Suit by F. W. Braun against Stanley Dallin, Telitha L. Dallin, and others, in which the named defendants filed a cross-complaint. From judgment for plaintiff as to ownership of property, subject to right of the named defendants to purchase it, plaintiff appeals. Affirmed.

John E. Biby and Harry C. Biby, both of Los Angeles, for appellant.

Clark, Law & Clay, of Los Angeles, for respondents.

CRAIG, J. Suit was instituted January 12, 1922, by plaintiff and appellant, to quiet title to lot 89 of tract 3987, in Los Angeles county, alleging that the defendants asserted some interest in said property adverse to plaintiff without right, that neither of them had any estate, right, title, nor interest therein, and praying that each of said defendants be required to set forth the nature of his claim, that the same might be determined, and that it be adjudged and decreed that plaintiff was the owner and entitled to a writ of possession thereof.

Defendants Dallin answered, denying that the plaintiff was the owner or entitled to possession of said lot, and affirmatively alleging that on November 25, 1921, the plaintiff threatened to sell the property under an alleged deed of trust which they believed to be void, and that to avoid litigation they agreed to refrain from bidding at such sale, and to buy the lot from the plaintiff for $1,150, and to pay $50 cash and $50 per month thereafter until the full sum had been paid, together with interest at 7 per cent. per annum, and that the plaintiff agreed to sell them the property upon such terms if they would not bid at the sale; that they thereafter notified the plaintiff that they were willing to proceed with the terms of their agreement, but that plaintiff refused to permit them to purchase the property upon said terms. They further alleged that they were the owners in fee of the property described, and prayed judgment that they be declared the lawful owners, and that the plaintiff "have no interest therein, and that the plaintiff be debarred and enjoined from asserting any claim thereto."

Defendant C. Robert Minton answered, denying for want of information or belief that the plaintiff was the owner or entitled to possession of the property, and alleging that he held a valid mechanic's lien against the premises for $471.38; and by cross-complaint against the plaintiff and defendants Dallin he alleged that the Dallins were at all the times mentioned the owners and in possession of said property, and that in pursuance of an agreement with them he furnished labor and materials between June 15 and August 15, 1921, in the construction of a dwelling house thereon, and thereafter filed his duly verified mechanic's lien above mentioned.

The defendants Dallin denied that Minton had performed the conditions of his contract, or that he was entitled to any amount. Defendant Ada Minton disclaimed.

The plaintiff, answering said cross-complaint, denied that the Dallins were the owners, but admitted that they were in possession of the premises at the times mentioned in the cross-complaint, and denied defendant Minton's right to a lien for labor and materials. He then alleges that prior to June 30, 1921, he was the owner in fee simple of said property, subject to a contract of purchase between himself and said Dallins; that on said last-mentioned date the latter assigned all their interest therein to cross-complainant Minton, and that the plaintiff and his wife on the same date also conveyed their interest to the same party, and received from Minton and his wife a promissory note for $843.50, secured by trust deed; that Minton defaulted in the payment of stipulated installments due upon his said note, and that the property was, on November 25, 1921, sold to the plaintiff by trustee's deed, duly executed and recorded.

The trial court found from the evidence adduced that "the title to the property * * * is in the plaintiff subject to the right of the defendants Dallin to purchase same for the sum of $1,150"; that the Dallins are in possession; that they went into possession on or about January 5, 1921, under an agreement to purchase from the plaintiff, subsequent to which time they made valuable improvements upon the premises. It is also found that on or about June 20, 1921, the Dallins transferred their interest to Minton, that Minton transferred to plaintiff, who in turn conveyed to Minton and took back a trust deed.

The findings further recite that thereafter, and on November 21, 1921, it was adjudged by the superior court that the agreement between the Dallins and Minton was void ab initio, and that Minton acquired no interest in the property from them; that thereafter and on or about the 25th day of November, 1921, "a verbal agreement was entered into between the defendants Dallin and the plaintiff that the plaintiff would foreclose his trust deed on said property and purchase same in at the sale thereof, and, if the defendants Dallin would not bid on said property, but permit the plaintiff to purchase same at said foreclosure sale, the plaintiff would sell said property to the defendants Dallin for the sum of $1,150, $50 cash, and $50 per month thereafter with deferred payments bearing interest at 7 per cent. per annum; that thereafter on said 25th day of November, 1921, said plaintiff foreclosed said trust deed, and bid said property in at the sale thereof; that said defendants Dallin were present at said sale, were ready and able to buy said property, but refrained from so doing because of said verbal agreement with the plaintiff; immediately after said sale said defendants Dallin offered to pay to the plaintiff the sum of $50 and enter into a written agreement to purchase said property according to the verbal agreement, but the plaintiff refused to enter into said agreement and refused to sell said property to the defendants Dallin according to the verbal agreement herein mentioned; that since said time the defendants Dallin have at all times been ready, willing, and able to perform the conditions of the verbal agreement to purchase said property."

Judgment was given the plaintiff as to ownership of the property, subject to the right of defendants Dallin to purchase the same for $1,150 upon the terms and conditions specified in the findings. Defendant Minton does not appeal.

[1] The principal ground of this appeal is the verbal agreement referred to herein and set forth in the finding above quoted. It is contended that an oral agreement to convey real property is void, and that no action can be based thereon; and that the trial court erred in permitting respondent to testify regarding the same. It appears from the record that appellant entered into a written contract of sale with respondents on January 5, 1921, of the property in question for a consideration of $1,132, payable $180 in cash and $15 per month; that thereafter and on June 20, 1921, respondents assigned their interest to Minton upon certain conditions which Minton did not fulfill, and that in an action subsequently decided between Minton and Dallin, wherein Braun was not a party, it was held that Minton had acquired no interest by the attempted assignment. Dallin had at the same time also caused Braun to convey his interest to Minton, which was subsequently recovered by Braun upon foreclosure of the trust deed. Respondents have at all times remained in possession, and Dallin testified that "as quick as the court destroyed this instrument that I gave to Minton I considered that it naturally reverted back and fell back in its old place"; "he said that if I did not bid that they would bid it in, and that they would let me pay them what they had in it for the indebtedness that was against the place, they would draw up the papers and let me pay them off, $50 down and $50 a month"; "I told him I knew at the time that I hadn't ought to pay all these expenses, but still rather than have trouble I thought to myself I had better do it"; "after the sale was over he came out and he says, 'All right, Mr. Dallin, we bid it in for the costs—for the costs and what there is in it.' And he says, 'You have your wife up in the morning, and we will have the papers all ready for you to sign, and you can go ahead and pay this indebtedness off and go right along.'"

The defense in this case, and the appeal, were obviously founded upon the acknowledged and well-known rule that a parol agreement for the sale of land, made after the termination of a prior written agreement, must be viewed as a new contract, and, standing by itself, is void under the statute of frauds. Smith v. Taylor, 82 Cal. 533, 23 Pac. 217. But the facts remove this case from the application of that rule. Dallin's right to purchase was created by the written contract of sale of January 5, 1921; he built a house on the premises, and has since continued to reside thereon. No steps were taken by the vendor to terminate the contract of Dallin's interest. All that can be said of the intervening negotiations and litigation is that the vendor and the vendee prior to this suit found themselves in the same position which they had formerly occupied toward each other, except with an additional indebtedness resulting from building operations and the expense of the foreclosure. The "memorandum in writing" consisted of the contract of January 5, 1921, and it is impossible to discover any respect in which the position of either party thereto was changed, except that by subsequent arrangement between them Braun assumed an added indebtedness, and the amount due him from Dallin was increased to include it. Appellant seeks to take advantage of the word "sale" because he had previously told Dallin that, if he would not bid at the foreclosure sale, he would "sell" him the property for $1,150, but it is evident that Dallin never considered his original contract at an end; when he tendered the $50 and demanded a writing evidencing their verbal agreement appellant demanded a larger payment, and finally wrote to Dallin that, if he did not wish to buy on those terms, he might pay $50 per month as rent. To this Dallin promptly replied by letter, "I had thought as soon as the sale of November 25 came off things would be clear, and so they should have been. Through Minton's doings I have been damaged, and still the damage goes on. My property here is in a stage that the storms and weather is very damaging to it, saying nothing about the rest. As to paying you rent, that is absurd."

Sandfoss v. Jones, 35 Cal. 481, is not essentially unlike the case at bar in so far as the holding applies to the situation created by the facts recited. The Supreme Court there said, at page 486:

> "So far as the contract relates to the sale of real estate, it amounts to an agreement on the part of Jones and Blanchard to buy the property at sheriff's safe for the benefit of Bartram, who was the execution debtor, and to advance their own money, if necessary, for that purpose. Whether they paid for the real estate wholly or in part with Bartram's money, or their own exclusively, is immaterial. In either event their agreement was not within the statute of frauds, and was not, therefore, void because it was not in writing. If the real estate was paid for by Jones and Blanchard with the money of Bartram, there was a resulting trust in favor of the latter which a court of equity will declare and enforce, for such a trust is expressly excepted from the operation of the statute of frauds. * * *
>
> "If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor, whose land is about to be sold by the sheriff, to purchase it with their own funds, and hold it for his benefit. Such an agreement is equivalent to a loan of the money and a taking of the title as security for its repayment; or an agreement by one person to purchase land for the benefit of another, under circumstances which would amount to a fraud upon the latter, if the former was allowed to repudiate his promise, and, therefore, not within the statute of frauds."

In that case even the possession was surrendered by the debtor, whereas in the instant case there was no suggestion that the debtor in possession should sacrifice any right or interest, nor is there any evidence that he conceded anything; and, if such were claimed by appellant, there is no evidence of any consideration having passed to the respondents therefor.

Moore v. De Barnardi (Nev.) 213 Pac. 1041, citing Sandfoss v. Jones, held that, where defendant occupant of land had an existing interest therein with the mortgagor, but, in reliance upon a parol agreement with the mortgagee that the latter would foreclose for defendant's use and benefit, and convey land to him upon acquiring title, if he would not become a bidder to protect his interest in the property, defendant refrained from protecting his interest so that he could not acquire title to the land in its perfected state through the foreclosure proceeding, the refusal of the mortgagor to afterwards convey was such a fraud as operated to convert the mortgagee into a trustee ex maleficio.

Broadwell v. Maxwell, 30 Ga. App. 738, 119 S. E. 344, 346, is in point. Maxwell instituted proceedings seeking to dispossess Broadwell for failure to pay rent. Broadwell alleged that the evidence showed that he did not originally hold the property as a tenant, but that he had owned it; that he had borrowed $3,500 from one Smith and given a deed to the property as security; that the debt was subsequently reduced to judgment by Smith, and the property offered for sale. Smith and Broadwell agreed that, if the latter would not bid at such sale, Smith would buy in the property and allow the defendant to redeem it by payment of the amount of the indebtedness. Smith bought in the property, Broadwell refraining from making a bid, and the defendant, after extensions of time had been given him therefor, tendered to Smith's administrator the amount paid by Smith, which was refused. Judgment was given for the plaintiff, and in reversing the lower court it was said on appeal:

> "It follows, therefore, that when the defendant, Broadwell, made the alleged agreement with Smith's attorney, by the terms of which bids were choked off, and Smith bid in the property at reduced figures, and took a deed from the sheriff, and allowed Broadwell to remain in possession and pay a certain amount as 'rent,' with the right to redeem the property upon the payment of the indebtedness, the relationship between the parties was that of trustee and cestui que trust.
>
> "In the case now before us, where the evidence is supplemented by the written contract of 'tenancy,' so called, this contract must be construed in the light of this relationship, and equitable principles must be applied thereto, and this contract given an effect accordingly. This being a resulting trust, the statute of frauds does not apply (Chastain v. Smith, 30 Ga. 96), and the parol agrement will be considered."

Upon the facts presented, and the authorities herein referred to, appellant is the owner of the property described, subject to the right of respondents Dallin to purchase the same, as recited by the judgment; and the respondents were entitled to remain in possession, as found by the trial court.

[2-4] The findings state that the defendants Dallin have at all times been ready, willing, and able to perform the conditions of the "verbal agreement to purchase said property"; appellant contends that this language indicates that it was the theory of the trial court that the rights of the Dallins are predicated upon the verbal agreement, and that the contract to purchase the property is to be found in the verbal agreement only. But we must construe the whole transaction from the facts presented, irrespective of the name by which it may have been designated (Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 88 Pac. 512; Hogan v. Anthony, 40 Cal. App. 679, 182 Pac. 52), or of any particular isolated feature of it. (Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60). The findings considered as a whole sufficiently state that the Dallins possessed a right to purchase the premises in question, based upon the entire transaction, beginning with the written contract, and including the verbal agreement, which was partially executed. Whenever the facts found are such as might authorize different infer-

ences therefrom, it will be presumed that the inference made by the trial court was one that will uphold rather than defeat the judgment, and in such case an appellate court will not draw from those facts any inference contrary to that which might have been drawn by the trial court for the purpose of rendering its judgment. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533; Haight v. Haight, 151 Cal. 90, 90 Pac. 197; Paine v. San Bernardino Valley Trac. Co., 143 Cal. 654, 77 Pac. 659.

[5] The real contract between the parties was the written agreement of January, 1921. This is still alive. The entire record justifies, and indeed requires, a finding to this effect, and that the rights of the parties are still measured by it. The rule is well established that where a judgment is justified by the facts shown upon an examination of the entire record a reversal will not be granted merely because of an erroneous finding or the failure of the trial court to make a finding upon any issue. Anderson v. Blean, 19 Cal. App. 581, 126 Pac. 859; American Nat. Bank v. Donnellan, 170 Cal. 9, 148 Pac. 188, Ann. Cas. 1917c, 744; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309.

[6] We do not agree with appellant's contention that there was no finding that he was not entitled to possession, since the finding that respondents were entitled to possession was a decision upon the issue presented. Koeberle v. Friganza (Cal. App.) 226 Pac. 35.

[7] It is next contended that the judgment does not follow the decision, in that the judgment requires that respondents pay "$1,150, including interest," while the trial court's decision specifies $1,150 "and interest." The findings, conclusions of law, and judgment require that respondents pay the appellant the principal sum of $1,150, in fractional amounts of $50 per month, and interest on deferred payments at the rate of 7 per cent. per annum; and, although worded slightly differently, there is no room for doubt that such rate of interest will accrue and be payable upon any remaining balance until fully paid, as the record stands.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

194 Cal. 379

WESTERN PIPE & STEEL CO. OF CALIFORNIA v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 11044.)

(Supreme Court of California. Sept. 4, 1924.)

1. Master and servant 🔑403—Dependency of nonresident parents of employee not presumed.

There is no presumption of dependency in case of nonresident parents of deceased employee.

2. Master and servant 🔑405(5)—Finding of partial dependency sustained.

That deceased employee had, for several years prior to his death, been sending $20 to $25 a month to his parents who resided in Italy, giving as reason that they were in need along with some other evidence, *held* sufficient to sustain finding as to parents' partial dependency.

3. Master and servant 🔑417(5)—Mere errors of procedure by Industrial Accident Commission not ground for review.

Denial of continuance by Industrial Accident Commission on ground that application came too late is mere error of procedure not affecting its jurisdiction to make award, and, on certiorari to review its award, does not constitute ground for review.

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under Workmen's Compensation Act by Angelo Zani and another, by A. E. Privato, their next frend, against Western Pipe & Steel Co. of California, employer. Compensation was awarded by the Industrial Accident Commission, and the Company brings certiorari. Award affirmed.

Eugene D. Bennett and Edgar C. Chapman, both of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

WASTE, J. This is a petition for writ of review, after an award made by the Industrial Accident Commission to the father and mother of one Joe Zani, deceased, who lost his life through injuries received while in the employ of the petitioner. The award was based upon the finding of the commission that the father and mother of the decedent, residents in Italy, were partial dependents upon their son at the time of his death, and that the deceased was contributing to the support of his parents at the rate of $240 a year. The petitioner contends that the evidence before the commission was not sufficient to support its finding of partial dependency.

[1, 2] There is no presumption of dependency in the case of nonresident parents of deceased employee. That question must be determined in accordance with the fact as the fact may be at the time the decedent received the injury. Workmen's Compensation Act (St. 1917, p. 844), § 14(b). The decedent in this case worked in the oil fields and received good wages. His personal expenses appear not to have been very large. There is evidence that once a month, for a period of two years prior to his death, and at about the time he received his pay checks from his employers, he called at the office of a notary and general adviser to the Italian colony in Los Angeles, to whom he gave money to send to his father and mother in Italy. Sometimes the money was sent through various forwarding agencies; at other times, through money orders, and sometimes in currency. These remittances averaged from $20 to $25 a month. A number of them are substantiated by receipts issued by the forwarding agencies. There was other evidence to the effect that the decedent devoted a considerable portion of his wages to the support of his parents. The decedent gave as the reason for sending these amounts to his parents that they were in need and did not have enough to eat, and it was necessary for him to send them money. There was further evidence from which an inference might be drawn that the parents of the deceased were partially dependent upon him for their support.

In view of the record in this case, the objection that the finding of the commission as to partial dependency is not supported is in the nature of a demurrer to the sufficiency of the evidence. Other and better evidence might possibly have been produced tending to shed light upon the question of the dependency of the parents in Italy, but no order or rule of the Industrial Accident Commission may be invalidated because of the admission into the record, and use as proof of any fact in dispute before it, of any evidence not admissible under the common-law or statutory rules of evidence. Workmen's Compensation Act, § 60(a). We are of opinion, therefore, that the finding of the commission, as to the partial dependency of the parents of the decedent, is supported by the evidence.

In cases of partial dependency the dependents, in addition to the reasonable expenses of burial of the decedent, not exceeding $100, shall be allowed a benefit fixed by the statute at three times the annual amount devoted by the deceased to the support of his dependents. Workmen's Compensation Act, § 9(c) (2). Such was the award in this case.

[3] At the conclusion of the hearing before the commission the petitioner requested a continuance to enable it to take the deposition of the parents of the decedent who were in Italy. The request was denied, and petitioner now argues strenuously that

this action amounted in effect to a denial of a hearing before the commission, and renders its award void as in excess of jurisdiction and as depriving petitioner of its property without due process. The evidence sought, it contends, would have had a material bearing on the question of the dependency of the claimants. The commission based its denial of the application for a continuance on the ground that it came too late, that it should have been made prior to the hearing. The Industrial Accident Commission is vested with very broad powers. All hearings and investigations before it are governed by the Workmen's Compensation Act, and by the rules of practice and procedure adopted by the commission. In the conduct of causes before it the commission is not bound by the common-law or statutory rules of procedure. Section 60. Adjournments from time to time are in the discretion of the commission or referee holding the hearing. Section 19a. The action now complained of in this case, at the very most that can be charged against it, was nothing more than an error in the proceedings of the commission which did not go to its jurisdiction to make the award. Consequently, it does not constitute a ground of review in this court. Maryland Casualty Co. v. In. Acc. Comm., 178 Cal. 491, 493, 173 Pac. 993.

The award is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; and SHENK, J.

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194 Cal. 375

REILLY v. POLICE COURT, CITY OF OAKLAND, ALAMEDA COUNTY, DEPT. 1, et al. (S. F. 11292.)

(Supreme Court of California. Sept. 3, 1924.)

1. Judgment ⟹552—Denial on merits, by District Court of Appeal, of writ of prohibition held res judicata on subsequent application to Supreme Court.

Denial by District Court of Appeal, on the merits, of writ of prohibition against trial of criminal complaint for libel, *held* bar to subsequent application to Supreme Court to prohibit trial of same prosecution based on same complaint, same questions being involved as on first application.

2. Courts ⟹475(1)—Prohibition may not be sought in Supreme Court while appeal from judgment refusing it is pending in District Court of Appeal.

Where an appeal from a judgment of the superior court refusing prohibition was still pending and undetermined in the District Court of Appeal, the petitioner may not seek prohibition on the same facts in the Supreme Court.

3. Appeal and error ⟹790(2)—Questions involved in appeal from refusal of prohibition to prevent trial not rendered moot by trials resulting in hung jury.

Where an accused appealed from denial by superior court of his application for writ of prohibition against trial in police court, fact that pending appeal trial took place in police court resulting in hung jury, as did also another trial in that court, did not render the questions on his appeal moot nor his appeal nugatory.

4. Courts ⟹476—Litigant may not seek same remedy on same facts in two different courts at same time.

A litigant will not be permitted to seek the same remedy on the same state of facts in two different courts at the same time, and pursue them both concurrently to a conclusion.

In Bank.

Application by Philip Reilly for writ of prohibition to be directed to the Police Court, City of Oakland, Alameda County, California, Department 1, and another. Writ denied.

Raine Ewell, of San Francisco, for petitioner.

PER CURIAM. [1] This is an application for a writ of prohibition to prevent the respondent court from proceeding with the trial of the petitioner upon a charge of criminal libel now pending before it, upon the ground that the complaint therein does not state facts sufficient to charge a criminal offense, and upon the further ground that the respondent court has no jurisdiction of the subject-matter thereof, in that the Whitney Act (Stats. 1885, p. 213) and the act of 1901 (Stats. 1901, p. 576) are unconstitutional and void. The facts of this case are stated by petitioner as follows:

"This is an application for an alternative writ of prohibition in the Supreme Court to prohibit a third successive trial on a void complaint in a police court of Alameda county, for the crime of libel. On the first trial on the same set of facts, the superior court issued an alternative writ of prohibition, staying all proceedings until final determination of said special proceeding. A demurrer to petition was interposed by respondents that the police court complaint was sufficient to sustain a conviction, which demurrer was sustained without leave to amend, judgment entered on demurrer and appeal duly taken and perfected, transcript filed in District Court of Appeal, a stay on said appeal was refused by the superior court, after appeal perfected and a writ of supersedeas refused by the District Court of Appeal and a writ of prohibition refused by the District Court of Appeal, each and all based on the ground that petitioner would have to submit to be tried upon said void complaint, and that if he was convicted he would have a remedy by an appeal from the judgment to the superior court."

[2] Upon the facts thus stated we must conclude that the questions which petitioner is here asking us to consider and determine are res adjudicata as against him. He shows that he has heretofore applied to the District Court of Appeal for a writ of prohibition, for the purpose of preventing these respondents from proceeding with the trial of the same prosecution based upon the same complaint which is involved herein. That application of necessity involved the same legal and constitutional questions which would be involved herein. The refusal of that court to grant the writ prayed for was an adjudication that, upon such a state of facts (identical with the facts herein), petitioner was not entitled to the relief prayed for. It would be useless for us now to inquire whether that judgment was correct or erroneous. Having become final, it is now conclusive upon the parties thereto, and upon all other courts in a proceeding between the same parties involving the same questions. In Dawson v. Superior Court, 158 Cal. 73, 110 Pac. 479, this court decided that the judgment of the District Court of Appeal denying on its merits an application for a writ of prohibition is a bar to a subsequent application in the Supreme Court. In that case, the question was reserved as to whether such an adjudication would be a bar if made otherwise than upon the merits. Petitioner expressly alleges herein in effect that the adjudication of the District Court was on the merits. He alleges that the denial of the writ by that court was "on the ground that the remedy of the petitioner was to submit to be tried in said police court on said complaint, and that, if convicted, then petitioner would have his remedy after conviction and during his imprisonment at the discretion of the police court if the bail were increased to an amount above that which petitioner could procure, by an appeal from the judgment of conviction, notwithstanding that the complaint failed to state a public offense." It has since been decided that the denial ex parte and without the filing of an opinion by an appellate court of an original application for a writ (other than the writ of habeas corpus) is a final adjudication that, upon the facts stated in the application, assuming them to be true, the petitioner is not entitled to the writ prayed for. Napa Valley Electric Co. v. Railroad Commission of California, 251 U. S. 366, 40 Sup. Ct. 147, 64 L. Ed. 310; People v. Hadley (Cal. App.) 226 Pac. 836, 838. If it could be assumed contrary to the express allegations of the petitioner herein that the denial of the application by the District Court of Appeal in this case was predicated upon the circumstances that the same question was involved in the appeal from the judgment of the superior court then pending in such district court (see Lickley v. County Board of Education, 62 Cal. App. 527, 217 Pac. 133), the same circumstance would move this court to deny the present application.

[3, 4] The appeal from the judgment of the superior court denying the writ of prohibition is still pending and undetermined in the District Court of Appeal, and of necessity involves the same questions which would be involved herein if we were to grant an alternative writ. A litigant will not be permitted to seek the same remedy upon the same state of facts in two different courts at the same time, and pursue them both concurrently to a conclusion. Petitioner argues that the questions presented by his appeal from the judgment of the superior court have become moot and his appeal rendered nugatory by reason of the fact that the trial which he was then attempting to prevent by the writ of prohibition has already taken place. That trial did not reach a conclusion. That trial as well as the one which followed it resulted in a "hung jury," the jurors upon each trial being unable to agree upon a verdict. Therefore the case still remains pending and undetermined in the respondent court. Otherwise, there would be no occasion for the present application for a writ of prohibition to prevent that court from proceeding with the trial thereof. So long as this state of facts obtains the questions involved upon the appeal to the District Court of Appeal cannot be regarded as moot or that appeal deemed nugatory.

The application is denied.

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194 Cal. 366

BIASCA v. SUPERIOR COURT OF HUMBOLDT COUNTY et al. (S. F. 11285.)

(Supreme Court of California. Aug. 30, 1924.)

Injunction ⚷148(1)—Interim restraining order not void for failure to require undertaking.

An interim restraining order issued by superior court at time of application for temporary injunction pendente lite, restraining defendants from doing things specified in injunction pending hearing on order to show cause why injunction should not be granted, is not void for failure of court to require undertaking mentioned in Code Civ. Proc. § 529.

In Bank.

Application by Henry Biasca for a writ of prohibition to be directed to Superior Court of Humboldt County, and George D. Murray, judge thereof, to restrain hearing of contempt proceedings. Writ denied.

W. F. Clyborne and A. J. Thatcher, both of Eureka, for petitioner.

PER CURIAM. This application for a writ of prohibition presents for decision the single question of the jurisdiction of the superior court to issue an interim restraining order, without requiring the undertaking mentioned in section 529 of the Code of Civil Procedure. A complaint was filed in the respondent court which stated a cause of action in favor of the plaintiff therein for an injunction against the defendant therein. Upon application for a temporary injunction pendente lite, the respondent court issued an order to show cause why an injunction should not issue as prayed for, which was made returnable seven days after the date of its issuance, and which provided further that, "pending the hearing of said motion for a preliminary injunction and until the determination of said motion," the defendants were restrained from doing the things therein specified. No undertaking was required or given in connection with the issuance of said interim restraining order. Contempt proceedings having been initiated in the respondent court, based upon an alleged violation of the interim restraining order, a writ of prohibition is sought to restrain the respondent court from proceeding with the same, upon the ground that, in the absence of such an undertaking, the restraining order was void. In San Diego W. Co. v. Steamship Co., 101 Cal. 216, 35 Pac. 651, this court pointed out the distinction between a preliminary injunction on the one hand, and an interim restraining order in connection with an order to show cause and expiring with it on the other hand, and held definitely that an undertaking is required in connection with the former, but not with the latter. That decision has never been overruled or departed from by this court so far as we are advised. It was cited and distinguished in Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512, and it was there pointed out that "the temporary restraining order referred to in the statute is an order which applies to the time intervening between an application for an injunction and the day fixed in the order to show cause. Under section 528, after the defendant has answered, an injunction cannot be allowed except upon an order to show cause. Under section 530, if the court or judge deems it proper that the defendant should be heard, an order may be made requiring cause to be shown at a specified time and place.

"Under either section, pending the application and before hearing the parties on the order to show cause, the defendant may be restrained. It would be the better practice, and certainly is the general practice, to require an undertaking during such temporary restraining order."

In Maier v. Luce, 61 Cal. App. 552, 215 Pac. 399, the District Court of Appeal held that any injunctional order issued in the absence of such undertaking is inoperative. We do not feel warranted in adopting this conclusion as applied to interim restraining orders such as the one here under consideration. Thirty years have elapsed since the decision in the San Diego Water Case, supra, during which time several amendments to section 529, Code of Civil Procedure, have been adopted, the last of which was subsequent to the decision in the Neumann Case, supra. None of these amendments evidences an intent on the part of the Legislature to depart from the rule of law embodied in this section as expounded in those two decisions. The provisions of the former section 530, Code of Civil Procedure, for an interim restraining order, which were referred to in the Neumann Case, were omitted therefrom in the amendment thereof in 1911 (St. 1911, p. 1421). But they were at the same time inserted, in substance, in section 527 (St. 1911, p. 59). We must therefore regard the amendments as legislative affirmances of that rule of law. This court has several times expressed its opinion that the better practice would be to require an undertaking upon the granting of such an interim restraining order, but we cannot conclude that the omission to do so renders such order void.

The petition is denied.

(194 Cal. 368)

HENNESSY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

(No. 11074.)

(Supreme Court of California. Sept. 2, 1924.)

1. Costs 🔑209—Must not be entered in judgment before judicially determined if disputed.

Under Code Civ. Proc. §§ 1033–1035, no authority whatever is given the clerk or any other officer to enter costs until same have been judicially ascertained if they are disputed.

2. Appeal and error 🔑442—Trial court retains jurisdiction to tax costs after judgment and appeal therefrom.

Under Code Civ. Proc. § 946, the trial court retains jurisdiction to tax costs, after rendition and entry of final judgment, and appeal duly perfected therefrom, as a "matter embraced in the action and not affected by the order appealed from."

3. Mandamus 🔑31—Will not issue to interfere with superior court decision as to sufficiency of particular facts to confer jurisdiction.

Mandamus will not issue to interfere with decision of superior court as to sufficiency of certain facts established by the record or determined by court upon proper evidence to give it jurisdiction to proceed with particular case.

4. Mandamus 🔑59—Will lie on refusal to entertain jurisdiction on erroneous decision that as matter of law court has none.

Where superior court erroneously decides as matter of law that it has been divested of jurisdiction to entertain motion to tax costs by pending appeal, and therefore refuses to entertain such motion, mandamus will lie to compel it to perform duty specially enjoined upon it of hearing motion.

5. Mandamus 🔑4(3)—Remedy by appeal held not alone reason for denying writ to compel hearing of motion to tax costs.

Conceding that order refusing to perform duty specially enjoined upon court by law, of hearing motion to tax costs, is appealable, that alternative alone is not sufficient reason for denying mandamus to compel hearing of motion, question of expedition in determination of matters, depending upon evidence as to items of cost being factor.

In Bank.

Application for writ of mandate by Annie L. Hennessy, directed to the Superior Court of the State of California in and for the City and County of San Francisco and another, to require retaxation of costs. Writ granted.

R. H. Cross, of San Francisco, for petitioner.

Albert I. Loeb, of San Francisco, for respondents.

SEAWELL, J. Annie L. Hennessy brought an action in the superior court of the city and county of San Francisco against T. E. Haley for the rescission of a certain contract and agreement entered into by said parties, and for the cancellation of certain promissory notes executed by Hennessy to Haley, which constituted a part of the transaction for the purchase by Hennessy from Haley, of the Spaulding Hotel, situate in the city of San Francisco. The details of the transaction are not important. Judgment went in favor of defendant Haley, and against plaintiff Hennessy for costs of suit, which was entered June 6, and recorded June 7, 1923. On the same day defendant Haley filed and served upon plaintiff Hennessy his memorandum of costs, amounting to $299.46, together with a notice of the entry of said judgment. Said plaintiff, petitioner here, filed and served her notice of appeal on June 7, stating that said appeal was taken from the whole and each and every part of said judgment. Within the period of five days allowed by statute to move for taxation of costs, to wit, June 11, 1923, said Hennessy served upon Haley and filed in the court below her motion to tax said costs. The clerk immediately upon receipt of the bill of costs, entered the amount in the judgment according to the demand of the defendant. This was premature and unauthorized by any statute. Said motion to tax costs came before the court for hearing on February 24, 1924, was taken under advisement, and, on the 27th day of February, 1924, was disposed of by the court in the following minute order:

> "In this action, the motion to re-tax costs having been heretofore submitted to the court, and the court having duly considered the same, and now being fully advised in the premises, it is ordered that said action be and the same is hereby denied for want of jurisdiction."

Other proceedings, which do not affect the question before us, followed the appeal.

The refusal of the court to entertain or decide the matter of costs upon the ground that it was divested of jurisdiction by reason of a pending appeal under the circumstances here shown, is before us for decision. This question must be decided with reference to the provisions of our statute which provide, in case of appeal, for a stay of proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, but which are not affected by the order appealed from, under the provisions of section 946, Code of Civil Procedure, and other sections pertinent to the subject.

[1] Section 1033, Code of Civil Procedure, gives to the party against whom costs are claimed the right to file within five days after notice of filing of the bill of costs a motion to have the same taxed by the court in which the judgment was entered. The clerk of the court must include in the judgment the costs "if the same have been taxed or ascertained." Section 1035, Code Civ. Proc. No authority whatever is given the clerk or any other officer to enter costs until the same have been judicially determined if they be disputed. In Kaiser v. Barron, 153 Cal. 474, 95 Pac. 879, it is said:

> "The entry of costs in the judgment, while a motion to tax them was pending, was without authority, and the issuance of an execution for the collection of such costs and the levy upon plaintiff's property was improvident and untimely."

[2] Section 946, Code of Civil Procedure, provides:

> "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. * * * But the court below may proceed upon *any other matter* embraced in the action and *not affected by the order appealed from.*" (Italics ours.)

Hayne on "New Trial and Appeal," in referring on the clause "any other matter embraced in the action and not affected by the order appealed from," says:

> "But even in the absence of such a provision, it is believed that the trial court may take any action that may be proper in connection with the cause, provided conditions are allowed to remain substantially unchanged as when the appeal was perfected. Matters ancillary or collateral in connection with the appeal itself or the proceedings in the lower court, as a settlement of a bill of exceptions, etc., are not affected by the appeal." Vol. 2 (Rev. Ed.), p.

1223, § 224; Estate of Waters, 181 Cal. 584, 185 Pac. 951; 2 Cal. Jur. 418.

A motion to tax the cost bill made after the rendition and entry of final judgment is a "matter embraced in the action and not affected by the order appealed from." It is true, as a general rule, that a duly perfected appeal divests the trial court of further jurisdiction in the cause. This rule has its qualifications, however. In re Morehouse, 176 Cal. 634, 169 Pac. 365. Such qualification exists by reason of the fact that ancillary or collateral matters in connection with the appeal are unaffected, and, notwithstanding the appeal the trial court may determine such matters as the settlement of bills of exception, hearing and disposing of motions for new trials, the payment of alimony, and other matters incidental to the action. In Whitaker v. Title Ins., etc., Co., 179 Cal. 111, 175 Pac. 460, we held that, upon an appeal from a judgment or order directing the payment of money, it was not necessary under the provisions of section 942, Code of Civil Procedure, that the bond should cover the amount awarded as costs in order to effectuate a stay of proceedings pending the appeal since the words "in double the amount named in the judgment must be taken as referring to the amount adjudged to be due the prevailing party upon the claim involved in the action and for which recovery is awarded, and as not including the incidental recovery on account of the costs of the action awarded only upon claim made and ascertainment of amount had subsequent to the giving of the judgment." In 7 Cal. Jur. 298, the rule is thus stated: "It is now settled that an order on a motion to re-tax a cost bill made after the rendition and entry of final judgment is appealable as a special order after final judgment." See, also, Dooly v. Norton, 41 Cal. 439; Empire Gold Min. Co. v. Bonanza, etc., Min. Co., 67 Cal. 406, 7 Pac. 810; Yorba v. Dobner, 90 Cal. 337, 27 Pac. 185; Linforth v. San Francisco Gas, etc., Co., 9 Cal. App. 434, 99 Pac. 716; Quitzow v. Perrin, 120 Cal. 255, 52 Pac. 632; Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360.

[3, 4] Sufficient has been said, supported by authority, to show that petitioner was entitled to have the matter of costs judicially determined in the usual and orderly way agreeable to the statutory provisions regulating the subject. The question next to be answered is whether the writ of mandamus should issue as prayed for, or whether petitioner should be relegated to some other remedy. The underlying principle which supports the right for relief by the aid of the writ of mandamus has been many times defined by the decisions of this court. It is well-settled law that this court will not interfere with the decision of a superior court in that class of cases in which a superior court is called upon to consider the sufficiency of certain facts established by the record, or certain facts determined by it upon evidence properly addressed to it, to give it jurisdiction to proceed with the particular case before the court. But the case at bar presents a proposition not dependent upon a consideration of the powers of the court as defined by the Constitution and the statutes. See Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699; Grimwood v. Barry, 118 Cal. 274, 50 Pac. 430; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 Pac. 359, 17 Ann. Cas. 933; Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582; Sullivan v. Superior Court, 185 Cal. 133, 195 Pac. 1061; Hill v. Superior Court, 15 Cal. App. 307, 114 Pac. 805; Moch v. Superior Court, 39 Cal. App. 471, 179 Pac. 440. What has been said above with respect to the question of jurisdiction is practically in the words of Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467. The language there used is so applicable to the question of law presented in the instant case as to justify a reproduction of the following paragraph:

> "The Code provides that the writ of mandate may be issued to 'compel the performance of an act which the law specially enjoins, as a duty resulting from an office.' Code Civ. Proc. § 1085. The law specially enjoins upon the superior court, and upon the judge thereof, the duty of hearing and determining all matters which are within its jurisdiction, and which come properly before it. The motion under consideration did come properly before that court, but the judge decided, as matter of law, and upon the statute and Constitution only, that the court had no power in any case to make orders of the kind there applied for, and upon that ground only refused to proceed to the merits of the application. If the person holding the office could thus decide what were the duties pertaining thereto which the law specially enjoins him to perform, the writ of mandate would be practically useless. The decision refusing to act which gives occasion for the writ would also furnish sufficient cause for denying it. As was well said in Temple v. Superior Court, 70 Cal. 211, 'The court cannot, by holding without reason that it has no jurisdiction of the proceedings, divest itself of jurisdiction and evade the duty of hearing and determining it.' To the same effect are Merced M. Co. v. Fremont, 7 Cal. 130; Ortman v. Dixon, 9 Cal. 23; Heinlen v. Cross, 63 Cal. 44; People v. Barnes, 66 Cal. 594; Crocker v. Conrey, 140 Cal. 213."

[5] Conceding the order refusing to tax costs to be an appealable order that alternative would not of itself be a sufficient reason for holding that remedy exclusive. The bare refusal to perform an act which the law specially enjoins, and which act embraces the determination of matters incidental to a judgment appealed from are not the only reasons that may be urged for the issuance of the writ, but also the question of expedition in the determination of matters depending upon evidence as to questions of witnesses' fees and items of costs which would be more

conveniently and readily disposed of at a time when said matters are fresh in the memory of all concerned rather than postponed to an uncertain day.

We may add to what has already been said that an order of reversal upon appeal would have amounted to a peremptory mandate. San Francisco Gas & Electric Co. v. Superior Court, supra.

Let the writ issue.

We concur: MYERS, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; RICHARDS, J.; SHENK, J.

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68 Cal. App. 244

LEW U. FON et al. v. CHAMBERS et al.
(Civ. 4092.)

(District Court of Appeal, Second District, Division 1, California. July 26, 1924.)

1. Searches and seizures 🔑5—Evidence held sufficient to support finding that tickets were designed and intended to be used in Chinese lottery.

In claim and delivery to recover tickets seized under search warrant, issued in pursuance of Pen. Code, § 1524, evidence *held* sufficient to support a finding that the tickets were designed and intended to be used in connection with a Chinese lottery.

2. Replevin 🔑72—Action in claim and delivery, a civil case in which issues are determined according to preponderance of evidence.

An action of claim and delivery for leaflets seized by police officers as intended to be used in a Chinese lottery, is a civil case in which the issues are determined according to the preponderance of evidence, and does not require proof beyond a reasonable doubt that the papers were in fact blank lottery tickets.

3. Evidence 🔑588—Trial judge may believe testimony of one witness or reject testimony of any other witness.

It is within the province of a trial judge to believe testimony of any one witness, or to disbelieve or reject the whole or any part of any testimony of any other witness.

4. Appeal and error 🔑994(3)—Finding of trial court, based on evidence, not disturbed on appeal, in absence of abuse of discretion.

If in exercise of prerogative of trial court to believe testimony of one witness or disbelieve or reject testimony of others, there is substantial evidence on which to base his finding, it cannot be disturbed in absence of abuse of discretion.

5. Evidence 🔑129(1)—Admitting testimony that tickets seized were similar to other lottery tickets used not error.

In claim and delivery for tickets defended on the ground that they were to be used in a Chinese lottery, where a witness was shown to have long experience in dealing officially with matters of such a nature, and the similarity of tickets in question with completed lottery tickets, was fully explained, admitting his testimony that the tickets were similar to lottery tickets used in other stores, was not error.

6. Searches and seizures 🔑5—Claim and delivery will not lie to regain tickets to be used in lottery, although no criminal action was taken against owners.

Where blank tickets intended and designed to be used in a lottery, and possessed in violation of an ordinance, were seized under a search warrant issued in pursuance of Pen. Code, § 1524, claim and delivery will not lie to recover them, regardless of the fact that no criminal complaint had been filed against the owners.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Lew U. Fon and others against Joseph F. Chambers and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for appellants.

Jess E. Stephens, City Atty., Chas. B. MacCoy, Deputy City Atty., and J. M. Friedlander, City Prosecutor, all of Los Angeles, for respondents.

HOUSER, J. Plaintiffs brought an action in claim and delivery against the defendants, who were, respectively, the police judge, the city prosecutor, the clerk of the police court, the chief of police, and a patrolman, to recover from them certain so-called merchandise consisting of pamphlets or paper leaflets on which it was alleged were portrayed Chinese poems and literature. The answer, besides containing a specific denial of nearly all the material allegations of the complaint, other than that the demand by plaintiffs for the merchandise and the refusal thereof by the defendants was admitted, set up the affirmative defense that the patrolman, having been informed that plaintiffs had in their possession tickets to be used in a lottery, "seized and took from said plaintiffs 29 boxes or cases containing slips of paper on which was and is written various Chinese characters; that said tickets or slips of paper were printed and designed to be used as and in connection with a lottery scheme and in furtherance of said lottery scheme, and were intended to be used and issued as lottery tickets in the operation of a lottery."

[1] The findings of the court with reference to the nature of the slips of paper were that at the time referred to in the complaint they were taken by the patrolman, and at such time were the property of the plaintiffs; that they were not in pamphlet form, but that such slips of paper constituting the contents of said 29 boxes "bear the same Chinese characters and are identical in form; that said tickets or slips were not designed or intended to be sold as literature or used as such"; that said patrolman (referring to one of the defendants) "on or

about the 9th day of August, 1921, having reasonable cause to believe that the contents of said boxes were designed to be used as and in connection with a lottery scheme and in furtherance of said lottery scheme, and were intended to be used and issued as lottery tickets in the operation of a lottery, and acting under and by virtue of a search warrant issued on the 9th day of August, 1921, * * * seized and took from said plaintiffs 29 boxes containing tickets or slips of paper on which were or are written Chinese poems and literature in various Chinese characters; that said tickets or slips of paper were printed and designed to be used as and in connection with a Chinese lottery scheme and in furtherance of said lottery scheme and were intended to be used and issued as lottery tickets in the operation of a Chinese lottery."

Appellants first contend that the finding by the court to the effect that the slips taken from the plaintiffs were lottery tickets, or lottery tickets in an unfinished state, intended for no other use than as lottery tickets or lottery material, is not sustained by the evidence. At the outset, it is admitted by appellants that, if the possession of the slips by the plaintiffs came under the prohibition of ordinance number 37737, new series, of the city of Los Angeles, the taking of such slips by the officers was lawful and is determinative of the appeal.

Section 1 of the ordinance in question provides that it shall be unlawful for any person to have in his possession "any ticket * * * paper * * * or any other object used or intended to be used in a lottery"; and section 4 thereof makes it unlawful for any person to have in his possession "any ticket * * * paper * * * or any other object used or intended to be used for contriving, preparing, setting up, or drawing any lottery, or used or intended to be used for contriving, setting up, preparing, marking, printing, stamping, writing, or getting ready for sale, or distribution, any lottery ticket, or lottery tickets." Section 6 of the ordinance provides that "in all cases, proof of the fact that such * * * paper * * * ticket * * * device, or other object, is used or intended to be used * * * or is understood to belong to, or to be a part of, or relates to, any lottery, lottery company, lottery tickets, or lottery drawing, is sufficient."

While but one box of the "merchandise" was opened by the officers, the action was for the recovery of the possession of the full number of 29 boxes under the allegation that they contained "Chinese poems and literature in pamphlet form"; and the admission of one of the defendants was in substance that "the boxes all contained the same as the one we had opened." The testimony given by one of the officers who served the search warrant was that he had been stationed as a police officer in Chinatown for six and one-half years; that he had seen slips similar to those in question in nearly every place in Chinatown, and that they were used as lottery tickets; that he was familiar with Chinese lottery tickets by reason of many raids in which he had participated, and in which raids lottery tickets were seized and thereafter used as evidence against the persons arrested in such raids; that the only difference between the tickets here in question and the lottery tickets seized in such raids was that "the other tickets, of course, were marked in here (indicating) over the Chinese characters and the name of the lottery company and the amount for which the company was capitalized, and also there would be the name in Chinese characters on it, and the amount which the ticket was played for."

The only evidence which might be considered as in any way contradicting the testimony to which reference has just been had was that of one of the plaintiffs, who testified that he did not know the use for which the slips were intended; that on each of the slips were 80 characters representing different poems, and which slips were sold at wholesale to "other stores and to school children." In this connection, it is significant that the slips were loose-leaf and were "tied in a bunch"; that they were sold only a "whole case at a time," and at a rate of 42 cents a pound. While it is possible that these slips may have been useful for some purpose other than as lottery tickets, the evidence does not show that they were ever put to any other use, or that any one other than one of the plaintiffs ever considered them as literature. The fact that they were tied up in bunches and were sold by the pound negatives any such idea, although such a method of sale of "poems and literature" perhaps in some cases might well be emulated by enterprising merchants of other nationalities. On the other hand, that they were identical with lottery tickets used in other stores in Chinatown, excepting that they were not marked, nor had thereon the name of the lottery company issuing the tickets, nor its capitalization, nor the amount for which the ticket was played, would indicate that they were stock lottery tickets, ready to be sold to different lottery companies, requiring only the filling in of the details just noted.

The fact that the slips had printed thereon Chinese characters representing 80 different poems, or "one poem with 80 different meanings," is of no great consequence. So far as their use as lottery tickets is concerned, apparently in the place of the Chinese characters, there might as well have been used 80 different numerals.

[2] The case is not one requiring evidence beyond a reasonable doubt that these slips of Chinese poems and literature were in fact blank lottery tickets; but it is a civil

case in which the rule is that the issue may be determined according to the probabilities arising from the preponderance of the evidence.

[3, 4] It was clearly within the province of the trial judge to give credence to the testimony of any one witness, or to disbelieve or to reject the whole or any part of the testimony of any other witness; and if, in exercising his prerogative in that regard, there was any substantial evidence on which to base his finding, it cannot, in the absence of an abuse of discretion on the part of the trial judge, be disturbed on appeal. That the evidence, together with the inferences which may reasonably be drawn therefrom, is sufficient to support the conclusion reached by the trial judge we entertain no doubt. It therefore follows that appellants' contention with reference to the finding of the court cannot be sustained.

[5] It is also urged that the trial court erred in receiving evidence over plaintiffs' objection thereto that the slips taken from the plaintiffs by the officers were "similar" to lottery tickets used in other stores in Chinatown. The foundation for such evidence was properly laid by showing the long experience of the witness in dealing in an official capacity with matters of the nature involved herein, and the similarity of the slips in question with completed lottery tickets was fully explained. In such circumstances, we are unable to perceive that the court erred in admitting the testimony.

[6] Plaintiffs finally urge that, because under the powers created by the search warrant the officers took merchandise which was in plaintiffs' possession for lawful purposes, and because no criminal complaint had ever been filed against plaintiffs up to the time the action herein was tried, the plaintiffs were entitled to a return of the seized property. What has heretofore been said with reference to the nature of the slips and their intended use will suffice as an answer to the first part of plaintiffs' contention. Regarding the latter part, the only authority cited by appellants is the case of Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 Pac. 56, which had to do with the jurisdiction of the police court to try ex parte the question of title to some personal property which had been taken on a search warrant from the possession of the pledgee thereof; and the court held that "one who is in possession of property under a claim of right cannot be deprived of its possession without due process of law; and, in order to constitute due process of law, there must be notice of the time and place of hearing and an opportunity to be heard."

On the other hand, many cases are cited by respondents which in principle sustain the judgment of the trial court. In the case of Collins v. Lean, 68 Cal. 284, 9 Pac. 173, a search warrant authorized an officer to search the person of an individual for lottery tickets. Such search failed to reveal any lottery tickets, but the room of the individual contained a package of 100 lottery tickets, which was found and seized under the search warrant. It was held that an action to recover the lottery tickets would not lie. Among other things, the court said:

> "Conceding all that the plaintiff claims as to the tickets being his property, and that he cannot be deprived of them as such without due process of law under most circumstances, yet nevertheless, it is firmly settled by the law that all rights of property are held subject to such reasonable and proper control of the mode of its keeping and use as may be deemed necessary for and in consonance with the welfare of the general public. And in the exercise of the police power vested in the Legislature under our state Constitution, certain kinds of property, when held or used so as to be injurious to the general public, may be seized and destroyed."

In the case of J. B. Mullen & Co. v. Moseley, 13 Idaho, 457, 90 Pac. 986, an action in replevin was brought to recover certain slot machines from the possession of the sheriff, and it was held on the authority of many cited cases that such an action would not lie where the subject-matter was designed and intended only for use in the commission of a criminal offense.

In the case of Stanley-Thompson Liquor Co. v. People, (1917) 63 Colo. 456, 168 Pac. 750, it was likewise held as to certain gambling devices which, prior to their seizure, had been in storage for three years, and which had never been used for the purpose for which they were manufactured or intended.

In Board of Police Commissioners v. Wagner (1901) 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423, it was held that replevin would not lie to recover a slot machine, even though no criminal proceedings had been instituted as against the owner thereof either before or after its seizure.

In Robertson v. Porter (1907) 1 Ga. App. 223, 57 S. E. 993, trover was instituted against the sheriff to recover the possession of "1 large oak table, with carved legs, worth $145; 1 roulette wheel, with complete appliances, worth $400; 1 bookmaker's wheel, worth $150; 1 large walnut table, worth $60; 1 long oak table, with rounded corners, worth $90; 1 round oak table, worth $25; 5,000 composition discs or chips, worth $175; 1 cribbage or faro layout, worth $25; 1 glass layout for bookmaker's wheel, worth $40; 1 long pine table, worth $12; 1 lot playing cards, worth $10; and 1 lot dice, worth $5." Although it is apparent that many of such articles might have been useful for other than gambling purposes, it was held that the plaintiff could not recover. In the course of the opinion it is said:

> "Courts are created for the upholding of the law and of morals, and will therefore decline to allow their processes used to further the maintenance of crimes and public evils. The law has the right of self-defense. It will not, by its own strong arm, assist in placing into the possession of any one instrumentalities designed for no other purpose than the breaking of the law. It will not protect the owner of a house devoted to lewd purposes, as to his rents (Ralston v. Boady, 20 Ga. 449); the mistress of a lewd house, as to her contracts with the inmates (Postelle v. Rivers, 112 Ga. 850, 38 S. E. 109); unlawful assemblages, as to their common fund (Regina v. Hunt, 8 Car. & P. 642); the milk dealer, as to his milk watered in violation of law (Deems v. Baltimore, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. Rep. 339); the 'blind tiger' keeper, as to his liquors (State v. O'Neal, 58 Vt. 162, 2 Atl. 586, 56 Am. Rep. 557); the indecent individual, as to his obscene prints and lascivious pictures; the gambler, as to his slot machine (Board of Police Com'rs v. Wagner, 52 L. R. A. 775, 93 Md. 182, 48 Atl. 455, 86 Am. St. Rep. 423), or as to his poker chips (Bales v. State, 3 W. Va. 687); the burglar, as to his kit, or the counterfeiter, as to his molds and coins (Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68); the highwayman, as to his spoils (opinion of Lord Ellenborough, referred to on page 16 of case last cited); nor will it protect the keeper of a gaming house, as to his paraphernalia and implements of crime (Kneeland v. Connally, 70 Ga. 424)."

From a reading of those portions of the ordinance quoted herein, there can be no doubt of its applicability to the facts involved in this controversy. The finding of the court, which is sustained by the evidence, is to the effect that the slips on which were printed the so-called poems and literature were in fact but blank lottery tickets, which were seized under a search warrant and taken from the possession of the plaintiffs under the provisions of the statute section 1524, Pen. Code. Considering the purposes for which the slips were intended, the authorities are practically unanimous in announcing the doctrine that replevin (or claim and delivery) will not lie. It therefore follows that the judgment was right and should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

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68 Cal. App. 259

PEOPLE v. YBARRA. (Cr. 1073.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1924.)

1. Homicide 🔑204—Statements made in expectation of death admissible as dying declaration.

Repeated statements by deceased, who was mortally wounded, that he did not expect to recover, followed by death 11 days later from such injuries after being committed to a hospital by physician who swears he believed the patient would die, *held* admissible as dying declaration.

2. Homicide 🔑228(1) — Corpus delicti held sufficiently established.

In prosecution for murder, where defendant's contradictory statements were disproved by direct testimony of several eyewitnesses, evidence *held* sufficient to establish corpus delicti.

3. Criminal law 🔑747—Conflicting evidence as to alibi for jury.

In prosecution for murder on the defense of alibi, it was for jury to determine whether defendant had made conflicting statements, and, if so, which, together with other evidence, was true.

4. Criminal law 🔑1169(2)—Admission of evidence held harmless error, in view of other similar testimony.

In prosecution for murder, admission of testimony of deceased's family as to statements made to them by deceased, that he had identified his assailant, if error, was harmless in view of testimony by defendant and several other witnesses to same effect.

5. Criminal law 🔑1170½(1)—State's contradiction of own witness not prejudicial error, where answers favorable to defendant.

Where testimony of witness for prosecution differed at trial from that on preliminary examination, questions by state, seeking to refresh her memory, resulting in answers favorable to defendant, *held* not prejudicial error as an attempt to impeach her.

6. Homicide 🔑340(2)—Giving instruction inapplicable to evidence harmless.

In prosecution for murder, though there was no evidence of the use of a dangerous weapon by defendant, instruction as to the presumption arising from the use of a dangerous weapon, while inapplicable, was harmless.

7. Homicide 🔑305—Instruction as to defendant's participation in robbery resulting in death of victim justified by evidence.

In prosecution for murder committed while robbing deceased, where there was evidence that two men acting together had committed robbery, one of whom was defendant, an instruction as to responsibility of individual participants in an unlawful act which is subject of a conspiracy was proper.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Jose Ybarra was convicted of murder in the first degree and appeals. Affirmed.

William T. Aggeler, Public Defender, Frederick H. Vercoe, and Franklin Padan, Deputy Public Defenders, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. Appellant was convicted of the crime of murder in the first degree and the penalty fixed at life imprisonment. This appeal is based principally upon alleged insufficiency of the evidence to establish the corpus delicti; also upon an alibi, and asserted errors in ruling upon the admissibility of evidence, and in the instructions to the jury.

In attempting to establish the corpus delicti, it was sought to introduce statements of the deceased, and much evidence was offered for the purpose of showing that he was impressed with the consciousness of impending death at the time they were made. The first point of appellant is that this foundation was not sufficient to permit of the introduction of the decedent's declarations as to his injuries and concerning the person or persons who had inflicted them upon him.

On Sunday, August 26, 1923, at about 9:30 in the evening, a police officer first saw Gordon McCutcheon, the decedent, in an alleyway in the city of Los Angeles, in a stooping position, as if arising to his feet; when the policeman approached he observed that McCutcheon had apparently been beaten about the face, and that there was blood on his face and on the front of his clothing. Eleven days later McCutcheon died from the injuries received at that time. The facts upon which the people relied for a foundation upon which to introduce his declarations were substantially as follows:

McCutcheon arrived at his home at about 10:30 at night. Members of his family testified that his face was badly swollen, one eye was entirely closed, and his clothing was soiled with blood. He had previously been in good health, but on this occasion he complained of his body paining him, and went to bed, where he remained until the following Wednesday; physicians were called in and visited him each day, and on Thursday, August 30, he was up and dressed and attended court; on Sunday evening, September 2, he returned to his bed, and was ordered to the hospital by his physician, who concluded it was a surgery case, though McCutcheon's temperature had been normal, pulse slightly elevated, his abdomen showed tenderness and his bowels were inactive. A surgeon who examined him at the hospital described his condition as "very bad," stating that he found evidences of strangulated bowel, and decided to operate, but that he and his consultants did not believe the man could live. On Thursday, September 6, an operation was performed, which revealed a ruptured intestine, general peritonitis—an inflamed condition of the intestines and surrounding structures and pronounced inflation. Immediately following the operation McCutcheon died. The surgeon who performed the autopsy found a gangrenous condition at the junction of the large and small bowels, and a rupture of the left side of the diaphragm, through which a large portion of the great omentum was protruding, and which had not been disclosed by the operation because it was above and not within the region then explored. It was testified that these conditions would result only from the force of great pressure, or a blow, from without.

When McCutcheon first arrived home on the night of August 26 he told his wife that he felt very badly, and then and on subsequent occasions he said: "I don't think I will be here with you long;" "I believe I am done for." He told his brother on the 27th that he did not think he would live; about three days before his death he said to his daughter: "Mary, don't go to work, I won't ever pull through with this;" for her to be a good girl, and to pray for him, that he was "going to die." She testified that, on two occasions thereafter, her father told her that he was not going to live, though she admitted that on one occasion he asked her to pray for him to get well.

[1] It is contended on behalf of the appellant that the interval between the time of the injury and the death of McCutcheon, his apparent improvement after the third day, his attendance at court, and request that his daughter pray that he might get well, all support the conclusion that, at the time of any declarations he may have made, he was not in a dying condition, and entertained such a degree of hope for recovery that he could not have believed that he was not going to recover. Statements made by a mortally wounded person, who repeatedly says that he does not expect to recover, followed by death from the identical injuries which he had in mind, after being committed to a hospital by a physician who swears that he believed the patient would die, furnish sufficient ground for the conclusion that such statements emanated from a mind impressed with the solemnity of the occasion as though under the binding force of a legal oath. This is essentially so when such facts are supported by the conditions revealed by the operation and the autopsy. According to the authorities it is the condition of the mind that governs, rather than the construction to be placed upon peculiar circumstances such as the degree of possibility that the person might, with the symptoms described, have recovered. That McCutcheon was beaten and ruptured internally, and that experienced physicians and surgeons recognized his condition as being fatal, that he repeatedly stated that he believed he must die, and that he did die from such rupture, though some days later, are facts which present as strong a case for the application of the rule admitting the statements in question as dying declarations as we have been able to find since People v. Ybarra, 17 Cal. 166, and People v. Lee, 17 Cal. 76, which are somewhat analogous to the case at bar, and are in harmony with the more recent case of People v. Cord, 157 Cal. 562, 108 Pac. 511. In the latter case it was said:

"We have no decisions in this state declaring the meaning of the phrase 'a dying person,' in section 1870 of the Code of Civil Procedure. It does not mean that in order to make such declaration admissible the person making it must be at the time in the act of expiring or in the final death struggle. It is seldom that a human being in that stage of dissolution is capable of making any statement whatsoever in the nature of a connected or reliable narrative or account of a past transaction. To admit such declarations only when made by a person in that condition would practically exclude them altogether, or render them useless for any purpose. We think the intention of the codifiers was to express, as clearly and comprehensively as was compatible with the necessary brevity, the rule on the subject of the admissibility of dying declarations as it had previously existed. By this rule it was not necessary that the person should be at the time in the throes of death, or that he should die immediately, or within any specified time thereafter, in order to give the declaration probative force. * * * It was considered that the belief that a fatal wound had been received and that death was about to ensue therefrom would deter such person from uttering a willful untruth about its cause, if not as effectively as would the sanction of an oath reinforced by the earthly penalty for its violation, at least sufficiently to justify its admission as evidence of the facts recounted. Where a person has been fatally wounded, is in sore distress therefrom, and believes that he will not recover and is soon about to die, his statement made in this belief relating to the cause of his injury is admissible, if it appears that he subsequently died from the direct effects of the wound, although he may have revived after making the statement or may have lived a considerable time thereafter, and may have again begun to hope for recovery. Such person is to be deemed 'a dying person' within the meaning of the statute from the time the wound is received until death results from the injury, and his statement during that period made in view of death and with the belief that it is near at hand, may be proven to establish the cause of death."

Objection to the introduction of the decedent's statement was therefore properly overruled. It was then related by the police officer that Mr. McCutcheon conducted him to a restaurant 175 feet from where he was found, where the latter identified the defendant, who, after being arrested, escaped and ran. The officer testified that the deceased, pointing to Ybarra, said, "that is one of the men that held me up." Members of his family stated that upon returning home he told them that a Mexican had held his hands behind him while another took about $50 from his pockets, and that they had then beaten him severely. The policeman also testified that the defendant was the man identified at the restaurant by McCutcheon, and that the defendant's hands were bloody, that there was blood on his shirt and on his sleeve; that the officer took the decedent to the receiving hospital, then returned to a house near the restaurant, where he found the defendant and placed him under arrest; he further testified that Ybarra offered to give him what money he had if he would let him go.

A lieutenant police detective by the name of Lopez testified that he questioned appellant on the day following his arrest, and that appellant told him in Spanish that he had nothing to do with the holdup, but that he ran when the officer came to arrest him because he was frightened; that the witness acted as interpreter for the district attorney at the latter's office at a later date when the appellant stated in response to questions that he met the deceased in the alley and that he took hold of him; that he got the blood on his hands in that manner and went to the restaurant to eat and to wash his hands. Upon the trial of this case the appellant testified that he first went to a picture show, on the evening of August 26th, then to a restaurant where he had a drink that crazed him; that while in the restaurant the officers came in and that one of them struck him on the nose, and that this was the cause of blood appearing on his hands and on his clothing. On the stand he denied any knowledge of being in the alley, or of having seen Mr. McCutcheon, and denied that he made the statements to which Lopez testified; on cross-examination he testified that he could not remember the theater that he had attended, or what he saw there; that when he entered the restaurant he asked the proprietress for something to eat, and that she said they did not have anything to eat, but that she placed some wine before him that was poisonous, and although he went in also to wash his hands he did not ask for water. The officer testified that he made no attempt to strike the appellant, and the woman who conducted the restaurant where he was found testified that when appellant entered and sat down she asked him what he wanted and that he said "nothing."

[2] The argument that the evidence furnishes grounds for an inference that death could have resulted from accident or natural causes, and that the corpus delicti was therefore not established in this case, is untenable for the reason that there is much evidence strongly tending to prove criminal agency, and this testimony, the statements of the decedent and of appellant, were predicated upon sufficient foundation and were properly admitted. The contradictory nature of appellant's various narrations, conflicting with the direct recitals of several eyewitnesses, fully justified, if they did not compel, the conclusion that he was not worthy of belief. His brief is prolific with quotations of authorities holding that, where it is just as reasonable to suppose that the deceased came to his death from other causes as from

the hand of the accused, the corpus delicti is not established; but none of them go so far as to hold that, where all the evidence offered by the prosecution tends to prove the offense charged, the mere suggestion by the defendant of other possible theories will nullify it. Were such a rule to be recognized few criminal cases would get to the jury.

[3] What has been said also applies to the question of appellant's asserted alibi. It was within the exclusive province of the jury to determine whether he had made conflicting statements upon that point, and, if so, which, together with all the other evidence in the case, was true.

[4] Another point raised by appellant is that, regardless of the question of admissibility of other statements claimed to have been made by McCutcheon regarding the cause of his injuries, it was error on the part of the trial court to permit his family to testify that he told them he had identified one of the Mexicans who held him up, and that he was in jail. It is argued that this was not part of the res gestæ, and he quotes from People v. Cyty, 11 Cal. App. 702, 106 Pac. 257, and others cases, wherein it was held that such evidence must "be restricted to the act of the killing, and to the circumstances immediately attending it and forming a part of the res gestæ." It is said in the case at bar that the statement of decedent was a narration of a subsequent transaction, or a mere opinion of the decedent. Appellant contends that this testimony was highly prejudicial, and that the judgment should be reversed upon the authority of People v. Carkhuff, 24 Cal. 640, which held that evidence there admitted "tended to prove the presence of the defendant at the house of the deceased on the night of the murder, and that may have been the evidence that mainly satisfied the jury that he was present at that time." However, in the instant case, the correctness of the ruling of the court as to the admissibility of evidence under consideration was entirely immaterial, and had it been omitted there were four witnesses for the people who testified to the occurrences at the restaurant; the defendant himself stated that McCutcheon pointed him out at that place, and the police officer related all of the circumstances of the identification, arrest, and imprisonment of appellant. Hence, whether or not McCutcheon told his family that he had identified the defendant in the restaurant, it was not an issue, and any error in admitting testimony as to what he said in that behalf was harmless. People v. Wolff, 182 Cal. 728, 190 Pac. 22; People v. Ong Mon Foo, 182 Cal. 697, 189 Pac. 690; People v. Goodwin, 132 Cal. 368, 64 Pac. 561; People v. Sanchez, 23 Cal. App. 743, 139 Pac. 820.

[5] Again it is objected that respondent was permitted to impeach certain of its own witnesses, and that this was prejudicial error. The only instance we find that is worthy of notice, and to which objection was interposed, was the submission to the witness Godoe when she testified at the trial of a portion of her testimony given at the preliminary examination. The report of her former testimony contained the statement that she saw blood on the appellant's face when he entered her restaurant; but she testified at the trial that she saw only dirt upon his face. The prosecution being surprised sought to refresh her memory, and she testified that they must have misunderstood her at the preliminary, because she did not know about any blood being on his face, that it was dirt. This was not an attempt to impeach her, but it brought forth testimony favorable to the appellant, and in any event would not constitute prejudicial error. People v. Glover, 141 Cal. 233, 243, 74 Pac. 745; People v. Casselman, 10 Cal. App. 234, 101 Pac. 693.

[6] The court below instructed the jury that—

> "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill, and which in fact does destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, and in the absence of evidence to the contrary this presumption must prevail."

Appellant contends that there was no evidence of his having used a dangerous weapon, and that this instruction led the jury to believe that he did, in fact, assail the deceased with a dangerous weapon. It is conceded by respondent that there was no evidence as to any weapon, but as was said in People v. March, 6 Cal. 543, 547:

> "There is no evidence in the record upon which to base the instruction, or to show its relevancy, and we have before decided that we would not disturb a judgment of the court below on account of an erroneous instruction, which was not applicable to the facts of the case. [See People v. Roberts, ante, 214.]"

The same ruling was made in People v. Dole, 5 Cal. Unrep. 934, 51 Pac. 945. In People v. Methever, 132 Cal. 326, 64 Pac. 481, it was held that where there was no evidence that the defendant charged with murder was drunk at the time the crime was committed, an instruction as to the effect of drunkenness, while unnecessary, was not prejudicial.

[7] The jury were also instructed as to the responsibility of individual participants in an unlawful act which is the subject of

a conspiracy, and appellant asserts that he was prejudiced thereby, since there was no evidence of this offense having been committed as a result of a conspiracy. The evidence discloses that decedent had said that two Mexicans held him up; he pointed out the defendant to the officers, saying to them, "That is one of the Mexicans that held me up," but there is no evidence as to which of the men struck him. This was some evidence that two men acting together had committed the robbery of McCutcheon, when he was injured.

It was purely a question for the jury to determine whether he was held up, whether two persons committed the offense, and, if so, whether or not the defendant took such active part as to be guilty of the battery which caused McCutcheon's death, even though he did not actually commit the assault.

> "The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. * * * But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury." People v. Kauffman, 152 Cal. 331, 92 Pac. 861.

The jury in the instant case were instructed in the exact language of the opinion above quoted, and an instruction requested by the defendant was also given, that "it must appear from the evidence and beyond a reasonable doubt that the defendant and not some one else committed the offense charged," and that "to warrant a conviction of the defendant he must be proven to be guilty clearly and conclusively beyond all reasonable doubt, so that there is no reasonable theory upon which he can be innocent when all of the case is taken together." Upon the record before us, we think that the instructions fully and fairly presented the law of the case and were proper.

The only remaining points raised relate to instructions given which under various rulings have been approved, or to the refusal to give requested instructions which were covered by others already given. It is not necessary to review them here. After careful consideration of the entire record, we are satisfied that no prejudicial error is contained therein, and the judgment and order denying the motion for new trial are affirmed.

We concur: FINLAYSON, P. J.; and WORKS, J.

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68 Cal. App. 302

MASON v. STRAUBE et al. (Civ. 4759.)

(District Court of Appeal, Second District, Division 2, California. Aug. 1, 1924.)

Appeal and error ⇒628(2)—Reporter's failure to file transcript on time held not jurisdictional.

Appellant having done all that was required to perfect his appeal, mere failure of the reporter to file the transcript within statutory 20-day limit did not require dismissal.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Leslie R. Mason against William C. Straube and another. Judgment for plaintiff, and named defendant appeals. Motion to dismiss appeal denied.

Walter Gould Lincoln, of Los Angeles, for appellant.

Fred Aberle, Jr., of Los Angeles, for respondent.

CRAIG, J. Respondent herein obtained judgment against appellant and his codefendant upon a promissory note January 7, 1924, which judgment was entered January 25, 1924, and on the 2d day of February, 1924, notice of appeal, with bond and notice for reporter's transcript under section 953a of the Code of Civil Procedure, were filed. The stenographic reporter did not furnish the transcript until on or about the 15th day of May, 1924, and thereafter and on May 29th it was delivered to appellant's counsel. On May 31st appellant served upon counsel for respondent notice of intention to settle said transcript in the superior court; but previously thereto and on May 24th notice of motion to dismiss the appeal was filed in this court by respondent, upon the ground that said appeal being taken under section 953a of the Code of Civil Procedure, but 20 days were allowed the reporter for filing the transcript, and that 58 days having elapsed from the date of the notice of appeal, the time limited by said section had expired.

It is shown by the records of the trial court that appellant duly served notice of appeal and filed his order for the reporter's transcript, and that as soon as said transcript became available he notified respondent of his intention to settle the same within the time required by the statute; and the transcript was settled by the court below on June 5, 1924.

It is obvious that appellant was not at fault, and the question presented having heretofore been decided, it is not necessary for us to discuss it at length. Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026, held that none of the requirements of said section as applied to officials was jurisdictional to the appeal, saying:

"Neither in the statute nor in the rules of the court is any penalty prescribed for the failure of the reporter to file such transcript within 20 days. We think it perfectly clear that the provision as to the time for filing such transcript is merely directory, and the failure of the reporter to file such transcript within the time allowed is not jurisdictional. It is doubtless the duty of the appellant, as the moving party, to take the necessary steps to secure the filing of such transcript, and for want of diligence in such matter on his part it is within the power of the trial court to terminate his proceedings for procuring such transcript. The determination of the question as to whether or not there has been due diligence in such matter is one largely lying in the discretion of the trial court, with which the appellate court will not interfere unless it appears that the court in its action has abused its discretion."

In the case last mentioned 48 days had elapsed when notice of motion to terminate the proceedings was given. In Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800, about 60 days elapsed on account of delays caused by the reporter and the clerk, but the Supreme Court in denying a motion to dismiss said:

"Respondent's contention in this regard is fully answered by Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026."

The motion to dismiss this appeal is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

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68 Cal. App. 171

LONG v. CHRONICLE PUB. CO. (Civ. 4192.)

(District Court of Appeal, Second District, Division 1, California. July 18, 1924. Hearing Denied by Supreme Court Sept. 15, 1924.)

1. Specific performance 🔑114(1)—Complaint for recovery of prize offered in newspaper subscription contest held sufficient as against general demurrer.

In action by contestant, in newspaper subscription contest, to compel judges to award her second instead of third prize, complaint *held* sufficient as against general demurrer.

2. Pleading 🔑343—Pleadings held to raise issues making proper refusal of judgment on pleadings.

In action for recovery of prize offered in newspaper subscription contest, pleadings *held* to raise issues requiring introduction of evidence in substantiation thereof, so that defendant's motion for judgment on pleadings was properly denied.

3. Trial 🔑165—Rule stated for construing evidence on motion for nonsuit.

On motion for nonsuit, evidence must be construed most favorably to plaintiff, and whatever, so construed, it tends to prove, together with such presumptions and inferences as may be reasonably drawn therefrom, must be regarded as proven.

4. Contracts 🔑248—Question of notice of change in terms of newspaper subscription contest held for jury.

In action to recover prize offered in newspaper subscription contest, question as to whether plaintiff in last week of contest had been notified of change in method of paying subscriptions *held* for jury.

5. Contracts 🔑238(1)—Contestant in newspaper subscription contest held entitled to personal notice of change in rules of contest.

Where printed rules of newspaper subscription contest, promoted by defendant's newspaper published in small city, provided that they might be amended, *held* that notice of change in rules published in newspaper was not binding on contestant not reading it, personal notice being required, notwithstanding Civ. Code, §§ 18, 19.

6. Notice 🔑10—Statute or contract requiring notice, without specifying manner of giving it, contemplates personal service.

Statute or contract which requires that notice be given, but which is silent as to manner of giving it, contemplates personal service thereof.

7. Contracts 🔑284(4)—Judges of newspaper subscription contest held not empowered to conclusively determine effect of published notice of change in rules.

That rules of newspaper subscription contest provided that, on any disputed question decision of management would be final, did not enable either management or judges of contest to declare that contestant, who was entitled to personal notice of change in rules, was bound by notice published in newspaper.

8. Contracts 🔑127(1)—Stipulation making judgment of one party on questions of law growing out of contract, conclusive invalid.

Party cannot even by express terms provide in advance of any controversy that his judgment of the law, regarding any question which may arise, shall preclude the other party from contesting same in court.

9. Contracts 🔑284(4)—Judges of newspaper subscription contest held not empowered to finally determine questions of law.

Where rules of newspaper subscription contest provided that management would have final decision of disputed questions, and also that contest should be under supervision of "judges from advisory board," *held* that judges selected by newspaper and, so far as shown, not in accordance with rules nor constituting management, could not bind contestant on questions of law.

10. Contracts 🔑238(1)—Waiver of compliance with terms of newspaper subscription contest held shown.

Where checks turned in by contestant in newspaper subscription contest were cashed by defendant newspaper and proceeds retained, *held* that defendant could not complain of noncompliance with rule of which contestant had no notice published in last stages of contest, requiring payment of subscriptions in cash or certified checks.

11. Appeal and error 🔑1046(5)—Overruling motion for directed verdict in presence of jury held not prejudicial to movant.

Court's answer in presence of jury to counsel's announcement that he desired to ask for directed verdict, and requesting discharge of jury for that purpose, "I will overrule it," *held* not prejudicial, since jury, when called back, would know that motion had been denied.

12. Appeal and error 🔑1069(3)—Oral instruction after retirement of jury as to amount of recovery held not prejudicial.

In action to recover value of automobile offered as prize in newspaper subscription contest, oral instruction after retirement of jury that, if they found for plaintiff, they must find for her in value of automobile as admitted in answer or nothing, *held* not prejudicial to defendant.

13. Appeal and error 🔑1058(2)—Exclusion of testimony on cross-examination held not prejudicial error in view of other testimony of witness.

In action to enforce terms of newspaper subscription contest, refusal to permit plaintiff on cross-examination to testify to matters material on question of notice of change in rules of contest *held* not prejudicial, defendant from subsequent answers of witness obtaining substantially what he sought.

Appeal from Superior Court, Imperial County; Frank R. Willis, Judge.

Action for specific performance by Marjory Long against the Chronicle Publishing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., dissenting.

Patrick J. Cooney, of Los Angeles (Alfred Blaisdell, of Calexico, of counsel), for appellant.

Charles L. Childers, of El Centro, for respondent.

HOUSER, J. [1, 2] This action was brought by plaintiff against the defendant for the value of an automobile alleged to be the sum of $1,995, which was offered by the defendant as a second prize in a newspaper subscription contest.

The facts may be briefly stated as follows: The defendant published in its newspaper a general offer by which it agreed to give certain designated prizes to the winners of a subscription contest, and provided rules governing same, among which were provisions to the effect that "cash must accompany all orders"; that the contest would be under the personal supervision of two or more judges "from the advisory board"; that the right to amend the rules was reserved to the defendant; that, should any question with reference to the contest arise, the decision of the management would be absolute and final; and that each of the contestants agreed to abide by all of the foregoing conditions.

From the start, the rule requiring that cash should accompany all orders was waived by the defendant, and, until the last week of the contest, personal checks were received in payment of subscriptions. The contest lasted for a period of about eight weeks, and on the beginning of the last week thereof the defendant published in its newspaper a notice as follows:

> "Important Notice.
>
> "All subscriptions deposited in the sealed ballot box must be accompanied by cash, money order, or certified check for the full amount to cover. Personal checks up to $10.00 are acceptable, providing no two checks are signed by the same party. This rule is made in fairness to all candidates and will be strictly adhered to."

At some time during the evening of the last day of the contest, plaintiff deposited with the defendant an uncertified check for $30, and another uncertified check for $18, to cover certain subscriptions obtained by plaintiff, which checks were cashed and the money received therefor was retained by the defendant. When the judges of the contest made an accounting for the several contestants it was found that, by giving plaintiff credit for the subscriptions covered by the two uncertified checks, aggregating $48, she would be entitled to the second prize, which was an automobile of the stipulated value of $1,995; otherwise she would be entitled only to the third prize, which was of the value of $500. The conclusion by the judges of the contest was that plaintiff was entitled only to the latter prize. Plaintiff was dissatisfied with such determination, and brought this action. The case was tried before the court sitting with a jury, which rendered a verdict in favor of plaintiff for the sum of $1,995, on which judgment was entered; and the defendant appeals therefrom.

The defendant demurred generally to the amended complaint, which set up in substance at least all the foregoing facts, with the exception of the "Important Notice," which was published at the beginning of the last week of the contest. The demurrer was overruled. The defendant's motion for judgment on the pleadings was likewise denied; and it is to such rulings that the defendant first directs attention of this court as a reason for a reversal of the judgment.

As the amended complaint was drawn, no mention was made of the requirement contained in the "Important Notice" that either cash, money order, or a certified check must accompany the subscriptions. The allegations of the amended complaint showed that the duty only of counting the votes correctly was assumed by the judges of the contest; and it was alleged that, had the judges properly given plaintiff credit, she would have received a sufficient number of votes to entitle her to the second prize, of the value of $1,995. The answer to the amended complaint, in addition to certain admissions of facts set up in the amended complaint and the denial of certain other allegations therein, contained an affirmative defense based upon the "Important Notice," together with the alleged finality of the decision by the judges of the contest—all of which being deemed denied by plaintiff, raised issues thereon requiring the introduction of evidence in substantiation thereof. In such circumstances no error was committed by the trial court in denying the defendant's motion for judgment on the pleadings; and we think that the court did not err in overruling the demurrer to the amended complaint.

[3] Appellant next complains that the trial court erred in denying the defendant's motion for a nonsuit, as well as in denying the defendant's motion for a directed verdict.

On a motion for nonsuit it is a cardinal rule that the evidence must receive a construction most favorable to the plaintiff, and whatever the evidence so construed tends to prove, together with such presumptions and inferences as may be reasonably drawn therefrom, must be regarded by the court as in fact proven. Ferris v. Baker, 127 Cal. 520, 59 Pac. 937, and cases cited; Union Construction Co. v. Western Union Tel. Co., 163 Cal. 298, 125 Pac. 242.

A review of the record on appeal discloses the fact that the evidence introduced in behalf of plaintiff supported the allegations of the amended complaint. In addition thereto, however, plaintiff caused to be introduced in evidence the "Important Notice" pleaded by the defendant. But in view of the fact that plaintiff did not show either actual or constructive service thereof on herself, the injection of the "Important Notice" into plaintiff's case was of no great consequence. The motion for nonsuit was therefore properly denied.

[4] Regarding the motion for a directed verdict, it need only be said that the evidence with reference to the service of the "Important Notice" on plaintiff, or the knowledge of plaintiff acquired either by actual or by constructive notice of the contents of the "Important Notice," was conflicting. The defense depended primarily upon a decision of the fact as to whether or not plaintiff had been notified by the defendant that, during the last week of the contest, only such subscriptions as were covered by either cash or by money orders or by certified checks would be credited to the several contestants. The question of fact was one for determination by the jury, and the judge of the trial court would not have been authorized to withdraw such question from the consideration of the jury.

The contract between the parties provided in substance, among other things, that the rules governing the contest might be changed, and that, in the event of any question arising, the decision of "the management" would be absolute and final. Although the wording of the contract is not clear, throughout the trial it was assumed by both parties to the action that "the management" referred to the judges of the contest. For present purposes, it may therefore be here assumed that, if plaintiff had had notice of the change in the rules to which reference has just been had, the ruling by the judges of the contest against plaintiff's contention, in the absence of fraud (assuming further that the judges had power and jurisdiction in the premises), would have precluded plaintiff from successfully contesting such conclusion. Such is the effect of one of the instructions given by the court to the jury.

[5] By another instruction, which constitutes one of appellant's principal reasons for urging a reversal herein, the jury was told that actual notice to plaintiff was required as to any change in the rules, from which it would follow that defendant's attempted notice to plaintiff by the publication of the "Important Notice" in its newspaper would have no binding effect upon plaintiff. It is claimed that, because plaintiff first acquired knowledge of the proposed subscription contest from the defendant's newspaper, and because the printed rules of the contest provided that such rules might be amended, plaintiff was bound to take notice of any amendment to the rules which thereafter might be published in the newspaper in which the original offer appeared. Section 18 of the Civil Code provides that actual notice consists in express information of a fact, and that constructive notice is that which is imputed by law. By section 19 of the Civil Code it is provided that:

> "Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

It is therefore urged that, if plaintiff had actual notice of the fact that the rules were likely to be amended, she was placed in possession of such facts and circumstances as would put her upon inquiry as to when, if at all, and if altered, in what respect, they were amended. The original rules contained neither an express declaration, nor anything from which it might reasonably be inferred, that any contestant for a prize under the subscription contest was either obliged or was expected to read possibly the whole of each and every edition of the newspaper thereafter published for the purpose of ascertaining whether or not any of the rules of the contest had been either modified or abandoned. Necessarily, from the nature of the enterprize, the several contestants would be required to be in constant touch with the management of the newspaper, during the time that the contest was in progress. The relationship between the parties, considering the population of the city (a city of the sixth class) wherein the newspaper was published, and the surrounding circumstances, would be of a very close personal nature. The contestants were not so numerous but that if any changes in the rules of the contest were either contemplated, or had been made by the management, the most natural thing to have been anticipated by each of the parties to the contract would have been an actual notification thereof, rather than the impersonal method of publication in a newspaper.

[6] A statute requiring that a notice shall be given, but which is silent as to the manner of giving such notice, contemplates personal service thereof. 29 Cyc. 1119. It is said in the case of Stockton Automobile Co. v. Confer, 154 Cal. 408, 97 Pac. 884:

> "It may be broadly stated that where a statute or contract requires the giving of notice, and there is nothing in the context, or in the circumstances of the case, to show that any other form of notice was intended, personal notice will be required. 21 Am. & Eng. Ency. of Law, p. 53, and cases. This is true, because the law always favors a personal notice, and countenances substituted and constructive notices as matters of necessity or extreme expediency. But the principle is not that personal notice must always be given, but that it must be given where, from the nature of the statute or contract—from the nature of the case in short—it appears that no other notice is contemplated."

With reference to newspaper notices, the following statement of the law occurs in 21 American & English Encyclopedia of Law, page 586:

> "A notice, advertisement, or other statement published in a newspaper, if not made pursuant to some statute or judicial order so as to have the legal operation of notice regardless of want of actual knowledge by the person to be charged, does not of itself afford implied or constructive notice to a person who is a subscriber to or habitual reader of that newspaper. In order to charge such person with notice of the fact or statement published it must be proved that he actually read it; in other words, actual notice must be shown."

In the instant case, plaintiff testified that she was not personally notified of the change in the rule to which reference has been had, nor did she see or read the "Important Notice" published by the defendant in its newspaper; and, although there was a conflict in the evidence with reference to personal notification of plaintiff by defendant's manager to the effect that the rule had been modified so as to require cash or a money order or a certified check to accompany each subscription to the newspaper, the verdict by the jury in favor of plaintiff constitutes a finding in plaintiff's favor as to such disputed fact.

The bald effect of the legal proposition as advanced by the appellant is that defendant laid down certain conditions, which plaintiff was at liberty to either accept or to reject, as she saw fit; and thereafter, assuming plaintiff's acceptance, the defendant had the right to modify the terms of the contract in any way it chose, whether lawful or unlawful, and which modification might either seriously impair or entirely destroy plaintiff's rights theretofore acquired by her under the terms of the contract; and, notwithstanding which, the decision by the defendant or its chosen representatives regarding plaintiff's rights in the premises would be "absolute and final."

[7] While the rules provide that, "The Chronicle guarantees fair and impartial treatment to all candidates, but should any question arise the decision of the management will be absolute and final;" and, while no question is apparently raised regarding the power of the judges of the contest, as distinguished from the "management" to supervise the contest and to determine to whom the several prizes should be awarded, nevertheless, the authority of the "management" or of the judges of the contest could not be so used as to deprive plaintiff of her legal rights. Assuming that the judges of the contest acted in the highest good faith with reference to their determination of the facts relative to plaintiff's rights in the premises, they possessed no authority to decree that plaintiff should not have that to which she was legally entitled. For the judges to be enabled to declare that by reason of the "Important Notice" having been published in the newspaper, plaintiff was obliged to comply with the terms thereof, whether she ever saw the notice or not, would be to empower the judges to determine the case against plaintiff contrary to the law. If she received no personal notice of the change in the rules (and the jury so found on the evidence), neither the defendant nor its "management" could rightfully take away from her that which she had earned under the terms of the contract, even though the defendant had contemplated by another provision of the contract to make the decision of the "management * * * absolute and final."

[8] It certainly cannot be lawful for one party to a contract, even by express terms thereof, to provide, in advance of any controversy growing out of the contract, that his judgment of the law regarding any question which may arise shall preclude the other party to the contract from contesting the same in a court of law or equity.

[9] In this case, the newspaper was owned by a corporation; and Mr. Perrin, who was

the president and manager of the corporation, had absolute control thereof. It was he who selected the judges of the contest. Plaintiff was not consulted with reference thereto, nor did she have any voice in their selection. The substance of the contract is that the newspaper said to plaintiff and to the other contestants that it would treat them all fairly, but that, if any contestant thought he had a grievance of any sort, whether of fact or law, or both fact and law, "the decision of the management will be absolute and final." By "the management" plaintiff may have understood that the manager of the newspaper, or the campaign manager of the contest (Mr. Stott), was intended. However, it is stated in another part of the rules of the contest that "to insure absolute fairness in the awarding of prizes, the race will be brought to a close under 'sealed ballot box' system, and will be under the *personal supervision* of two or more judges from the Advisory Board." What the "advisory board" was, or of whom it consisted, or whether it had any existence in fact, is not shown either in the rules of the contest or in the evidence taken at the trial. Neither does it appear that the judges were selected from any board, whether advisory or otherwise. At any rate, the judges of the contest who were to settle any controversy, whether of fact or of law, or both of them combined, which might arise as between any of the contestants and the defendant, were to be "hand picked" solely by the defendant. The tribunal, if it may be so called, was entirely one-sided. It was as though the defendant's manager had constituted himself the sole judge of all questions which might arise in the matter, whether of law or of fact, with the provision that from his decision upon all such questions there should be no appeal. But the rules do not contain such a statement either in substance or in effect. The provision with reference to the judges is that "the race * * * will be made under the *supervision* of two or more judges from the advisory board"; that is, that the judges should have a general oversight of, or superintendency over, or right of inspection of, the contest. There is nothing to show that the judges were selected according to the terms of the contract, nor that they constituted the "management" as provided by the rules; and, consequently, even conceding the right of some judges, under proper circumstances, to decide the controversy, no authority or jurisdiction is shown in the judges who did decide it. It may be admitted that an arbitration board, legally selected, would have possessed power and jurisdiction, but here was a board selected by one of the parties to the controversy from an unknown source, and, so far as disclosed, not in accordance with the rules of the contract, deciding not merely questions of fact, but questions of law as well. The judges may have done their best, but their decision should not be binding upon plaintiff.

[10] The evidence does not show that the two checks aggregating the sum of $48 were returned or offered to be returned to plaintiff to be dealt with by her as she might desire. But, to the contrary, the defendant at all times retained those checks in its possession during the pendency of the controversy between plaintiff and the defendant, cashed the two checks, and appropriated the money so received to its own use; thus establishing the fact that the two checks, from a money standpoint, were not only satisfactory to the defendant, but that they were in all respects the equivalent of "cash, money order, or certified check," required by the "Important Notice." The defendant received exactly the same benefit from the two checks as it would have received had cash been deposited in lieu of the checks. In the circumstances, no money or property loss of any sort could have ensued to the defendant or to any of the other persons interested in the contest by reason of the two checks being considered as identical with so much cash.

On the other hand, the defendant having accepted the two checks, and having received the cash represented thereby, and being financially benefited to that extent, was in no position to urge compliance with the belated rule of which plaintiff had neither actual nor constructive notice.

From what has been said herein, it follows that no error was committed by the trial court in instructing the jury concerning the subject of notice, to the effect that plaintiff was entitled to actual notice regarding any change in the rules governing the contest.

[11] Appellant complains of error on the part of the court arising out of the fact that, after all the evidence in the case had been introduced and counsel for the defendant had declared in open court that after the jury should be excused he desired to make a motion for a directed verdict, the judge, in the presence of the jury, stated "I will overrule it" (referring to counsel's proposed motion). But it is apparent that, considering the fact that the jury was present when counsel for defendant made the motion, whether present or not when the motion was ruled upon by the court would make no difference, for the reason that, if the jury had been excused from the courtroom at the time the ruling was actually announced by the court, upon the return of the jury to the courtroom, and the jury being thereafter permitted to continue with its consideration of the case, would have indicated to the mind of any member of the jury, who thought about the matter at all, that the motion had been denied; and, accordingly, the same result would have been reached.

[12] Appellant makes further complaint of the action of the court in orally advising the jury, after its retirement from the courtroom at the close of the trial and upon its subsequent return thereto for the purpose of procuring further instructions from the court, that the jury must find for plaintiff either in the sum of $1,995, or nothing. At the time referred to, the reporter's transcript shows that the following occurred:

> "The court: Gentlemen of the jury, the bailiff of the court said you wanted to see the court for some purpose.
>
> "Juror: Your honor, we wish to ask you whether it is under the jurisdiction of the jury to set any other amount besides the supposed value of the car at that time, which as we understand was $1,995.
>
> "The court: That is the amount that is admitted in the answer as the approximate value of the car.
>
> "Mr. Cooney (attorney for the defendant): Yes, sir.
>
> "The court: You can't take into consideration what some one thinks about the value of the cars.
>
> "Juror: It would have to be that or nothing.
>
> "The court: Either that for the plaintiff or nothing.
>
> "Juror: We wanted to be sure it read that way.
>
> "Mr. Childers (attorney for plaintiff): She is entitled to $500 in any event. The pleadings show she was entitled to and was tendered $500, and they still tender it to her. The pleadings say that. She isn't entitled to $500 and the automobile both.
>
> "Juror: Have we got any right, your honor, to make a fifty-fifty proposition of those damages?
>
> "The court: No.
>
> "Juror: Then she has got to have an automobile, and that is the way of it."

By the answer of the defendant, it was specifically admitted that the value of the automobile in question was the sum of $1,995. Such being the case, the question of value of the automobile was not one for the jury to determine. From a consideration of the conversation which took place among the members of the jury, the court and counsel representing the respective parties to the action, it is apparent that the jury wished to compromise the matter by returning a verdict that the automobile was worth less than the value thereof as admitted by the defendant; or, in the words of one of the jurors, "to make a fifty-fifty proposition of those damages." Under the pleadings in the case and as a matter of law, plaintiff was entitled either to a verdict for $1,995 or nothing, with the exception that she might in any event be entitled to a verdict for $500, representing the third prize in the contest. But it is clear that no question existed in the minds of the members of the jury respecting the third prize. The questions by the jury indicated that the jury was considering solely its right to find for plaintiff and then "to set any other amount besides the supposed value of the car at that time, which as we understand was $1,995." Considering the circumstances, we think no prejudicial error was committed by the court in connection therewith.

[13] It is finally urged by appellant that the trial court erred in refusing to permit plaintiff to testify on cross-examination by counsel for the defendant as to how much money and how many checks for subscriptions were "turned in" by her on the last week of the contest. It is not difficult to understand that such evidence was material, in that it might have been used as a basis for determining whether or not plaintiff had followed the rule requiring either "cash, money order, or certified check" on all other occasions during the period that the rule was enforced, and ultimately going to the point of plaintiff's knowledge of the rule. But it appears from the record that, immediately preceding the question with reference to how much of the subscriptions was paid in cash, plaintiff had testified that she had handed in a great number of subscriptions during the last week of the contest. Immediately following the question to which such objection was made plaintiff was asked:

> "Q. Was the balance of the money representing the subscriptions over and above these two checks in cash? A. Yes, sir; I think they were."

It therefore is apparent that, with the exception of the two checks in question, cash was paid for all such subscriptions, and, consequently, that defendant obtained everything which it sought, other than an answer to the question of the amount of cash which was "handed in" by the plaintiff; and as to the refusal of the court to permit the witness to testify thereto, we are unable to perceive any prejudicial error.

The judgment is affirmed.

I concur: CONREY, P. J.

CURTIS, J. I concur. Plaintiff had actual notice of the right reserved by defendant to amend the rules of the contest. She also, in my opinion, had actual notice that all rules of the contest, including any amendment thereof, would be published in the newspaper conducted by defendant. As a prudent person, I think she was put upon inquiry as to what amendments, if any, might be made and published. She therefore had constructive notices of all amendments made by the defendant and published in its paper, including the "Important Notice." Having constructive notice of the amendment she was bound thereby. The defendant, however, in cashing her checks, uncertified, and appropriating the money received thereon to its own use, waived the rule requiring that all checks accompanying subscriptions be certified. The plaintiff was therefore entitled to credit for the subscriptions covered by the two uncertified checks.

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68 Cal. App. 252

SCELLARS et ux. v. UNIVERSAL SERVICE EVERYWHERE et al. (Civ. 3956.)

(District Court of Appeal, Second District, Division 2, California. July 26, 1924. Rehearing Denied Aug. 27, 1924. Hearing Denied by Supreme Court Sept. 25, 1924.)

1. **Negligence 🔑121(2) — Res ipsa loquitur only applicable to person having control and management.**

In order for maxim "res ipsa loquitur," to apply, person sought to be held liable must have had control and management of thing causing injury.

2. **Negligence 🔑121(2)—"Res ipsa loquitur" defined.**

"Res ipsa loquitur" means thing or affair speaks for itself, and so speaking authorizes inference of negligence in absence of showing to contrary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Ipsa Loquitur.]

3. **Bailment 🔑31(1)—Where automobile found damaged after washing, held under circumstances that doctrine of res ipsa loquitur not applicable.**

Where automobile intrusted to defendant for washing was, for that purpose, driven up an incline 20 feet long to level surface 40 inches above ground, and afterwards was found to be damaged, and there was no showing of negligence aside from accident except testimony that high motor speed could cause the damage, doctrine of res ipsa loquitur was not applicable.

4. **Negligence 🔑121(2)—"Res ipsa loquitur" inapplicable when cause of damage is mere surmise.**

Where it is a matter of surmise only that damage was due to a cause for which defendant is liable, the doctrine of res ipsa loquitur is inapplicable.

5. **Negligence 🔑121(2) — Res ipsa loquitur avoidable by proof.**

Even if case is proper for application of doctrine of res ipsa loquitur, defendant is not prevented from avoiding its effect by affirmative proof that it had been in nowise negligent in managing object of which it had control.

6. **Negligence 🔑121(2) — Burden of proof where res ipsa loquitur applies.**

Where maxim, "res ipsa loquitur," applies, plaintiff is not relieved from burden of proof generally required in damage suits, and defendant need only meet plaintiff's proof by evidence of equal weight.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Louis W. Scellars and wife against the Universal Service Everywhere, a corporation, and others. From a judgment for plaintiffs, and an order denying motion for new trial, defendants appeal. Reversed.

Hearing denied by Supreme Court; Lawlor and Richards, JJ., dissenting.

Ray L. Chesebro, of Los Angeles, for appellants.

George S. Hupp, of Los Angeles, for respondents.

CRAIG, J. The defendant corporation appeals from a judgment for damages and from the order denying its motion for a new trial, upon the ground of insufficiency of evidence to sustain the findings and judgment of the trial court.

Appellant conducted an automobile washing and cleaning business in the city of Los Angeles, and on May 27, 1920, respondent drove his Cadillac automobile from his residence to appellant's stand, a distance of about 10 blocks, where he delivered it to one Carr, an employee of appellant, and ordered it washed. Respondent returned in about 2 hours for the car, when he was told by said employee that it was broken. Carr handed respondent a small "wrist pin," which he stated that he had found in the pan underneath the machine, and upon investigation by an expert it was found that the crank case was broken in 3 places; that the connecting rod had broken and gone down inside, tearing out the rocker plate around the cam shaft, necessitating repairs which cost $738.78. It was alleged in the complaint that, prior to said washing, the machine was of the reasonable market value of $4,300, and that, while in possession of defendants, the latter so carelessly, negligently, and unskillfully handled and managed the same that it was damaged to the extent of $2,800. The answer specifically denied each material allegation of the complaint.

The appellant maintained an elevated rack upon which automobiles were driven up an incline about 20 feet long, to the level surface, which was 40 inches above the ground. Carr testified that respondent's machine stood about 25 feet from the incline, and that he placed the machine in low gear and drove it to the top, whereupon he heard a click, then a dull thud or "bang," when he immediately shut it off at the switch and threw it out of gear; that the car was then pushed along on the rack by hand and washed. He further testified that he did not at any time have the car in high gear, and did not race the motor, and that the clutch did not slip; that he had operated nearly all makes of automobiles, and was familiar with and had operated Cadillacs; that he did not do anything unusual in the handling or management of this particular machine, and "did not know what was the matter with the motor" when it stopped.

Respondent testified that the car was purchased by him in the fall of 1917, and that he had driven it about 20,000 miles, but had had it inspected and gone over monthly, and that, when he left it at the rack, it was apparently in good condition. Experts called as witnesses for respondent testified that, when the car was taken down, broken parts were found in the bottom of the crank case; that high motor speed could cause the damage which occurred in this instance, one witness saying, "Different things that I know could cause it;" that defective parts or crystallization of metal would cause it to break, and, in fact, that a defective part might have started the breaking, but that he did not know what did it; neither the respondent nor any witness in the case knew the condition before the accident of the parts involved.

Upon the evidence above outlined the court found that "the defendant so carelessly, negligently, and unskillfully handled and managed the same, and particularly by racing and running the engine thereof at excessive speed that the engine thereof was damaged and broken," as alleged in the complaint.

The respondents relied upon the doctrine of res ipsa loquitur. Appellant's contention is that there was not such a preponderance of the evidence in favor of plaintiffs' claim that Carr caused the damage by racing the motor as would justify the rendition of a judgment upon that theory.

[1, 2] The cause of the injury in this case is undetermined. It may have been one over which the defendant had control, and it might have been one with which he had nothing to do. In order that the maxim, "res ipsa loquitur," may apply, it must first be shown that the person held liable had control and management of the thing in question. O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674. This maxim means:

> " 'The thing, or affair, speaks for itself,' and, so speaking, authorizes the inference of negligence in the absence of a showing to the contrary." O'Connor v. Mennie, supra.

In the same opinion it is said:

> "Of course, to justify its application in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action."

[3, 4] In the instant case, aside from the occurrence of the accident, there is no further showing of negligence on the part of the defendant except the testimony above referred to that high motor speed could cause the damage which resulted. To hold the defendant liable under these circumstances would be to merely conjecture that he had conducted himself negligently, and thus caused the injury. Where it is a matter of surmise only that the damage was due to a cause for which the defendant is liable, the doctrine is inapplicable. O'Connor v. Mennie, supra. For this reason we are of the opinion that the evidence in the case before us was insufficient to establish negligence of the appellant, or to render applicable the doctrine of res ipsa loquitur. Besides, by respondents' own showing, the injury might have occurred as the result of other causes than racing or running the engine at an excessive speed, as defective parts or metallic crystallization, and such other causes must have been those over which the defendant had no control. It has been held in a case arising in this jurisdiction that:

> "The doctrine of res ipsa loquitur involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others." Lucid v. E. I. Du Pont, De Nemours Powder Co., 199 Fed. 377, 118 C. C. A. 61, L. R. A. 1917E, 182.

[5] And also we may say as the court did in Maryland Casualty Co. v. Matson Nav. Co., 177 Cal. 610, 613, 171 Pac. 427:

> "But conceding, without determining, that this is a proper case for the application of this principle, and that the plaintiff would have had a right to rely upon it, as affording a prima facie showing of negligence, still the defendants would not be prevented from avoiding its application and effect by affirmative proof that it had been in no wise negligent" in managing the object of which it had control.

The evidence not only wholly failed to show a want of due care on the part of appellant's agent, but it affirmatively establishes without attempted contradiction that the condition and the maintenance of the part or parts of respondents' car which broke were matters with which appellant could have had no possible concern. And the appellant produced direct, positive and undisputed testimony that the engine was not raced, as the court found.

[6] In cases where the maxim "res ipsa loquitur," is applicable, the plaintiff is not relieved from the burden of proof generally required in suits for damages; the defendant need only meet plaintiff's proof by evidence of equal weight. Rathbun v. White, 157 Cal. 248, 107 Pac. 309; Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666. As conceded by respondents, "Carr was the only person who could tell what did happen," and we have his positive testimony that he did not operate the motor at a high rate of speed; but we also have the testimony of respondents' own witnesses to the effect that there are other causes which will produce the same result, and no one testified that he saw any of the parts before the accident, or that they were not defective.

The judgment and order denying motion for new trial are reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

194 Cal. 383

DUNN v. DUFFICY. (S. F. 10462.)

(Supreme Court of California. Sept. 10, 1924.)

1. Physicians and surgeons 🔑18(4) — Complaint for malpractice held to sufficiently allege negligence as against general demurrer.

Complaint that defendant neglected to ascertain by use of ordinary care and skill that a tendon was severed, and that he carelessly and unskillfully failed to sew up tendon under plaintiff's finger, *held* sufficient allegation of negligence as against general demurrer.

2. Negligence 🔑111(1) — May be pleaded in general terms.

Subject to qualification and condition that it must appear from facts averred that negligence caused injury, it is sufficient to say that act complained of was negligently done, without stating particular omission which rendered act negligent.

3. Physicians and surgeons 🔑18(4) — Complaint held to show cause of injuries.

In action for malpractice, complaint *held* sufficient to show causal connection between the alleged negligent omissions and injuries complained of.

4. Physicians and surgeons 🔑18(4) — Complaint held to show good practice required certain treatment which, if pursued, would have prevented injury.

Complaint that defendant negligently failed to sew up severed tendon under plaintiff's finger, and that as result her finger became useless and her right hand permanently crippled, was equivalent to allegation that good practice required it to be sewed up and that, if it had been, no injury would have resulted.

5. Pleading 🔑18—Requirements of complaint as against special demurrer for uncertainty, stated.

Complaint setting forth essential facts of case with reasonable precision and with sufficient particularity to acquaint defendant with nature, source, and extent of cause of action, is good as against special demurrer for uncertainty.

Myers, C. J., and Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Margaret Dunn against Rafael Dufficy. From judgment for defendant, plaintiff appeals. Reversed.

Hamilton A. Bauer, of San Francisco, for appellant.

Martinelli & Martinelli, of San Rafael (Hartley F. Peart and Charles V. Barfield, both of San Francisco, of counsel), for respondent.

LENNON, J. Plaintiff appeals from a judgment following an order sustaining defendant's demurrer to the second amended complaint. The action is one for damages for alleged malpractice. The complaint alleges that the defendant is, and at the times referred to was, a duly licensed and practicing physician and surgeon, and proceeds as follows:

> "That on or about the 1st day of May, 1920, plaintiff herein suffered a severe cut by glass to the second finger of her right hand, and then and there, at San Rafael, Cal., placed herself under the care of, and employed defendant to sew up, care for and cure same for a reasonable reward to be paid by plaintiff to said defendant for his said services to plaintiff. That said defendant then and there accepted said employment and received from plaintiff a fee for his said services.
>
> "That upon accepting the employment hereinbefore set forth, defendant administered the following treatment and services to plaintiff, to wit, defendant thereupon sewed up the cut surface of plaintiff's injured finger and then bandaged the same up. That at said time and place, the tendon under the cut surface of plaintiff's said injured finger was severed, all of which could have been ascertained by defendant, by the use of ordinary care and skill, but was unknown to plaintiff. That defendant failed and neglected to ascertain, by the use of ordinary care and skill, that said tendon was severed, and carelessly, negligently, and unskillfully, failed and neglected to sew up the said severed tendon under plaintiff's said injured finger. In a few days' time plaintiff returned to the office of said defendant, and said defendant thereupon removed said bandage, and again dressed and rebandaged said finger. That in a few days' time plaintiff again visited defendant at his office, and said defendant thereupon removed the bandage and discharged plaintiff as cured. That after a period of about two weeks plaintiff noticed that her said finger did not straighten, but remained bent. That plaintiff thereupon returned to the office of defendant and reported to him the condition of her said finger and exhibited it to said defendant. That thereupon said defendant advised plaintiff to return home and that the said finger would straighten out in a few weeks. That at the end of said period plaintiff's said finger still remained bent and was beginning to lose life. That plaintiff did not visit defendant any further."

The demurrer was both general and special, the grounds of special demurrer being uncertainty, ambiguity, and unintelligibility, with 22 specifications under each of these grounds. The order sustaining the demurrer granted leave to the plaintiff to amend within 10 days, and plaintiff having declined to avail herself of this permission, the judgment followed from which this appeal is prosecuted.

[1, 2] In support of his general demurrer, respondent presents three principal contentions: (1) That the complaint does not contain a sufficient allegation of negligence; (2) that no facts are alleged showing a causal connection between the claimed negligent acts and the injuries complained of, and (3) that the cause of action is barred by the statute of limitations. It may be said in passing that there is no merit in the third contention, inasmuch as it appears from the record that the action was commenced within one year following the acts complained of. As to the first contention we are of the opinion that the allegation "that defendant failed and neglected to ascertain by the use of ordinary care and skill that said tendon was severed, and carelessly, negligently, and unskillfully failed and neglected to sew up the said severed tendon under plaintiff's said injured finger," is a sufficient allegation of negligence as against a general demurrer. It is settled by a long line of decisions in this state, beginning with the leading case of Smith v. Buttner, 90 Cal. 95, 27 Pac. 29, that—

> "Negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent."

It seems to us that the allegations of the complaint last quoted meet and comply with these requirements.

It is, of course, conceded that this rule is always subject to the qualification and condition that "it must appear from the facts averred that the negligence caused or contributed to the injury." Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 Pac. 954; Bergen v. Tulare County Power Co., 173 Cal. 709, 161 Pac. 269; Ingalls v. Monte Cristo Oil & Development Co., 176 Cal. 128, 167 Pac. 857; Hughes v. Warman Steel Casting Co., 174 Cal. 556, 163 Pac. 885; Manwell v. Durst Bros., 178 Cal. 752, 174 Pac. 881, 1 A. L. R. 669; Goldstein v. Healy, 187 Cal. 206, 201 Pac. 462; Fay v. Cox, 45 Cal. App. 696, 188 Pac. 623.

[3] We are of the opinion that the complaint herein does contain a sufficient averment of facts necessary to meet this requirement. Among other allegations contained in the complaint are the following allegations which, in our opinion, show a causal connection between the alleged negligent omissions and the injuries complained of:

> "That as a result of the carelessness, negligence, and unskillfulness of the defendant as hereinbefore stated, plaintiff's said finger has become useless and her right hand permanently crippled by the loss of the use of the second finger thereof; that by reason of her inability to further use her said finger and as a result thereof her said right hand, all of which was occasioned by the negligence, carelessness, and unskillfulness of defendant as herein set forth, plaintiff has been unable to pursue her occupation as stenographer for a period of nine months; that by reason of the carelessness, negligence, and unskillfulness of defendant as hereinbefore alleged, plaintiff was compelled to, and did, engage the services of three other physicians; * * * that by reason of the negligence, carelessness, and unskillfulness of defendant as hereinbefore alleged, and the loss of the use of the said right hand as hereinbefore

alleged, * * * plaintiff has suffered general damage in the sum of $10,000."

True, these allegations in themselves contain no averment of facts bearing upon the issue of proximate cause, but they do refer back and by reference incorporate within themselves the allegations previously quoted herein which set forth the facts upon which this action is based. These allegations, stripped of legal verbiage, state in effect that (1) the tendon of plaintiff's finger had been severed by a piece of glass, (2) defendant, employed as a physician to treat said injury, failed to discover that the tendon had been severed, (3) the defendant failed to sew up the severed tendon, and (4) as a result of such failure to discover the severance of the tendon and the consequent failure to sew it up, plaintiff's right hand became permanently crippled. It seems to us, therefore, that the requirements of the rule have been met in the instant case.

[4] It is contended that in order to state a cause of action the complaint should have contained the allegation that good practice required that a severed tendon be sewed up, and that if the tendon had been sewed up no injury would have resulted. The allegation that "defendant carelessly, negligently, and unskillfully, failed and neglected to sew up the said severed tendon under plaintiff's said injured finger," and that "as a result of the carelessness, negligence, and unskillfulness of the defendant as hereinbefore stated, plaintiff's said finger has become useless and her right hand permanently crippled, * * *" is in effect an allegation that the resultant injury was due to a failure by the defendant to sew up the severed tendon in the plaintiff's finger. That allegation is equivalent to an allegation that good practice required a severed tendon to be sewed up and that if the tendon had been sewed up no injury would have resulted. By definitely placing the responsibility for the resultant injury upon the defendant's failure to sew up the tendon, the allegation thereby obviously negatives the idea that the injury might have been permanent even if the tendon had been sewed up.

A review of the cases cited in support of the rule that, from the facts averred, it must appear that the negligence caused or contributed to the injury, discloses the fact that those cases wherein it was held that the pleadings did not satisfactorily fulfill this requirement, are readily distinguishable from the case at bar. In Smith v. Buttner, 90 Cal. 95, 27 Pac. 29, it was alleged that plaintiffs were in possession as tenants of a dwelling house owned by the defendant who caused the same to be raised some six or seven feet while the plaintiffs were occupying it, and that after so raising it defendant wholly failed and neglected to provide any safe and proper means of entrance to or egress from the house and "by reason of the negligence and failure of defendant to provide safe, suitable, or proper means of exit from said house, said plaintiff, Dora Smith on said 30th day of June, 1887, in endeavoring to descend from said house to the ground, for a proper and lawful purpose, while in the exercise of due care and diligence, and without any fault or negligence on her part, fell to the ground, and dislocated her left wrist, and broke the bone of her left arm, near the wrist and sustained other severe and painful injuries." In that case the court said that—

> "The negligence consisted simply in failing to provide a safe, proper, and suitable means of entrance to or egress from the house, and it is alleged that this negligence caused plaintiff to fall. But no fact is averred which shows that such negligence had anything to do with the accident. * * * Such complaint does not state the facts constituting plaintiffs' cause of action."

From a perusal of the complaint in the case last cited, it is evident that there is a hiatus in the link of alleged causal connection, and this deficiency should have been supplied by appropriate allegations describing in what manner defendant failed to provide a safe, suitable, and proper means of exit from the house; whether the structure was insufficiently secured or whether the negligence consisted of an entire failure to supply any steps. In describing the negligence in such general terms—a failure to provide a safe, suitable, and proper means of entrance and egress—such a broad field is described that there are included therein possibilities which would not give plaintiffs a cause of action. On the other hand, in the case of Goldstein v. Healy, 187 Cal. 206, 201 Pac. 462, based upon somewhat similar facts, the complaint was held to be sufficient. The complaint therein alleged that a certain railing was placed on the outer edge of a platform upon which was erected a tent, owned by the defendant, and rented by him as living quarters to guests at a summer resort; that said railing "consisted of decomposed and rotten wood * * * negligently and carelessly maintained in said condition by the said defendant; * * *" and that while a guest at said summer resort was leaning against said railing, "by reason of said rottenness and decomposition of the said wood of which said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, * * * the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below, a distance of about 20 feet, and causing the plaintiff to strike upon his head and body." It will be noted that the negligence was specifically defined and the facts upon which plaintiff relied to show a causal connection between the injury and the negligence definitely detailed. In the instant case the negligence is precisely described as a failure to sew up a severed tendon. It would be practically impossible to describe the negligence in more exact and explicit terms, and if the pleadings in this case will not suffice to bring the defendant into court, it is difficult to conceive of pleadings that would.

The case of Manwell v. Durst, 178 Cal. 752, 174 Pac. 881, 1 A. L. R. 669, is not in point for the reason that the complaint in that case not only failed to state facts showing a causal connection between the alleged negligence of the defendant and the injury to the deceased, but the facts, as pleaded, failed to show any negligence at all. In that case the deceased was employed by the defendants to assist the sheriff and his deputies in clearing defendants' premises of a dangerous mob. As was pointed out in the opinion in that case, it is the employment without informing the employee of the danger that constitutes negligence, and the court held that the complaint, failing to contain any allegation that the defendants failed to inform the deceased of the danger of the employment, failed to state any negligence in the matter.

The case of Merriam v. Hamilton, 64 Or. 476, 130 Pac. 406, in which the Supreme Court of Oregon approved and followed the rule of Smith v. Buttner, supra, was a malpractice case. Therein it was alleged that the defendant negligently and carelessly failed to discover and diagnose the true condition of the plaintiff and properly treat her therefor, and that by reason thereof the plaintiff was rendered sick and injured in her health and constitution. The manner and method of treatment was not specified. And in that case the complaint did not, except by inference, allege that plaintiff was suffering from any disease at the time of the employment of the defendant. In the case at bar the nature of the original injury is stated and the permanency of the injury directly attributed to a failure to treat the injured finger in a definite manner, i. e., to sew up the severed tendon.

The same criticism is applicable to the case of Sweat v. Foster, 28 Ga. App. 360, 111 S. E. 66, which was also a malpractice case wherein it was alleged:

> "That the death of his wife was due to the unskillful diagnosis and treatment by defendant as a medical practitioner, and to the gross carelessness and neglect in his treatment and handling of said wife's illness."

Inasmuch as the complaint in the case last cited, as in the case of Merriam v. Hamilton, supra, just commented upon, failed to specify the nature of the treatment accorded the patient, the situation presented in both cited cases is not analogous to the situation presented in the case at bar.

In the case of Davis v. Rodman, 147 Ark. 385, 227 S. W. 612, 13 A. L. R. 1459, also a malpractice case, the negligence consisted of a failure on the part of the physician, called in to attend a patient stricken with typhoid fever, to notify the patient's family that typhoid fever was an infectious disease. Manifestly, with negligence of this character specific facts were necessary to connect the injury with the negligence complained of. In the instant case the injury is directly connected with the negligence, and consequently there are no intermediate facts required to be set forth in order to show the connection of the injury with the negligence set forth.

[5] Respondent insists that the special demurrer on the ground of uncertainty is well founded. With this contention we cannot agree. All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of his cause of action. Goldstein v. Healy, supra.

The judgment is reversed.

We concur: RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.

MYERS, C. J. I dissent. I am unable to distinguish this case from Smith v. Buttner and think, therefore, that the judgment herein should be affirmed unless we are willing to overrule that case, which has stood unchallenged for more than 30 years and has been cited with approval more than 30 times. The cases cited in the majority opinion are in full accord with that case and no decision to the contrary has been cited. A comparison of the allegations of the complaint herein with those under consideration in Smith v. Buttner, on the one hand, and with those under consideration in Goldstein v. Healy, on the other hand, compels the conclusion in my mind that this case is ruled by Smith v. Buttner. That conclusion is confirmed by Merriam v. Hamilton, which expressly follows Smith v. Buttner.

I am also of the opinion that the special demurrer herein for uncertainty was well founded as to some of the particulars therein specified.

I concur: SHENK, J.

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McFARLAND et al. v. SUPERIOR COURT OF MERCED COUNTY et al.
(S. F. 11041.)

(Supreme Court of California. Sept. 11, 1924. Rehearing Denied Oct. 9, 1924.)

1. **Injunction 🔑231—Judgment of contempt affirmed if affidavit and evidence sufficient.**

On certiorari to review adjudication of contempt for violation of injunction, regardless of affirmative defenses and questions of fact raised by petitioners, if affidavit of contempt was sufficient and there was sufficient evidence to support its allegations, judgment must be affirmed and petition denied.

2. **Injunction 🔑230(3) — Evidence held to show violation of injunctional order as to taking of water.**

Evidence *held* to show violation of injunction restraining taking of water from stream by irrigation district, until plaintiffs had received specified quantity.

3. **Injunction 🔑225—Diligence immaterial as regards disobedience of injunction.**

Under Code Civ. Proc. § 1209, subd. 5, making disobedience of judgment order or process of court contempt, diligence in stopping pumping preventing plaintiff from receiving quantity of water specified in injunction is not material as to fact of disobedience.

4. **Injunction 🔑230(3)—Evidence held sufficient to support judgment of contempt against attorney of irrigation district.**

Testimony as to conduct of attorney of irrigation district in advising officers that injunction decree was "no good," and that district continued pumping on advice of such attorney, was sufficient to support judgment of contempt as to attorney.

5. **Injunction 🔑228—Order binding upon all persons acting for corporation enjoined.**

Injunction restraining corporation, its officers, agents, and employés, is binding upon all persons acting for corporation with full notice and knowledge of injunction.

6. **Injunction 🔑230(1)—Parties to original action need not be ones instituting proceedings in contempt.**

It is not necessary that parties instituting proceedings in contempt for violation of injunction be parties to original action; contempt proceeding being separate and distinct.

7. **Injunction 🔑223(1) — Injury unnecessary to contempt in disobeying.**

It is not necessary, in order to constitute contempt by violating injunction, to show injury.

8. **Injunction 🔑225 — Change of conditions does not warrant disobedience.**

That conditions have changed and additional supply of water has developed is no defense to proceedings in contempt for violation of injunction restraining irrigation district from taking water.

9. **Injunction 🔑225—No defense to contempt proceedings that others took water unlawfully.**

In contempt proceedings against irrigation district violating injunction restraining taking of water, it was no defense that others were unlawfully taking water.

In Bank.

Application by R. C. McFarland and others for certiorari to review order of superior court of county of Merced, E. N. Rector, Judge. Order to show cause discharged, and petition denied.

Dennett & Zion, of Modesto, for petitioners.

T. P. Wittschen, of San Francisco (Kenneth C. Gillis, of San Francisco, of counsel), for respondents.

LAWLOR, J. This is an application for a writ of review of an order adjudging petitioners, who are, respectively, the officers and attorney of the Tranquility Irrigation District, guilty of contempt of court for the violation of a judgment of injunction issued by respondent court in a proceeding instituted therein and entitled "Miller & Lux, Incorporated, a corporation, and the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, a corporation, v. J. G. James Company, a corporation, and the San Joaquin Valley Farm Lands Company, a corporation, No. 2006 of the files of said court."

On August 14, 1923, the affidavit of W. H. Trump, the secretary of the San Joaquin & Kings River Canal & Irrigation Company, a corporation, was filed in the superior court of the state of California, in and for the county of Merced. This affidavit alleged that on the 8th day of January, 1917, the above-entitled court made and entered its final judgment in an action in which Miller & Lux, Incorporated, a corporation, and the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, a corporation, were plaintiffs, and J. G. James Company and the San Joaquin Valley Farm Lands Company, a corporation, were defendants; that said judgment has ever since said day been, and now is, in full force and effect; that by said judgment the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, a corporation, was entitled to take and divert from the San Joaquin river 1,360 cubic feet of water flowing therein per second at the head of its main, and outside canals situated in the county of Fresno, near the confluence of the San Joaquin river and Fresno slough, and that by said judgment the defendants and all of the agents and attorneys thereof, and all successors and assigns of the said defendants, were forever enjoined, restrained, and strictly prohibited from pumping, taking or diverting any of the waters of the San Joaquin river or any of the water of the

San Joaquin river being or flowing in Fresno slough from the channels of said river or slough until the said plaintiff, the San Joaquin & Kings River Canal & Irrigation Company, shall have received into the head of its canals 1,360 cubic feet of water; that the defendants, the J. G. James Company and San Joaquin Valley Farm Lands Company, a corporation, formed an irrigation district known as the Tranquility Irrigation District, and conveyed to it all the canals, pumps, and works owned by them in the San Joaquin river or in Fresno slough, and that the Tranquility Irrigation District is the successor and assignee of the defendants; that the officers of the Tranquility Irrigation District had notice of the entry and existence of this decree and the terms thereof; that on the 9th, 10th, and 11th days of August, 1923, "there was less than 1,360 cubic feet of water flowing per second in the San Joaquin river and Fresno slough to the heads of said plaintiff's canals," and that the Tranquility Irrigation District on those days knowingly and intentionally took and pumped a large quantity of water of the San Joaquin river then flowing in Fresno slough, well knowing that the plaintiff was not receiving, and could not receive into its canals, the quantity of water so adjudged to it, and well knowing that the taking of the said water prevented the said plaintiff from taking, diverting, and using the quantity of water adjudged to it as aforesaid.

Upon this affidavit the trial court issued an order to show cause ordering the Tranquility Irrigation District and its officers and attorney to appear before the court on September 4, 1923, to show cause why they should not be adjudged guilty of contempt and punished accordingly.

On September 4, 1923, the said R. C. McFarland, the engineer and superintendent of the Tranquility Irrigation District, filed his affidavit stating that the Tranquility Irrigation District takes its water from the Kings river and from the Fresno slough; that the water diverted from the Kings river during a portion of the season is diverted by gravity, and during another portion of the season the water used by the district is pumped from the Fresno slough; that during the last two or three years the district has modified the diverting system from the Kings river so that the amount of water coming into Fresno slough has been materially increased; that at all times and at the present time there is coming into the Fresno slough above the point where the district pumps large amounts of water from sources other than the San Joaquin river; that the level of underground water, or the water table, has been raised so that at the present time the surface of the water in Fresno slough is only 0.80 hundredths of a foot above the water level; that the pumping of the Tranquility Irrigation District does not affect the flow of the water at the head of the canal of the San Joaquin & Kings River Canal & Irrigation Company's canal; that every indication is that the water which would be pumped by the Tranquility Irrigation District is water coming from sources other than the San Joaquin river, and that the supply of water has been increased and developed by the action of the Tranquility Irrigation District; that the said district, in response to the demands of the plaintiff, ceased to pump on the 14th day of August, 1923, and is not now pumping; that large amounts of water are being diverted into canals higher up the river than the intake of the canal of the San Joaquin & Kings River Canal Company, and higher up than the pumping plant of the Tranquility Irrigation District, which said canals are owned and controlled by the plaintiff; that the intake of the San Joaquin & Kings River Canal & Irrigation Company has been examined and that said canal is not taking all of the water flowing in the river, but a very considerable amount of water is flowing past said intake and on down the San Joaquin river and that a large portion of the water diverted by that company into said canal is being apparently wasted and turned out to flood grass land.

A joint affidavit of the said R. C. McFarland, W. A. Draper, the general manager and a member of the board of directors, respectively, of the district, and L. L. Dennett, the attorney thereof, denies that the district or the officers or attorney thereof violated the decree of the court, that the pumping by the district has in any way affected the flow of water to the canal of the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and alleges that, as soon as they were notified that the water in the river had fallen below 1,360 cubic feet per second, the Tranquility Irrigation District ceased to pump; that the demand made by the San Joaquin & Kings River Canal & Irrigation Company was malicious and without any foundation, and that the Tranquility Irrigation District, in ceasing to pump in accordance with such demand, has suffered damage in an amount in excess of $100,000. The affidavit further alleges that the Tranquility Irrigation District perfected the diverting works from the Kings river, and is entitled to use and divert all of the waters of that river coming into Fresno slough; that during the month of August, 1923, the district pumped the following amounts of water from Fresno slough: August 1, 42 second feet; August 2, 45 second feet; August 3, 42 second feet; August 4, 36 second feet; August 5, 30 second feet; August 6, 35 second feet; August 7, 41 second feet; August 8, 42 second feet; August 9, 47 second feet; August 10, 49 second feet; August 11, 53 second feet; August 12, 48 second feet, and August 13, 44 second feet; that during all this time there was flowing by the diverting weir of the San Joaquin & Kings River Canal & Irrigation Company an amount in excess of 53 second feet; that is, that at no time has the San Joaquin & Kings River Canal & Irrigation Company diverted into its canal all of the water in the San Joaquin river; that the major portion of the water diverted in the canals of the San Joaquin & Kings River Canal & Irrigation Company is not used to supply the water users from said canal, but is diverted by Miller & Lux, a corporation, upon riparian land covered with wild grasses and of little value, and that, under and by virtue of the judgment and decree it is the right of the San Joaquin & Kings River Canal & Irrigation Company, and not of said Miller & Lux, to a priority over the land of the J. G. James Company; that due to the diversion of water from the Kings river and other sources the water level in the Tranquility Irrigation District has been raised until it is within four or five feet of the surface of the land, and the water in Fresno slough is only about eight-tenths of a foot above the ground level, and that, if the Tranquility Irrigation District ceases to pump, the water level will continue to rise and alkali will be brought up from underground surfaces and the land in that district will be damaged and destroyed; that, subsequent to the judgment, the plaintiff entered into agreements with certain power companies, and had consented to the construction of reservoirs at Bass lake, Kertchoff, and at Huntington lake, where water had been stored, and that the storing of this water has materially affected the condition of the San Joaquin river, and rendered it impossible for the purpose and intent of the judgment to be carried out and complied with; that on the San Joaquin river above Fresno slough and the intake of the San Joaquin & Kings River Canal & Irrigation Company are various diverting ditches —Gravely Ford, Aliso canal, and Lone Willow slough—and it is alleged that the amount of water diverted through these diversions is greater than that to which the plaintiff is entitled, and that, if they were diverting the amount of water only to which it is entitled, then the amount of water flowing in the river at the intake of the canal would be greater than that specified in the judgment, and, finally, that the plaintiff has maliciously and intentionally diverted the water, as alleged above, so as to reduce the flow of the San Joaquin river to a point where they could claim that the Tranquility Irrigation District was interfering with the flow of said river.

In the order for judgment the court found that:

"The evidence shows that the parties and persons cited to show cause in the above-entitled action are in contempt of the order and judgment of the court, by reason of the fact that they knowingly took in excess of 30 cubic feet of water per second more than the judgment herein permitted them. According to their own evidence they could not take as much as 10 cubic feet of seepage water per second from Fresno slough when there was less than 1,360 cubic feet flowing at the head of plaintiff's canal. They could take seepage water only at that stage of river flow."

On February 8, 1924, the defendants, R. C. McFarland, W. A. Draper, and L. L. Dennett, were each adjudged guilty of contempt of court and fined in the sum of $50 each.

The judgment which the court found to be in full force and effect, the violation of which constituted the contempt, is as follows:

"That the plaintiff, the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is entitled to take and divert from the San Joaquin river 1,360 cubic feet of water flowing therein per second at the head of its main and outside canals, situated in the county of Fresno near the confluence of the San Joaquin river and Fresno slough, * * * and the right * * * is prior and superior to any right of the defendants to take or divert any of the water of the San Joaquin river or any water of the San Joaquin river being or flowing in the Fresno slough and the said defendants * * * are forever enjoined, restrained, and strictly prohibited from pumping, taking, or diverting, or otherwise removing any of the waters of the San Joaquin river, or any of the waters of the San Joaquin river being or flowing in Fresno slough from the channels of the said river or slough until the said plaintiff, the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, shall have received into the head of its said canals 1,360 cubic feet of the water of the San Joaquin river flowing therein per second, or so as to in any manner interfere with the flow of the water of the said San Joaquin river to the heads of said canals of the said plaintiff, or so as to in any way interfere with the diversion of said quantity of water by the said plaintiff."

The petition for a writ of review is based upon the contention that the judgment of the court was in excess of the jurisdiction thereof. In paragraph VII of the petition 15 particulars are specified in which the excess of jurisdiction is claimed to appear. The argument is "that there was a complete lack of evidence that the Tranquility Irrigation District was taking any water from the San Joaquin river," and "that the Canal Company is entitled not to 1,360 cubic feet of water to do with as it wishes, but to 1,360 cubic feet of water for the purposes which give rise to the injunction, and that it cannot complain if the Tranquility Irrigation District was pumping water when less than 1,360 cubic feet of water came to the canals of the Canal Company, unless the Canal Company wished to put that water to the beneficial use authorized by the judgment."

An order to show cause was ordered to issue by this court on February 21, 1924.

Respondents' brief points out (1) that the affidavits charging a violation of the decree constitute the complaint and the counter affidavits of defendants the answer; that the only denial of any of the allegations of the affidavit was "one to the effect that the pumping of the said Irrigation District had not in any way interfered with or affected the flow of water into the canals of the Canal Company"; that the answer "expressly admitted the pumping of large quantities of water by the said district, from 47 to 53 second feet continuously on the days in question, for which a violation of the injunction was claimed"; that the affirmative allegation in the answer that "by its pumping the Tranquility Irrigation District did not take out of Fresno slough any more water than was coming into it from the Kings river and sources other than the San Joaquin river" was not supported by any evidence introduced by the defendants, and that the only issue was "whether under the circumstances the taking from Fresno slough of the quantity of water (47 to 53 cubic feet per second), admittedly taken with the aid of the defendants with knowledge of the decree, was a violation of the injunction." The brief further points out: (II) "That the water in Fresno slough comes from the San Joaquin river has been determined by this court in litigation between the Canal Company and the predecessors in interest of the Tranquility Irrigation District," citing the two decisions in Miller & Lux v. Enterprise Co., 169 Cal. 415, 147 Pac. 567, and Miller & Lux v. James, 180 Cal. 41, 179 Pac. 174; (III) "the evidence independent of the decisions in the previous cases showed a willful and deliberate taking of water in violation of the decree;" (IV) "as there was no act in excess of jurisdiction on the part of the lower court its judgment is final;" and (V) "but one issue could be tried in the contempt case and the jurisdiction of the court concerning the same was beyond question," there being no evidence to support the affirmative defenses set up by defendants in their counter affidavits.

Petitioners' reply is based on the ground of lack of jurisdiction as shown in the affidavit of contempt: First, that no demand was made upon the Tranquility Irrigation District by or on behalf of the Canal Company to stop pumping, the notice having been given by the Miller & Lux Company; second, that the Canal Company was entitled to priority only for the public use determined in the original judgment; third, that the Tranquility Irrigation District was using the water pumped by it with the consent of the Canal Company, and that there was nothing to show that the Canal Company had not abandoned its right to the water; fourth, that there is no evidence that the district did not use diligence in stopping its operations; fifth, that, as to its attorney, L. L. Dennett, there is absolutely no evidence connecting him with the alleged contempt; sixth, that the Tranquility Irrigation District, as successors of the defendants in the original suit, are not guilty of contempt even if it diverted water from Fresno slough belonging to the Canal Company; seventh, that proceedings in contempt can only be initiated by one beneficially interested, and Miller & Lux initiated the proceedings; eighth, that one not injuriously affected cannot complain, and the Canal Company has not shown that it was injured; and ninth, that the fact that the contemners were officers and agents of the district does not of itself make them liable for a contempt of the district.

[1, 2] The only question here is whether the evidence before the court is sufficient to sustain the adjudication of contempt. Regardless of the affirmative defenses and questions of fact raised by petitioners, if the affidavit of contempt was sufficient, and there was sufficient evidence to support its allegations, the judgment of the lower court must be affirmed, and the petition herein denied. In re Brambini (Cal. Sup.) 218 Pac. 569.

The testimony taken upon the order to show cause is substantially as follows:

J. J. Hogue, a witness called on behalf of plaintiff, testified that he had been in the employ of the San Joaquin & Kings River Canal & Irrigation Company between three and four years, and was in charge of the water coming into the heads of plaintiff's canals at a place called Mendota, where a dam is maintained across the river. He stated that the Fresno slough and Lone Willow slough empty into the San Joaquin river near this dam, and that the canals of the company take out above the dam, the effect of which is to back up the water of the San Joaquin river into Fresno slough. The White House gauge or measuring station is above the place where the Lone Willow slough takes out of the river, and is equipped with an automatic gauge recorder and a staff gauge recorder. A gauge station is also maintained at the Lone Willow slough. He testified further:

"Q. Now, the measurements that you took, how did you go about it? A. Well, at each measuring point, we had a station and the station is divided off into sections, according to the width of the stream. Q. Now, a station, what do you mean by a station? A. At the point where I took the measurements and the station is divided off into different sections, and the first cross-section is taken of the channel and then the meter is lowered to the standard method and measurements are taken, readings are taken. Q. Did you lower the meter? A. Yes, sir. Q. How many measurements did you take across the stream, how many times did you lower your meter in the stream? A. At every section. Q. How far apart were those sections? A. Some of them were 4 and some 10, depending on the width of the stream. Q. You mean feet? A. Yes, sir. Q. What did you do then? A. Then, I took cross-sections; then I lowered the meter down. Q. What happended when you lowered the meter? A. See the revolutions. Q. What did those revolutions indicate? * * * A. Well, it indicates the velocity. Q. Now, after having gotten the velocity, what did you do next? A. Well, compute out the discharge. Q. What is that? A. Compute out the discharge over the area. Q. How did you do that? A. The area of the different sections times the velocity; it is done according to the standard method. Q. What had you done about the standard method? A. I am going according to one now."

He did not measure Fresno slough, but the measurements on the San Joaquin river, just above Lone Willow slough, are as follows:

"August 7th, 1,420.91; August 8th, 1,110; August 9th, 1,000; August 10th, 1,210; August 11th, 1,300; August 12th, 1,350; August 13th, 1,090; August 14th, 986.04."

The measurements on Lone Willow slough, which takes out immediately below the above point, are as follows:

"August 7th, 160 feet; August 8th, 127; August 9th, 125; August 10th, 137; August 11th, 147; August 12th, 158; August 13th, 127; August 14th, 118."

No other water can come into the San Joaquin river between the point of measurement above Lone Willow slough and the place that the canals of the company take out at Mendota dam, and the amount of water flowing at the dam is the difference between these two streams. It appears, then, that on August 7, at the head of the canal, there were 1,260.91 second feet; on August 8, 983; on August 9, 875; on August 10, 1,073; on August 11, 1,153, and on August 12, 1,192; on August 13, 963; and on August 14, 868.04. These figures represent the maximum amount of water that could possibly flow in the San Joaquin river at the head of the Canal Company's diverting works. However, no allowance is made for evaporation and seepage between the point of measurement and the intake of the canal. The witness further testified that during the days between August 7th to the 14th, inclusive, the Tranquility Irrigation District was pumping water out of Fresno slough, and R. C. McFarland was notified to close down the pumps as soon as possible; that he said the court decision did not amount to very much, and he did not think they would stop pumping. In a letter he said the matter would be taken up with the attorney of the Tranquility Irrigation District before the pumps would be closed. On August 11th further notice was given by Miller & Lux, Incorporated, to the Tranquility Irrigation District to shut down its pumps as the water at the White House measured only 1,000 second feet. On August 12th, in a conversation with R. C. McFarland, the district was requested to shut down the pumps immediately. On August 14th the Tranquility Irrigation District notified Miller & Lux that the pumps had been closed down. On cross-examination J. J. Hogue testified that he made measurements at the main, outside, and Helm canals every week. For the week of August 7th they were as follows: At the outside canal, 270 feet; at the Helm, 330 feet, and at the main, 750 feet. On August 13th the measurements were as follows: In the outside canal, 162 feet; in the main canal, 708 feet, and in the Helm, 207 feet. No measurements of the water coming from Fresno slough into the San Joaquin river were made, nor were any taken of the amount of water going over the Mendota weir. The witness stated that he did not know whether any water was coming from the Fresno slough into the San Joaquin river or from the San Joaquin river into Fresno slough or whether the water in Fresno slough came from Kings river. However, there were about three feet of water in Fresno slough for several weeks from indications on the channel. The water that went over the Mendota weir was seepage through the boards. To explain the difference of 70.91 feet between the two figures given on August 7th, the witness said: "No doubt it was backed up at the weir; it was left above the weir as back water."

C. L. Kaupke, a witness called on behalf of plaintiff, testified that he had been an engineer since June, 1909, and connected with the state division of water rights since 1921; that on July 6, 1923, there was no water at Burrel, about 20 miles above the dam, in the Kings river, that could flow into Fresno slough to the head of the canals of the Tranquility Irrigation District; that the water ceased flowing at the head of the James canal on June 11, 1923, and at the Beta main canal on June 16, 1923; that there is no source or supply of water for Fresno slough other than San Joaquin river unless there is plenty of water in Kings river; that the only possibility is under surface streams and seepage water and that at McMullen, just above the diversion weir of the James canal, there were not in excess 5 or 6 second feet of water on August 25, 1923.

E. T. A. Bartlett, a witness called on behalf of plaintiff, testified that he is a surveyor, and since 1906 has been a civil engineer and in the employ of the San Joaquin & Kings River Canal & Irrigation Company for six and a half years; that the effect of the dam is to back up the water in Fresno slough about 12 or 14 miles, and that if the Tranquility Irrigation District operates its two pumps on Fresno slough, of approximately 50 second feet capacity each, the water is withdrawn from the head of the canals of the San Joaquin & Kings River Canal & Irrigation Company.

R. C. McFarland, one of the petitioners, sought to show by illustrating a chart that the water pumped out of Fresno slough by petitioners came from the Kings river. The chart indicated the constant increase of seepage from the Kings river, that is, that the water level had increased until it appeared that, at the time of the hearing, there is more water flowing in the Fresno slough from seepage than is being pumped out. The witness declared that the chart showed that the surface water in Fresno slough was between 1 and 2 feet higher in 1923 than in 1922. The seepage water is claimed to come from the area of 27,000 acres in the Tranquility Irrigation District, the water level having raised "practically 4 feet and a half since last year." The following measurements, taken between August 15 and September 15, 1923, after the affidavit in contempt was filed, were given: One and 4/10 second feet of water flowing in from the James Irrigation District to Fresno slough as drainage water, an average of 2 second feet flowing into Fresno slough from the Kings river by-pass and the final average about 10 second feet of actual flow to the Fresno slough. It was shown that measurements for 30 days do not vary 3 per cent. As tending to show that the Canal Company did not use all the water flowing in the San Joaquin river, the witness testified that on August 16th there was considerable water flowing over the Mendota weir, "practically about 25 feet flowing over the weir." On cross-examination he admitted that all he could show by the illustrated chart was the elevation of the water plane, and that it was merely his conclusion or guess as to what caused the water to rise in Fresno slough—whether it was seepage or whether it came down the river.

Petitioners claim that the evidence establishes the following facts: That the Canal Company was not using even the water flowing in the river; that Miller & Lux was permitted to divert water through the Helm canal, the Helm ditch, Lone Willow slough, and Aliso ditch; that the Canal Company did not object to the diversion of the water; that on August 12th the record at Lone Willow weir shows there were 1,350 second feet of water, and that "unquestionably there was a considerable additional source of supply from Fresno slough"; that reservoirs on the San Joaquin river controlled by the Canal Company are storing water to which petitioners are entitled; that since the pumps of the Tranquility Irrigation District are practically at the head of the Fresno slough, and since the drainage of the reclamation district and the James Irrigation District discharges water below the pumps, evidence as to the amount of water coming in above the pumps is relatively unimportant; that there was coming into the Fresno slough from sources other than the San Joaquin river, water greater in quantity than that being pumped by the Tranquility Irrigation District; that on August 12th, with the water coming into Fresno slough, there were more than 1,360 second feet of water flowing in the San Joaquin river; that on August 14th, after investigation, the Tranquility Irrigation District shut down its pumps; and that these facts do not sustain the adjudication of contempt.

But even if this appraisal of the evidence be correct it does not sustain the contention of petitioners that the court was without jurisdiction to pronounce a judgment of contempt. They tried to show by their testimony that the Fresno slough had an independent source of supply as great, or greater, than was pumped out. This was a question of fact to be determined by the court, and, in the face of the evidence the determination became final.

It is clear from the import of the judgment of injunction that the San Joaquin & Kings River Canal & Irrigation Company is entitled to take 1,360 cubic feet of water per second out of the San Joaquin river, "near the confluence of the San Joaquin river and Fresno slough," and that the Tranquility Irrigation district is enjoined from taking any water of the San Joaquin river being or flowing in Fresno slough until the canal company shall have received 1,360 cubic feet of water per second of the San Joaquin river into the head of its canals. No attack is made on the jurisdiction of the court to make the injunction. It is shown that the decree is in full force and effect; that petitioners are the successors of the defendants, the J. G. James Company, Incorporated, and the San Joaquin Valley Farm Lands Company, Incorporated; that they had knowledge of the full force and effect of the judgment and decree of injunction; that the pumping operations of the Tranquility Irrigation District on Fresno slough withdraw water from the head of the canals of the San Joaquin & Kings River Canal & Irrigation Company; and finally, by their own testimony, that they pumped 47, 49, and 53 second feet of water from Fresno slough on the 9th, 10th, and 11th days of August when the water in the San Joaquin river measured, respectively, 1,000, 1,210, and 1,300 cubic feet per second, and, when on the said respective days only 875, 1,073, and 1,153 cubic feet per second of water were received into the canals of the company. The trial court declared that "according to their own evidence, they could not take as much as 10 cubic feet of seepage water per second from Fresno slough when there was less than 1,360 cubic feet flowing at the head of plaintiff's canal." It is true the witnesses for the Canal Company testified they did not know whether water was coming into Fresno slough from other sources than the San Joaquin river, and that no measurements had been taken of water flowing from the San Joaquin river into Fresno slough. On the other hand, C. L. Kaupke testified that there is no source of supply of water in Fresno slough other than the San Joaquin river, unless there is plenty of water in Kings river, and that the only possibility of other sources of supply for Fresno slough is undersurface streams and seepage water. He further testified that on July 6, 1923, at Burrel, about 20 miles above the dam, there was no water in the Kings river that could flow into Fresno slough to the head of the canals of the Tranquility Irrigation District, and that the water ceased flowing at the head of the James canal on June 11, 1923, and at the Beta main canal on July 16, 1923. Furthermore, petitioner R. C. McFarland, although he testified that there were on the average of 10 cubic feet per second of seepage water in Fresno slough, he admitted on cross-examination that all he could show by the chart was the water plane, and that it was merely his conclusion and guess as to what caused the water to rise in Fresno slough. In view of the testimony that water backs up into Fresno slough from the San Joaquin river unless there is water coming into Fresno slough from Kings river by reason of the Mendota dam, that in the earlier part of the season, that is, in July, there was no water that could flow into Fresno slough from the Kings river, and that seepage water was not and could not be measured, the trial court could have found the source of the water in Fresno slough contrary to the contention of petitioners. In other words, there is sufficient evidence to justify the court's finding that the greater portion of the three feet of water in Fresno slough was water backed up into that stream by the Mendota dam.

[3-7] The other points raised by petitioners may be briefly discussed. Petitioners claim that due diligence in stopping pumping operations on August 14, 1923, was shown to have been exercised. Section 1209, subdivision 5, Code of Civil Procedure, provides that disobedience of any lawful judgment, order, or process of a court is a contempt, and therefore diligence is not material as to the fact of disobedience. As to one of petitioners, L. L. Dennett, the attorney of the Tranquility Irrigation District, it is contended there is no evidence connecting him with the alleged contempt. The testimony as to the conduct of the attorney in advising R. C. McFarland that the decree was "no good" and that he, McFarland, could have it set aside, and that the district continued pumping on the advice of the attorney, is sufficient to support the judgment of contempt as to him. Ex parte Vance, 88 Cal. 281, 26 Pac. 118. An injunction restraining a corporation, its officers, agents, and employees is binding upon all persons acting for the corporation with full notice and knowledge of the injunction. 5 Cal. Jur. 894. The claim is made that the Miller & Lux Company instituted the proceeding in contempt "to take an unconscionable advantage of the Tranquility Irrigation District, and to avoid, so far as Miller & Lux was concerned, the limitations imposed by the judgment in which the injunction was issued." As a matter of fact, the affidavit instituting the proceedings in contempt was subscribed and sworn to by the secretary of the Canal Company. It is immaterial which company gave notice to cease pumping. Moreover, there is no provision requiring the parties to the original action for which the judgment has been rendered to institute proceedings in contempt. A contempt is a separate and distinct proceeding, and is no part of the original case out of which it arises. As a matter of practice, the party most likely to institute proceedings would be the one beneficially interested in the judgment. The final point that the canal company did not show any injury resulting from the alleged contempt may be disposed of by the remark that it is not necessary in order to constitute a contempt to show injury. The sole test is whether the judgment has been violated.

[8, 9] The allegations of petitioners that conditions have changed and an additional supply of water developed, and that water to which they are entitled is being impounded in reservoirs by the Canal Company are unsupported by evidence, and, furthermore, if any testimony had been offered in support of the allegations, it would clearly be immaterial and irrelevant to the issue of contempt before the court. Moreover, petitioners would have recourse to an action at law to determine any relative rights that may have intervened subsequent to the granting of injunctive relief. It may be mentioned, however, that respondents, in answer to petitioners' claim that the Miller & Lux Company is using the water to which they are entitled, stated that Miller & Lux purchased the water from them, and that even if taken wrongfully this would be no answer to a violation of the injunction by petitioners.

No attempt has been made herein to review the evidence so far as it affects or applies to the merits of the case; it has been considered solely for the purpose of ascertaining whether the court could have found the necessary jurisdictional facts therefrom. Strain v. Superior Court, 168 Cal. 216, 142 Pac. 62, Ann. Cas. 1915D, 702; White v. Superior Court, 110 Cal. 60, 42 Pac. 480; Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175.

The order to show cause is discharged, and the petition for a writ of review denied.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; SHENK, J.

194 Cal. 516

SPRECKELS et al. v. GRAHAM, County Clerk. (S. F. 11298.)

(Supreme Court of California. Sept. 24, 1924. Rehearing Denied Sept. 26, 1924.)

1. Elections 🔑142—Candidates for office of presidential elector cannot be nominated by petition; "public officer."

Candidates for offices of presidential electors cannot be nominated by petition under Pol. Code, § 1188, providing for such nomination of candidates for "public office," since presidential electors, even if public officers, within the common acceptation of the term, are not within the statute, in view of legislative history of such statute, and section 1197, and Direct Primary Law 1917, § 1, subd. 9 (b), and sections 2, 5—(citing Words and Phrases, First Series, "Officer"; "State Officer").

2. Statutes 🔑206—Rule as to construction of co-ordinate provisions of statute stated.

Co-ordinate provisions of statute will be construed so as to give effect to each, and so that they shall harmonize rather than conflict with one another, if it is reasonably possible to do so, but, if there is an irreconcilable conflict, the provision last in point of time or place shall prevail.

3. Elections 🔑21—Statute prescribing method of nominating candidates for presidential elector other than as candidates of existing party held constitutional.

Direct Primary Law 1917, § 1, subd. 9(b), prescribing mode of nominating group of candidates for presidential electors other than as candidates of existing party, *held* not unconstitutional as limiting unjustifiably the right of suffrage.

Lennon, Lawlor, and Seawell, JJ., dissenting.

In Bank.

Mandamus by Rudolph Spreckels and others against Robert E. Graham, as County Clerk of the County of Marin, State of California. Writ denied.

Nathan Moran, of San Francisco, for petitioners.

Henry Greer, of San Rafael, for respondent.

MYERS, C. J. Application for writ of mandate directing respondent, as county clerk of Marin county, to receive, examine, certify, and forward to the secretary of state a certain document or set of documents purporting to nominate the petitioners as group candidates for the office of electors of President and Vice President of the United States, to be placed upon the ballot and voted for at the approaching November election; the respondent having refused so to do. It must be conceded that the county clerk is a ministerial officer; that his duties are those prescribed by statute; and that a writ of mandate can only issue to compel him to perform an act which the law specially enjoins as a duty resulting from his office. It must also be conceded that the document or documents offered to the county clerk for his reception, etc., must have had their inception in lawfulness; or in other words must, in their preparation, certification, and presentation to the county clerk for his action thereon, have been based upon some statutory authorization of the persons so preparing and presenting the same so to do. The petitioners herein allege that five persons, qualified electors of the county of Marin, joined in proposing these petitioners as candidates for nomination to the office of electors for President and Vice President of the United States, to be voted for at the November election; and also joined in appointing verification deputies to serve in procuring, and who did procure, the signatures of voters to the nominating papers of these petitioners for such office, and did present the aforesaid nominating paper bearing the signatures of certain voters registered and residing in the county of Marin to the respondent, as county clerk of Marin county, for his examination, certification, and transmission to the secretary of state.

Petitioners base their claims of right to be nominated as such candidates by direct petition of electors, and to have their names as such nominees printed upon the ballots at the November election upon section 1188 of the Political Code and the provisions of the Direct Primary Law therein referred to. The respondent contends that neither in the statutes referred to nor in any other law of this state has the Legislature provided for the direct nomination by petition of candidates for presidential electors. He further contends that there is no provision in our laws for the nomination of several such candidates in a group by means of a single set of nomination papers.

Section 1188 reads as follows:

> "A candidate for any public office for which no nonpartisan candidate has been nominated at any primary election may be nominated subsequent to said primary election, or in lieu of any primary election, in the manner following: A nomination paper containing the name of the candidate to be nominated, with other information required to be given in the nomination papers provided for in the Direct Primary Law then governing primary elections, shall be signed by electors residing within the district or political subdivision for which the candidate is to be presented, equal in number to at least one per cent. of the entire vote cast at the last preceding general election in the state, district or political subdivision for which the nomination is to be made subject to the restrictions contained in said Direct Primary Law. The provisions of said Direct Primary Law as therein applied to nonpartisan offices, when the nomination to be made under this section is for an office for which nominations are made at the August primary election, and the provisions of that law as therein applied to primaries

> other than the August primary election and the May presidential primary election, when the nomination to be made under this section is for a municipal office or for any office to which that law does not apply, shall substantially govern as to the manner of the appointment of verification deputies, the form of nomination papers and the securing of signatures thereto, and fastening together of sections of the nomination paper containing such signatures, and the filing thereof with the county clerk, or the certification thereto by the county clerk and transmission thereof to the secretary of state or to the city clerk or secretary of the legislative body of any municipality, as the case may be, the filing of the candidate's affidavit, the payment of a filing fee, and all other things necessary to get the name of a candidate under this section upon the ballot, except that such provisions shall be directed toward getting the candidate's name on the ballot for a general or municipal election or a special election and not on the ballot for nomination at a primary election. In addition to the other matter required to be set forth on the candidate's nomination paper, it must also be set forth that each signer thereof did not vote at the primary election immediately preceding at which a candidate was nominated for the public office mentioned in said nomination paper; provided, that this statement shall be omitted in case no candidate was nominated at said primary election for the public office mentioned in said nomination paper.
>
> "Upon the filing of a sufficient nomination paper and affidavit by any candidate nominated under the provisions of this section and the payment of the filing fees as hereinbefore provided, the name of such candidates shall go upon the ballot at the ensuing general or municipal election according to the provisions of section one thousand one hundred ninety-seven of this Code."

It will be noted that the section is composed of four sentences, only the first two having an important bearing upon the questions here involved. The first sentence purports to grant the substantive right, and specifies its limitations and restrictions. It provides, in substance, as follows:

> "A candidate for any public office for which no nonpartisan candidate has been nominated at any primary election may be nominated * * * in the manner following: * * * [by means of nomination papers signed by the requisite number of electors], subject to the restrictions contained in said direct primary law."

The second sentence specifies the procedural requirements necessary to be complied with by a candidate who would avail himself of the substantive right accorded by the provisions of the first sentence. For this purpose it divides all of such candidates into two classes, and prescribes (by reference) one code of procedure to be followed by all of such candidates within one of the designated classes and another and different code of procedure to be followed by all candidates of the other class. Under this section, if the candidate aspires to an office for which nominations are made at the August primary, he must follow and conform to the procedural provisions of the Direct Primary Law as applied to nonpartisan offices. If he is seeking a nomination to a municipal office or to any other office to which the Direct Primary Law does not apply, he must follow and conform to the requirements of that law as applied to primaries other than the August or May presidential primary. Counsel for petitioners has so analyzed the provisions of this sentence, and has graphically presented the result of the analysis in his brief in the manner following:

Class.	Procedure.
1. Office for which nominations are made at August primary.	Nonpartisan provisions of direct primary law.
2. (a) Municipal office. (b) One to which direct primary law does not apply.	Provisions of direct primary law as therein applied to primaries other than the August and May.

It is at once apparent that petitioners do not come within the second class either in subdivision (a) or (b) thereof, inasmuch as they are not seeking nomination to a municipal office or to an office to which the direct primary law does not apply. They frankly concede this, and urge that by a process of liberal construction they can be regarded as candidates for an office for which nominations are made at the August primary. In support of this contention they point to section 3 of the Direct Primary Act (St. 1913, p. 1382), which provides that:

> "The August primary election shall be held * * * for the nomination of all candidates to be voted for at the ensuing November election."

If this provision were to be regarded as controlling and to be construed literally, it would have the effect of excluding all independent nominations and limit the voting at the November election to those candidates alone who are nominated at the August primary. When other provisions of the primary law are referred to, it is at once apparent that such was not the purpose or intent of this provision. Petitioners argue that presidential electors are in effect "nominated at the August primary," even though indirectly through the subagency of a state convention. The acceptance of this contention would necessitate the ignoring of various other provisions in the Direct Primary Law. That law is defined in its title as "An act to provide for and regulate primary elections, *and providing a method* for choosing the delegates for political parties to state conventions *and for nominating electors* of President and Vice President of the United

States." (Italics added.) The August primary election is therein defined (section 1, subd. 2) as "the primary election held in August to nominate candidates to be voted for at the ensuing November election *or to elect* members of a party central committee or *delegates* to a party convention." (Italics added.) Section 2 provides:

> "All candidates nominated at a primary election for elective public offices shall be nominated by direct vote at such election held in accordance with the provisions of this act; provided, that electors of President and Vice President of the United States shall be nominated as provided in subdivision two of section twenty-four of this act."

Subdivision 2 of section 24 provides for the holding of a state party convention of each political party, the delegates to which are composed in part of the candidates of such party for legislative offices who were nominated as such at the August primary, in part of delegates who were elected as such at the August primary, and in part of "hold-over senators" who were neither elected nor nominated at such primary. The functions of such convention are to formulate the state platform of the party, to elect a state central committee, and in presidential years to nominate the candidates of such party for electors of President and Vice President. The candidates for presidential electors so nominated cannot be justly said to have been nominated at the August primary. The most that can be said is that some (though not all) of the persons who afterwards engage in the selection of such candidates are nominated at the August primary, while others of such persons are elected at such primary, and others of them were involved in the primary in no manner at all. Those of the delegates to the state convention who are in fact either nominated or elected at the primary are in no wise committed to the candidacies of any particular persons for presidential electors. Until the state convention has been held in September no one can know who are to be the nominees for presidential elector, and, if such convention should not be held, there would be no such nominees.

[1] The question then arises whether, viewing section 1188 as a whole and applying to it a broad and liberal construction, we can arrive at the conclusion that the Legislature intended to provide thereby a means for the independent nomination by petition of candidates for presidential elector. This question is to be resolved by a consideration of the language of the section in the light of its legislative history and in comparison with the other provisions of our statutes relating to the subject-matter thereof. If the first sentence stood alone, it might be concluded that the Legislature intended it to apply to the office of presidential elector (assuming that to be a public office). But in that case we should also have to conclude that the legislative intent to provide a means for the independent nomination of candidates by petition had failed, being rendered nugatory by its uncertainty and ambiguity. This by reason of the provision thereof that the signing of nomination papers therein provided for is made "subject to the restrictions contained in said Direct Primary Law." Turning to that law we find therein three different sets of restrictions as to the manner of the appointment of verification deputies, the form of nomination papers, the securing of signatures thereto, and the filing and certification thereof. Each of these three sets of restrictions differs from each of the others in material respects. One set of restrictions applies to what may be termed partisan offices, the nominations for which are made at the August primary. The second applies to what may be termed nonpartisan offices, the nominations for which are made at the August primary, and the third applies to offices for which nominations are made otherwise than at the August or May presidential primary. If, therefore, the first sentence of section 1188 stood alone, the candidates, their supporters, and the public officers having to do with the matter of such nominations would be left entirely in the dark as to which set of restrictions should be referred to for the purpose of determining whether or not a would-be candidate had complied with the requirements of the law. When we refer to the second sentence of section 1188, however, we find that all these doubts and uncertainties are there resolved and cleared away as to the procedure for the nomination of candidates for all offices other than presidential elector. It is there prescribed that certain specified restrictions contained in the Direct Primary Law shall govern as to candidates for all offices for which nominations are made at the August primary, and that certain other specified restrictions shall govern as to municipal offices and all others to which the Direct Primary Law does not apply. These two classes include all public offices of the state of California or any governmental subdivision thereof, with the sole exception of presidential elector (assuming that to be a public office). The remaining provisions of section 1188 cast no light at all upon the question here under consideration. The conclusion thus seems inevitable when we read the first and second sentences, each in the light of the other, that the Legislature did not intend to provide thereby a means for the independent nomination of presidential electors.

A consideration of the legislative history of section 1188 and of the Direct Primary Law tends to confirm this conclusion. Certainly those two statutes must be considered together and construed together as in pari materia, each referring to and supplementing the other. Prior to the enactment of the Direct Primary Law section 1188 contained within itself all of the necessary procedural provisions for the independent nomination of candidates for the offices within its purview. Stats. 1907, p. 657. Upon the enactment of the Direct Primary Law in 1911, section 1188 was at the same time amended by eliminating the procedural provisions therefrom and substituting a provision for the appointment of verification deputies "under the provisions of section 5 of the Primary Law." Stats. 1911, p. 897. In 1913 the Direct Primary Law was amended, and at the same time section 1188 was amended so as to provide:

> "For the purposes of this section the provisions of said Direct Primary Law, as said sections apply to the nominees for judicial, school, county, and township officers, shall substantially govern as to the manner of the appointment of verification deputies, * * *" etc. Stats. 1913, p. 1168.

In 1917 both statutes were again amended (St. 1917, p. 1341) concurrently to read as at present. It is reasonable to suppose that, if the Legislature had intended to provide in section 1188 for the independent nomination of presidential electors and to prescribe the procedural provisions therefor in the Direct Primary Law, there would be found in the latter some provision for the group nomination of candidates. But no such provision can be found therein. On the contrary, every phrase and expression contained in that entire statute which throws any light upon this question tends to indicate the legislative intent that separate nomination papers must be signed and filed in behalf of each candidate seeking to avail himself of its provisions. The words and expressions indicating such intent are too numerous for quotation here. They are found in nearly every line of the first three subdivisions of section 5 of the Direct Primary Law and in numerous places in the succeeding portions thereof. There is every reason, however, why candidates for presidential electors should be nominated in groups. The law expressly prescribes that their names shall be placed upon the ballot in groups so arranged that a single vote may be cast for all the candidates within such group. Pol. Code, § 1197. That the Legislature was not unaware of the wisdom of providing for group nomination of candidates in cases where such procedure is desirable is evidenced by the provisions of the presidential primary act which, while providing that the procedure to be followed shall be "substantially as provided in the Direct Primary Law," contains also an express provision for the grouping of candidates upon a single set of nomination papers. The omission of any similar provision from section 1188 strongly indicates that presidential electors were not within the contemplation of the Legislature in framing that section.

The decision of this court in Wheeler v. Hall, 188 Cal. 49, 204 Pac. 231, seems, at first blush, to be in conflict with this conclusion, but I think that upon analysis it will be found not to conflict therewith. The question there concerned the right of a group of candidates for a board of freeholders to be nominated as a group by a single set of nomination papers, and this court disposed of that question by the terse statement that "there is no provision in the law that forbids several candidates for such an office, not exceeding the whole number to be elected, from having their names inserted in a single nomination paper and circulating it in that form." The question there arose under the provisions of section 7½ of article 11 of the Constitution, which provides that "candidates for election as members of said board of freeholders shall be nominated by petition, substantially in the same manner as may be provided by general law for the nomination, by petition of electors, of candidates for county offices, to be voted for at general elections." The court was therefore constrained to make some practicable application of the procedural provisions of the Direct Primary Law, regardless of whether or not the Legislature had intended those provisions to apply thereto. In fact, the Legislature did not so intend, as it expressly provided in the Direct Primary Law that "this act shall not apply to * * * the nomination of freeholders to be elected for the purpose of framing a charter." Direct Primary Law, § 2; Stats. 1913, p. 1382; Stats. 1917, p. 1344. The question before the court in the Wheeler Case, therefore, was not a question of the legislative intent as to whether the procedural provisions of the Direct Primary Law should be applied to the nomination of freeholders, because the Legislature had unequivocally declared its intent that they should not. It was a question of giving practical effect to the mandate of the people as embodied in the Constitution and of necessarily overriding the legislative intent in so doing. In the instant case, however, we are solely concerned with ascertaining and giving effect to the legislative intent.

[2] A resort to the ordinary rules of statutory construction leads to the same conclusion. The rule which requires us to construe the co-ordinate provisions of a legislative enactment so as to give some effect to each, if reasonably possible so to do, leads to the conclusion that the phrase "any public office" in the first sentence was not intended to apply to presidential electors, as to hold otherwise would be to conclude that the Legislature had failed to effectuate its intent. The same result obtains if we apply the rule that several co-ordinate provisions of a statute shall be so construed, if reasonably possible, that they shall harmonize rather than conflict with one another. If, on the other

hand, it should be concluded that there is here an irreconcilable conflict, the rule would apply that the provision last in point of time or place should prevail, and the same result would be reached.

I think it not at all unreasonable to suppose that the Legislature in framing and adopting this section did not consider that the office, or position, or duty, or charge, or trust, of a presidential elector is a public office of this state. The question whether it does constitute such an office is at best not free from doubt. The Supreme Court of the United States, in the cases of In re Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951, and McPherson v. Blacker, 146 U. S. 35, 13 Sup. Ct. 3, 36 L. Ed. 869, did not hold that a presidential elector is a state officer, nor even that he is a public officer. They hold merely that he is not a federal officer. The janitor of a city hall is not a federal officer, but it does not follow that he is a state officer. The Supreme Court of Kentucky has held that presidential electors are public officers of that state within the meaning of certain of its statutes. Hodge v. Bryan, 149 Ky. 110, 148 S. W. 21. That case was decided upon the authority of an earlier decision of the same court by a divided court, in which the dissenting opinion is to my mind the better and more soundly reasoned. Todd v. Johnson, 99 Ky. 548, 36 S. W. 987. The Supreme Court of Idaho has held in a well-reasoned opinion that presidential electors are not state officers. State v. Gifford, 22 Idaho, 613, 126 Pac. 1060. The definitions of office and officer vary widely in the different states and even in the several decisions of the same court. One of the broadest of the definitions which have found support in the authorities is "an employment on behalf of the government, in any station or public trust, not merely transient, occasional, or incidental." 29 Cyc. 1363, note 16. See, also, 7 Words and Phrases, First Series, pp. 6635-6638. A conclusion generally accepted by the later authorities, including the courts of this state, is that a public office involves a delegation to the individual of some of the sovereign functions of government to be exercised by him for the benefit of the public. 29 Cyc. 1363, note 18; 6 Words and Phrases, First Series, p. 4925. This court in its earlier decisions approved definitions which it later found necessary to discard as too broad. In Vaughn v. English, 8 Cal. 39, it was said that—

> "The term officer, in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government."

That definition would, of course, include presidential electors as well as the city hall janitor. The case of Palmer v. Woodbury, 14 Cal. 43, involved the question whether or not a pilot appointed by the board of pilot commissioners was a public officer, and the court said:

> "It is difficult to conceive of a definition of a public office which would not embrace this appointment. The pilots are appointed by virtue of an act of the Legislature; have a fixed term to their employments; have definite duties prescribed; fixed rates of compensation; are required to give bond, and are entitled to do all the business of pilots for the harbor of San Francisco. They are subject to penalties for misfeasance and malfeasance, and are protected by law in the enjoyment of their offices and emoluments."

Later, in the leading case of Patton v. Board of Health, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66, this court entered into a careful consideration of the question what constitutes a public office in this state, and arrived at the following conclusion:

> "It seems to be reasonably well settled that where the Legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are *continuing and permanent, not occasional or temporary*, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the Legislature that some portion, great or small, of the *sovereign functions of government* are to be exercised for the benefit of the public, and the Legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office." (Italics added.)

The point was also emphasized in that case that the duties of the office there under consideration "cannot be said to be unimportant or purely ministerial, or lacking in the requirements of judgment and discretion." In the recent case of Coulter v. Pool, 187 Cal. 181, 201 Pac. 120, this court entered upon a careful and thorough reconsideration of the questions involved in the use of the phrases "public office" and "public officer," and arrived at the following conclusions:

> "A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is *not transient, occasional*, or *incidental*, by which *for a given period* an individual is invested with power to perform a public function for the benefit of the public. State v. Jennings, 57 Ohio St. 415 (63 Am. St. Rep. 723, 49 N. E. 404). A public officer is a public agent, and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of *a part of the governmental functions* of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer,

such, for instance, as *a fixed tenure* of position, the exaction of a public oath of office and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury." (Italics added.)

The conclusions there reached have been followed in Foucht v. Hirni, 57 Cal. App. 685, 208 Pac. 362, and Curtin v. State of California, 61 Cal. App. 377, 390, 214 Pac. 1030. It is difficult, perhaps impossible, to frame a definition of public office or public officer which will be sufficiently accurate, both as to its inclusion and its exclusion, to meet the requirements of all cases. But two elements now seem to be almost universally regarded as essential thereto. First, a tenure of office "which is not transient, occasional, or incidental," but is of such a nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency, and, second, the delegation to the officer of some portion of the sovereign functions of government, eitther legislative, executive, or judicial. If these elements are essential to a public office, it follows that presidential electors are not public officers, and are therefore wholly without the purview of section 1188. But I am not prepared to go the length of holding that presidential electors are not public officers. There are approved definitions sufficiently broad to include them as such. A definition sufficiently accurate to meet the requirements of one case may be found inadequate to another. The real question herein is, not whether presidential electors are public officers, but whether the Legislature in using the phrase "a candidate for any public office" in section 1188 intended thereby to make the provisions of that section applicable to presidential electors. It may be conceded that they are public officers, and still it is not unreasonable to suppose that the Legislature in framing that section did not so regard them. They have no tenure of office other than transient; they have no duties to perform which involve the exercise of judgment or discretion in the slightest degree, and neither are they vested with any portion of the governmental powers of sovereignty, either legislative, executive, or judicial. Their office, if it be an office, has no real existence except for a few hours on the second Monday in January following the presidential election. Their sole function is to perform a service which has come to be nothing more than clerical—to cast, certify, and transmit a vote already predetermined. It was originally supposed by the framers of our national Constitution that the electors would exercise an independent choice, based upon their individual judgment. But, in practice so long established as to be recognized as part of our unwritten law, they have been "selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power" (Miller, Const. U. S. p. 149), "simply to register the will of the appointing power in respect of a particular candidate" (McPherson v. Blacker, supra). They are in effect no more than messengers whose sole duty it is to certify and transmit the election returns. In this respect their powers, duties, and functions seem not greatly different from those of the messenger provided for in Political Code, § 1310, and, like him, they are entitled to compensation for the services rendered upon presentation of an account therefor, certified by the secretary of state, audited by the controller, and paid out of the general fund in the state treasury. Pol. Code, §§ 1312, 1322. What is here said is not intended to reflect in any wise upon the character, qualities, or standing of the petitioners or of those persons who have been selected by the several state conventions as candidates for presidential electors. It is well known that such candidates are commonly chosen with a view to their high qualities of character and reputation, but the fact remains that the sole public duty to be performed by them after election involves no exercise of judgment or discretion and no portion of the "sovereign powers of government." It was probably out of consideration for the circumstance that by the unwritten law the sole function of presidential electors is to "represent the preferences of the appointing power" that the Legislature in abolishing the convention system and substituting therefor the direct primary for the nomination of candidates for all state offices has always excepted presidential electors from the operation of the substituted system. It seems evident that the Legislature in framing and adopting section 1188 did not regard presidential electors as public officers, and had no intention of providing therein for their nomination. The plainly indicated legislative policy is that candidates for presidential electors shall be nominated only at a state convention of a party or political organization, at which a party platform shall be formulated, candidates for President and Vice President indorsed, and a group of electors selected who shall be identified as representing the policies expressed in such platform and as committed to the candidacies so indorsed. The platform so formulated may not accord with the national platform of such party, and the candidates for President and for Vice President so indorsed may not be those who were nominated at the national convention of such party. Sbarboro v. Jordan, 164 Cal. 51, 127 Pac. 170. But, in any event, the presidential electors so nominated are understood to represent and to be committed to the party policies and the presidential and vice presidential candidacies so indorsed at such state convention. Upon this understanding the voters predicate their choice for presidential electors at the November election. Some significance is no doubt to be attached to the circumstance that in section 1197 it is provided that "the names of candidates for the office of electors for President and Vice President shall be arranged in groups. * * *" Even if the Legislature in using the word "office" in that connection had used it with the particular intent of thus creating a public office, it would not ex proprio vigore have had such effect. Coulter v. Pool, supra. There is no reason for supposing that by using the word "office" as it was used in section 1197 the Legislature intended to create thereby a public office. That section is wholly concerned with provisions designating the form of the ballot and the order in which the names shall appear thereon, and it is apparent that the word "office" was there used merely as a convenient means of expressing the legislative intent as to the manner in which the names of candidates for presidential electors should be printed upon the ballot, and for no other purpose. The suggestion has been made that by a process of liberal construction it can be concluded that candidates for presidential electors may be nominated according to the form and in the manner specified in section 5, subdivision 3, of the Direct Primary Law. I am unable by any process of reasoning to arrive at this conclusion, but, assuming it to be correct, we must also conclude, I think, that the petitioners herein have not brought themselves within the terms of that section and subdivision. It provides:

> "Verification deputies appointed as provided in subdivision 2 of this section * * * may * * * obtain signatures to such nomination paper of such candidate for such office. * * *"

Subdivision 2 provides that the five electors who join in proposing a candidate for nomination must be registered as intending to affiliate with the same political party, and that they must make affidavit to this effect, which was not done in the instant case. Subdivision 3 provides that "only qualified electors of such county or city and county, registered as intending to affiliate with the political party by which the nomination is to be made shall be competent to sign such section," and that the signer shall make affidavit that he has registered as intending to affiliate with such party, which has not been done herein. The only exception to the universal application of these requirements is "when the office for which the candidate is proposed is a judicial, school, county, township, or municipal office. * * *" And plainly the office of presidential elector, if it be an office, does not come within this exception.

[3] It has been suggested that the conclusion here reached operates to limit unjustifiably the right of suffrage. In my opinion it does not so operate. It operates to limit, not the right of suffrage, but the privilege accorded to candidates of having their names printed upon the ballot. If that privilege be not accorded to these petitioners, every qualified elector of the state will nevertheless have the right and the opportunity to cast his vote for them at the general election by writing their names upon the ballot in the spaces which will be provided thereon for that purpose. I agree, of course, that the exercise of the right of suffrage in this manner is less easy and convenient than it would be if the voter were enabled by stamping a single cross in a square to cast his ballot in favor of thirteen candidates, and that the right to pursue the easier and more convenient method, if it were accorded by the provisions of the law, would be in the nature of a substantial right, to be secured, if necessary, by action of the courts. But the Legislature has seen fit, indeed of necessity has been required, to prescribe certain conditions and restrictions as a condition precedent to the exercise of such right, with which conditions and restrictions petitioners herein have failed to comply. In subdivision 9 (b) of section 1 of the Direct Primary Law (St. 1917, p. 1343) is prescribed a mode of procedure by which could have been accomplished the nomination of a group of candidates for presidential electors other than as candidates for one of the existing political parties, and as a result of which the names of such candidates would have been printed in a group upon the ballot at the November election. In prescribing such conditions the Legislature acted well within its constitutional powers. Const. art. 2, § 2½; Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181; Hart v. Jordan, 168 Cal. 321, 143 Pac. 537; Don v. Pfister, 172 Cal. 25, 155 Pac. 60; Heney v. Jordan, 179 Cal. 24, 175 Pac. 402. The case of People v. Smith, 206 N. Y. 231, 99 N. E. 568, which was governed by the provisions of the New York Constitution, and the cases of Eaton v. Brown, 96 Cal. 371, 31 Pac. 250, 17 L. R. A. 697, 31 Am. St. Rep. 225, and Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97, which were decided prior to the adoption of article 2, section 2½, of our Constitution, cannot be regarded as authority to the contrary.

I agree that for the purpose of ascertaining the meaning and effect of section 1188 it is our duty to give a liberal construction to its terms and provisions. But the legislative mandate commands no more liberal construction of this section than of every other section to be found in any of the Codes. Pol. Code, § 4; Civ. Code, § 4; Pen. Code, § 4; Code of Civ. Proc. § 4. The command for a liberal construction found in the Direct Primary Law is limited in its application by its own terms to that statute, and the legislative solicitude there expressd is in behalf of "the real will of the electors," not in behalf of candidates or would-be candidates. That act contains numerous and detailed provisions and restrictions prescribing the things which must be done and which must not be done by one who would become a candidate at an election. Notwithstanding the mandate for liberality contained in that act, it is manifest that one who would avail himself thereof to procure the placing of his name upon the ballot at an election must comply, at least substantially, with those provisions, requirements, and restrictions. To hold otherwise would be to nullify those provisions and thus defeat the main purpose of the act. I believe that it would be our duty, in the absence of any legislative mandate, to apply a liberal construction to such provisions as are here under consideration, but I am of the opinion that to construe section 1188 as providing for the nomination of presidential electors would "require an unwarranted reading into the law of language not put there by the Legislature and not necessitated either by reason of ambiguity or obvious error." Street v. Bertolone (Cal. Sup.) 226 Pac. 913. As we said in another recent case:

> "Courts are not clothed with legislative power. * * * We are not at liberty to extend the application of the law to subjects not included within it either by express language or by fair implication." In re Okahara (Cal. Sup.) 216 Pac. 614.

There may be good reasons for concluding that the best interests of the people of the state would be served by making provision for the independent nomination of candidates for presidential electors, but, if the Legislature in its wisdom has not seen fit to so provide, this court has no right to supply the omission.

The petition is denied, and the alternative writ discharged.

We concur: RICHARDS, J.; SHENK, J.; WASTE, J.

LENNON, J. I dissent. The writ, in my opinion, should issue. Independent candidates seeking independent nominations, whether they be standing for the highest or for the lowest of our public offices, should be accorded the same consideration that is accorded to candidates who are pledged to the policies of a party.

The question involved in this cause is undeniably of great importance to the people. Their right of suffrage is involved, and the right of suffrage, in a democracy, is, or ought to be, inviolable. The only conclusion to be drawn from the prevailing opinion is that section 1188 of the Political Code, under which independent nominations for "*any* public office" may be made, applies to every office within the gift of the people, save and except the highest office, and that, where the highest is concerned, the people are wholly without right to make independent nominations. With this conclusion I cannot agree.

In California independent nominations for public office are made pursuant to the provisions of section 1188 of the Political Code, this section being specifically referred to by the Direct Primary Law. So desirous were the makers of the Direct Primary Law to protect independent candidacies, and to facilitate independent nominations, they wrote into it this clause:

> "*Nothing herein* shall be construed as prohibiting the independent nomination of candidates as provided by section 1188 of the Political Code." Section 5, subd. 9, Direct Primary Law. (Italics added.)

What is here to be considered is whether or not section 1188 of the Political Code permits and adequately provides for the independent nomination of candidates for the office of presidential elector—this office being a state office and not a federal office. Pol. Code, § 1197; Donelan v. Bird, 118 Ky. 178, 80 S. W. 796; Hodge v. Bryan, 149 Ky. 110, 148 S. W. 21; Todd v. Johnson, 99 Ky. 548, 36 S. W. 987, 33 L. R. A. 399; In re Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951; McPherson v. Blacker, 146 U. S. 1, 35, 13 Sup. Ct. 3, 36 L. Ed. 869.

An analysis of section 1188 of the Political Code will reveal that it is made up of four sentences, each of which makes provision for certain very definite things.

The first sentence provides for the independent nomination of a candidate for any public office for which no nonpartisan candidate has been nominated at any primary election. It reads as follows:

> "A candidate for *any* public office for which no nonpartisan candidate has been nominated at any primary election may be nominated subsequent to said primary election, *or in lieu of any primary election*, in the manner following: A nomination paper containing the name of the candidate to be nominated, with other information required to be given in the nomination papers provided for in the Direct Primary Law then governing primary elections, shall be signed by electors residing within the district or political subdivision for which the candidate is to be presented, equal in number to at least one per cent. of the entire vote cast at the last preceding general election in the state, district or political subdivision for which the nomination is to be made subject to the restrictions contained in said Direct Primary Law." (Italics added.)

The second sentence specifies two things: First, the law that shall govern the appointment of verification deputies, and other routine matters, when the independent nomination is made for an office for which nominations are made at the August primary election, in which case those portions of the Direct Primary Law which apply to nonpartisan offices shall govern as to the routine matters set forth in the body of the sentence; and, secondly, the law that shall govern the appointment of verification deputies and other routine matters when the independent nomination is for a municipal office or for an office to which the Direct Primary Law does not apply, in which case those provisions of the Direct Primary Law which apply to primaries other than the August primary election and the May presidential primary election shall govern as to the routine matters set forth in the body of the sentence.

The third and fourth sentences specify matters that must be included in the independent candidate's nomination paper in addition to the matter specified in the first sentence, and the manner in which the candidate's name shall go upon the ballot when his nomination paper has been properly filed.

Certainly the office of presidential elector is a partisan office. Certainly, therefore, no nonpartisan candidate or group of candidates has been nominated for this office at a primary election. Our August primaries do not bring about the nomination of candidates for the office of presidential elector. Our August primaries do not indicate, in their results, the identity of the candidates who are to go upon the ballot in the November election, in so far as the office of presidential elector is concerned. The manner of the nomination of presidential electors, aside from independent nominations under section 1188, Political Code, is described in the Direct Primary Law (section 2 and subdivision 2 of section 24), wherein party conventions are made necessary, and wherein the fashion of the functioning of those conventions is set forth.

All that our August primaries do is to select the delegates who are to attend those conventions, and none of the delegates so selected is pledged to any candidate for the office of presidential elector, nor is any delegate bound to vote in those conventions for any candidate save the candidate of his personal preference; and therefore no man may know, after the August primaries and until the decisions of the conventions, who the presidential electors of his party are to be. If the convention did not ever convene, no presidential electors would be nominated, and the mere fact that the August primaries set those conventions in motion by giving them a personnel cannot rightly be made the premise for a conclusion that the electors are nominated in August, or at any other time before the conventions meet.

The second sentence of the section has no bearing upon the independent nomination of candidates for the office of presidential elector, since this office is not one, as has been seen, for which nominations are made at the August primary election, neither is it a municipal office nor an office to which the Direct Primary Law does not apply, and those portions of the Direct Primary Law governing the appointment of verification deputies and other procedural phases of a nomination referred to in this sentence do not apply to this sort of a nomination.

It is obvious that the office of presidential elector is not a municipal office, and, since the Direct Primary Law itself makes provision for the nomination of presidential electors by means of the convention system, it is also obvious that it is not an office to which the Direct Primary Law does not apply.

The Direct Primary Law of the state of California is a liberal enactment. Its purpose is to give wide scope to the right of suffrage. By its own definite pronouncements it is to be liberally construed "so that the real will of the electors shall not be defeated." Direct Primary Law, § 1, subd. 9.

Liberally to construe legislation requires that its language shall be given a fair and a reasonable meaning in the light of the object of the legislation. Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326. This court has heretofore declared in unmistakable terms that "the purpose of the statutory provision [sec. 1188, Pol. Code] concerning nominations by certificate is * * * to permit absolutely independent nominations of persons as candidates who have no political affiliations with any party, and who do not intend to form a party, but who become candidates for reasons personal to themselves or to those who sign the certificates." Partridge v. Devoto, 148 Cal. 167, 170, 82 Pac. 775, 777. Let it be noted that the petitioners here are seeking independent nominations without regard to political party affiliations.

The liberal construction of a statute negatives any strict, narrow, ungenerous, or literal interpretation. And a liberal construction of section 1188 leads to the conclusion that the Legislature did not intend to exclude the office of presidential elector from the list of those offices to which independent nominations may be made. This section of the Political Code is inseparably bound up and interwoven with the Direct Primary Law; the Direct Primary Law refers to it as providing the manner and the means whereby independent nominations shall be made, and by this reference incorporates the section within itself.

A reading of this section in its entirety, always giving it the liberal interpretation to which, by the provisions of the Direct Primary Law, it is entitled, "so that the real will of the electors shall not be defeated," and always bearing in mind that the Direct Primary Law commands, without equivocation, that "nothing herein shall be construed as prohibiting the independent nomination of candidates as provided by section 1188 of the Political Code," compels the conclusion that provision for the independent nomination of candidates for the office of presidential elector, in the manner in which that nomination is sought to be made by the petitioners, is found in the first sentence of the section.

According to that sentence "a candidate for any public office" (that is to say, a candidate for the public office of presidential elector) "for which no nonpartisan candidate has been nominated at any primary election (which is the situation here exactly), "may be nominated subsequent to said primary election, or in lieu of any primary election" (that is to say, in place of a primary election, or in the absence of a primary election, which is what the petitioners seek to do), "in the manner following * * *" (and then follows a description of the mechanics of the nomination).

These views are rightfully taken of the section as a whole or as it has been analyzed, if it be remembered that the section is to be liberally construed and that its purpose is not to restrict the right of independent nominations but to foster that right. To take the view that the section contains a bar to the independent nomination of presidential electors is to read into that section that which is not there; indeed, it is to defeat the very purpose of the section, which was and is to make possible the independent nomination of candidates for any office for which no nonpartisan candidate has been nominated at a primary. In order that the real will of the voters shall not be defeated the intent of the section should be carried out, and that intent is made plain by the words "in lieu of any primary election" in the opening sentence of the section. There has not been in this state any primary election for the office of presidential elector.

The provision of section 5, subdivision 9, of the Direct Primary Law, which declares, "Nothing herein shall be construed as prohibiting the independent nomination of candidates as provided by section 1188 of the Political Code, as said section reads at the time of said nomination," has been held to have reference to attempted nominations under section 1188 of the Political Code, "subsequent" to or "in lieu of any primary election." It means "that a candidate for a party nomination who was defeated at the primary [election] may not have his name placed on the general election ballot as a candidate for the office under the provisions of said section 1188. In other words, the provision as a whole is simply a declaration that nothing in the act shall be construed as prohibiting the independent nomination of candidates subsequent to or in lieu of any primary election, as provided in said section 1188, except that no candidate defeated for a party nomination for such office at the primary may be so nominated." Narver v. Jordan, 173 Cal. 424, 160 Pac. 245. It would seem, therefore, that "in lieu of any primary election," that is, in place of a primary election, independent candidates without party affiliations for the office of presidential elector, which obviously is included in the phrase "any office" found in section 1188 of the Political Code, may be nominated as that section liberally construed provides, by a substantial compliance—as far as it is possible for independent candidates without party affiliations—with the procedure provided in section 5, subdivision 3, of the Direct Primary Law.

To hold that it is not possible to make independent nominations for the office of presidential elector because this office is not mentioned by name in section 1188 would be to limit unjustifiably the right of suffrage. The right of suffrage, which is a constitutional guaranty not lightly to be disregarded, involves and is bound up with the right to make nominations. A legislature, indeed, has not the power to impose unreasonable, unnecessary, or impossible restrictions which may tend to deprive independent bodies of voters of equality of opportunity in the making of nominations. People v. Smith, 206 N. Y. 231, 99 N. E. 568, 571. Our Legislature, it should be noted, not only has not attempted to restrict the right of suffrage, but has sought to give to the citizenry the greatest possible freedom in the matter of making both party nominations and nominations independent of parties. And it should be the policy of courts to protect that freedom and even to encourage it by a liberal construction of our election laws in favor of the right of the voter. This court itself has given approval to the decision of one of our appellate courts wherein it is said:

> "The right of qualified citizens to vote at all elections is the fundamental right upon which our government is founded. To justify a court in holding that the people of the state have surrendered or abridged that right, their intent to do so must appear with great certainty and clearness." People ex rel., etc., v. Elkus, 59 Cal. App. 396, 404, 211 Pac. 34, 38.

Obviously, a restriction upon the right to make nominations is a restriction upon the right to vote. Certainly our election laws were intended to accord equal consideration to all candidates. If this was not the intention of our law, section 1188, Political Code, would never have become legislation, and would now be meaningless. Since the petitioners should be afforded the opportunity which the law provides to make nominations for presidential electors, it follows that the voters should be afforded the opportunity to cast their ballots, if they desire to do so, for the petitioners' nominees as a group. Section

1197 of the Political Code, indeed, makes provision for group voting for presidential electors, and it has been held by this court that—

> "There is no force in the objection that the nomination paper filed in behalf of said candidates is faulty because separate nomination papers were not circulated and signed for each of the candidates, and that a single nomination paper containing all their names should not have been circulated and signed by the voters. There is no provision in the law that forbids several condidates for such an office, not exceeding the whole number to be elected, from having their names inserted in a single nomination paper and circulating it in that form. We therefore hold that it does not render the nomination paper defective." Wheeler v. Hall, 188 Cal. 49, 51, 204 Pac. 231, 232.

The question presented in the case last cited, as the prevailing opinion declares, "concerns the right of a group of candidates of a board of freeholders to be nominated as a group by a single set of nomination papers," and, save for the fact that the petitioners, in the instant case, are seeking to be nominated to the office of presidential elector and not for the office of freeholders, there is no possible distinction, it seems to me, between the point presented in the cited case and the proposition presented for decision in the instant case. While it is true, as the prevailing opinion declares, the question was disposed of by this court in a "terse statement," nevertheless it was adequately and correctly disposed of, and the terseness of the statement cannot detract from the correctness of the decision. And that the question of the right of a group of candidates to be nominated as a group by a single set of nomination papers was definitely decided in the case last cited is evidenced by the concluding clause of the decision, wherein it is said, "we therefore hold" that the circulation or signing of single nomination papers containing the names of a group of candidates "does not render the nomination papers defective." If Wheeler v. Hall was good law when it was decided, it is good law now. If it is not good law now it should be directly and definitely overruled.

In so far as the question as to whether or not incumbent presidential electors occupy a public office is concerned (which the prevailing opinion ultimately concedes is not the question here), let it be said that the case of Coulter v. Poole, 187 Cal. 181, 201 Pac. 120, is not at all inconsistent with the views herein expressed to the effect that a presidential elector is a state office. Coulter v. Poole gives expression to a general rule to which there are well-recognized exceptions founded upon other respectable authority which hold that a public office need not have continuance, and that whether or not an office is public is not determined by the fact that an incumbent performs but one act or a series of acts.

Thus it was said in State ex rel. Clark v. Stanley, 66 N. C. 59, 8 Am. Rep. 488:

> "A public office is an *agency* for the state, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its *original broad* sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the state." (Italics added.) "Public officers are usually required to take an oath, and usually a salary or fees are annexed to the office, in which case it is an office 'coupled with an interest.' But the oath and the salary or fees, are mere incidents, and constitute no part of the office: Where no salary or fees are annexed to the office, it is a naked office—honorary—and is supposed to be accepted, merely for the public good. This definition also excludes the idea, that a public office must have continuance. It can make no difference, whether there be but one act, or a series of acts to be done—*whether the office expires as soon as the one act is done*, or is to be held for years or during good behavior." (Italics added.)

It has been held in effect in this jurisdiction that freeholders, elected by voters of a political subdivision, whose sole duty is to frame a county government charter, are public officers, even though their tenure of office is transitory, during which they function but once. Wheeler v. Hall, supra.

A liberal construction of the statute in question would, it seems to me, compel the conclusion that the word "office," as used in section 1197 of the Political Code and in section 2 of the Direct Primary Law with reference to presidential electors was employed by the Legislature and intended to be understood as meaning an office within the liberal and broad definition of that term. The prevailing opinion declares that "it may be conceded that they [presidential electors] are public officers, and still it is not unreasonable to suppose that the Legislature in framing that section did not so regard them." In view of the further concession in the prevailing opinion that "there are approved definitions sufficiently broad to include them [presidential electors] as such," I am unable to appreciate the reasoning which leads to the conclusion of the prevailing opinion that it is "not unreasonable to suppose that the Legislature * * * did not so regard them." If presidential electors come within any approved definition of public officers, then it seems to me it must necessarily be presumed that the Legislature had that definition in mind. The Legislature has decided for itself that the position of presidential elector is of sufficient dignity and importance to be deemed an office. The designation of a legislative enactment is generally conceded to be indicative of the legislative intent and ordinarily of strong persuasive force in determining whether or not any given position is to be deemed an office, and in a case of this character, where a liberal interpretation is required, it ought to be conclusive of the legislative intent to employ the term "office" in its broad and liberal meaning.

Section 1197 of the Political Code designates the position of presidential elector as office as does section 2 of the Direct Primary Law, and to say, as the prevailing opinion says, that the word "office" as employed in those sections and the phrase "any office" as employed in section 1188 of the Political Code does not mean office, but means something else which is not defined, is the acme of strict construction.

The fact that the form of ballot prescribed and printed in the Political Code, specifically makes, under the head of presidential electors, reservation therein for a blank column in which the names of thirteen independent candidates for presidential elector may be written in, is strongly indicative of the legislative intent to provide for the independent nomination of presidential electors, and tends most strongly to confirm the conclusion that when they referred in other portions of the Direct Primary Law to the "office" of presidential electors they had in mind the broad and liberal definition of the term "office." The prevailing opinion concedes that independent nominations for presidential electors may be made by the "write-in" process. And if this be so, then it seems to me to be inconsistent to say, as does the prevailing opinion, that "the plainly indicated legislative policy is that candidates for presidential electors shall be nominated only at a state convention of a party or a political organization."

But it is idle to pursue this particular phase of the case further. The prevailing opinion does not go so far as to say that a presidential elector does not occupy a public office. The prevailing opinion holds neither one way nor the other on this point. And it would seem that, if the prevailing opinion were forced to a conclusion on this point, the holding would be that the office of presidential elector is a public state office within the liberal and broad meaning of the term.

The assertion of the prevailing opinion that by no process of reasoning may section 5, subdivision 3, of the Direct Primary Law, be applied to the office of presidential elector is, in my opinion, answered by the holding in Partridge v. Devoto, supra, that section 1188 of the Political Code was designed to permit absolutely independent nomination of persons as candidates who have no political affiliations with any party and by the Direct Primary Law itself wherein it is said that no "failure to comply with all the provisions of this law shall defeat its purpose." If this mandate of the Direct Primary Law is to be given a reasonable meaning, that meaning is that independent candidates for independent nomination who have no political affiliations with any party are not to be stayed where they have done all that they can do to comply with the law and that, when they have done that, they have done enough to entitle them to go before the people at the polls.

Moreover, this court should now do that which the prevailing opinion concedes this court was "constrained" to do in the case of Wheeler v. Hall, supra, that is, "make some practicable application of the procedural provisions of the Direct Primary Law" to the end, as the Direct Primary Law itself declares, "that the real will of the electors shall not be defeated." This, it seems to me, could readily and rightfully be done in the instant case, even though the provisions of the Direct Primary Law and the provisions of section 1188 of the Political Code concerning the independent nominations of candidates for "any office" be clumsily and unskillfully drawn. The difficulties presented by the lack of perspicuity in the law under consideration are not insurmountable. The general intent of the law concerning the independent nomination of candidates for "any office" should be carried out, and, if the procedure provided by the statute for the nomination of independent candidates for "any office" be doubtful or defective, because of looseness or ambiguity of expression, appropriate procedure for the preparation and presentation of certificates of nomination for such independent candidates may justly be determined and permitted by analogy from other procedural provisions of the law. There is no just way in such a situation other than that of analogy. Matter of Fagan, 21 Misc. Rep. 403, 47 N. Y. Supp. 288. And this is so because to the right of suffrage, as constitutionally guaranteed, the right to make nominations is essential, and the Legislature may not, intentionally or unintentionally, impose unreasonable, unnecessary, and impossible restrictions which will deprive independent bodies of voters of equality of opportunity in the making nominations. People v. Smith, 206 N. Y. 231, 99 N. E. 568; Eaton v. Brown, 96 Cal. 371, 31 Pac. 250, 17 L. R. A. 697, 31 Am. St. Rep. 225; Murphy v. Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97. See, also, concurring opinion of former Chief Justice Angellotti in Socialist Party v. Uhl, 155 Cal. at page 794, 103 Pac. 181.

With reference to the "write-in" process the prevailing opinion concedes "that the exercise of the right of suffrage is less easy and convenient than it would be if the voter were enabled by stamping a single cross in a square to cast his ballot in favor of 13 candidates and that the right to pursue the *easier* and more *convenient* method, if it were accorded by the provisions of the law, would be in the nature of a substantial right to be secured, if necessary, by the action of the courts." (Italics added.) If it be less easy, that is to say, more difficult, for the voter to exercise his right of suffrage by the "write-in" process than it would be by permitting independent nominations to go upon the ballot, then it seems to me there is no escape from the conclusion that the Legislature has discriminated against the independent voter by the imposition of a restriction which places him at a decided disadvantage, and here again we are confronted with the fundamental proposition that the Legislature may not impose restrictions upon the right of suffrage which will deprive independent bodies of voters who have no party affiliations of equality of opportunity in the making of nominations.

Plainly, it is the purpose of the prevailing opinion to hold that the office of presidential elector is not an office which the Legislature had in mind when it enacted section 1188 of the Political Code. This, of course, is a purely negative view. And it is a recognized principle of law that courts, in interpreting statutes, should endeavor always to so construe them as to give them an affirmative rather than a negative meaning. When a statute has been enacted, courts should seek to give it vigor, courts should endeavor to give it life rather than to kill it by technical refinements of reasoning which approximate mere negation and are far from liberal. This especially should be the policy of courts in interpreting statutes which declare themselves to be written in a liberal spirit, and which assert that they are to be liberally construed. Indeed, to construe statutes strictly, when the statutes demand a liberal construction, is, in cases of this character, to defeat not only the will of the Legislature but the "real will of the electors" as well.

LAWLOR, J. I dissent. Plainly put, the effect of the decision is that only parties organized at the time of the preceding general election or one coming within paragraph (b), subdivision 9, section 1, of the Direct Primary Law, are entitled to have placed on the general ballot in the November election candidates for electors for President and Vice President, and that, since petitioners did not organize under said paragraph (b), they cannot nominate such electors. In other words, such independent voters not having affiliated with a party could have no voice either in the May or August primaries except as to nonpartisan candidates at the August primary or in nominating electors for the general election. Hence, if they have not organized under said paragraph (b) their only alternative is to enroll under the banner of one of the other parties with whose principles they may not be in sympathy. The right to form a party under said paragraph (b) cannot avail here, for the reason that no such organization was attempted by petitioners.

In a general sense a primary election is a contest within the particular party and a general election a contest between parties. The Direct Primary Law provides:

"Section 1. Words and phrases where used in this act shall, unless such construction be inconsistent with the context, be construed as follows:

"Primary Election.

"1. The words 'primary election,' any and every primary nominating election provided for by this act.

"August Primary Election.

"2. The words 'August primary election,' the primary election held in August to nominate candidates to be voted for at the ensuing November election or to elect members of a party central committee or delegates to a party convention.

"May Primary Election.

"3. The words 'May presidential primary election,' any such primary election, held in May of each year of the general November election at which electors of President and Vive President of the United States are to be chosen, as shall provide for the indication of preference in the several political parties for party candidates for president of the United States through the election of delegates to national party conventions.

"Definition of the Word Election.

"4. The word 'election,' a general state, county, city or city and county election as distinguished from a primary election, recall election, or special election.

"November Election.

"5. The words 'November election,' either the presidential election, or the general state, county, or city and county election held in November of each even numbered year. * * *

"Definition of 'Political Party,' 'Party,' 'Political Organization.'

"9. The word or words 'political party,' 'party,' 'political organization,' or 'organization,' a political party or organization of electors which has qualified, as hereinafter provided, for participation in any primary election; and such party or organization shall be deemed to have so qualified when one or both of the following conditions have been complied with:

"Qualification as Political Party.

"(a) If at the last preceding November election there was polled for any one of its candidates who was the candidate of such party only for any office voted on throughout the state, at least three per cent. of the entire vote of the state, or for any one of its candidates who was the joint candidate of such party and any other party for any office voted on throughout the state, at least six per cent. of the entire vote of the state; or

"(b) If on or before a date which shall be the seventy-fifth day before any primary election, there shall be filed with the secretary of state a petition signed by registered qualified electors of the state, equal in number to at least three per cent. of the entire vote of the state at the last preceding November election, declaring that they represent a political party or organization the name of which shall be stated therein, which party said electors desire to have participate in such primary election. * * *

According to the majority opinion, therefore, only voters affiliated with parties can vote at a primary election except for nonpartisan candidates, and a body of independent voters who conceivably in given situations might constitute a majority of the electorate can have no voice in having candidates placed on the ballot at the general election if they did not proceed under said paragraph (b). The circumstance that such voters are accorded the privilege of voting at the general election for or against the candidates nominated by the parties with which they are not affiliated, or that they may write in the names of candidates of their own, can have no weight in deciding whether electors for President and Vice President may be placed on the November ballot other than as the representatives of a party. Such a discrimination among bodies of citizens should not be accepted unless it is demonstrably clear the Legislature so intended.

It is not questioned that section 1188 and any amendment thereof is made a part of the Direct Primary Law—and that it is confined to independent nominations. It has no purpose other than to effectuate the primary law as to independent nominations. The language employed in that section, "a candidate for any public office," to designate the class entitled to independent nominations, could hardly be broader. But the prevailing opinion holds that when the Legislature used the phrase it did not regard candidates for presidential electors as officers, although the term is not in any manner qualified in the section or in the primary law. It is reasoned that, if the Legislature regarded such electors as officers, it would have provided a suitable procedure for independent electors for President and Vice President, and that, even giving a liberal construction to the provisions of section 1188 and the Primary Law, no such mode can be discovered. In other words, from this asserted omission it is held that the Legislature intended that electors for President and Vice President could only be nominated by parties; with the result that as the statute stands the words "for any public office" in section 1188 does not connote all candidates for public office, but only some of them. It is upon the reasoning that the Legislature did not regard such electors as officers that the prevailing opinion does not deem it necessary to determine whether a presidential elector is an officer—a question I deem necessary to a determination of the case.

I regard as unfortunate the conclusion that the Legislature in using the comprehensive term—any candidate for public office—meant to exclude electors for President and Vice President, especially where the effect is to disfranchise a body of citizens. In my opinion the conclusion could be avoided in view of the fact that nominations by parties were eliminated from section 1188 by the amendment thereof and because of the liberal rule of construction prescribed by the Primary Law itself in these words: "This statute shall be liberally construed, so that the real will of the electors shall not be defeated by any informality or failure to comply with all the provisions of the law," and that "Nothing herein shall be construed as prohibiting the independent nomination of candidates as provided by section one thousand one hundred eighty-eight of the Political Code, as said section reads at the time of said nomination." The general rule is thus expressed in 10 Cal. Jur. § 3, p. 20:

> "Sections 1041 to 1292, inclusive, of the Political Code deal with the subject of elections in a general and comprehensive manner, and there are a number of statutes dealing with the subject of elections in particular cases. The former and the latter are in pari materia, and in accordance with the general rules of statutory construction should be construed together. When, therefore, it does not clearly appear that the Legislature intended by a statute relating to a special election to prescribe all the rules that should govern such election, and where it does appear that the language of the general statute is so comprehensive that it literally embraces the subject-matter of the special statute, the latter will not exclude the general statute from the field it occupies, unless there is a necessary repugnancy between the acts. * * * In construing election laws, a construction that will permit the virtual disfranchisement of any qualified voter will never be adopted if the statute be fairly susceptible of any other meaning."

In my view section 1188 was intended to include independent candidates for any public office, and it is therefore necessary to first determine whether a presidential elector is an officer of the state. The weight of authority is opposed to State v. Gifford, 22 Idaho, 613, 126 Pac. 1060, which arose in 1912, when the Progressive party organized and selected presidential electors. The case holds that a presidential elector is not a public officer. I cannot conceive why a presidential elector is not a state officer. Todd v. Johnson, 99 Ky. 548, 555, 36 S. W. 987, 33 L. R. A. 399. It is not shown that the Idaho statute is the same as our own. From the time of his election to the casting of the vote in the electoral college the elector is under an obligation to perform a duty, a duty that pertains to the public—not as a representative of a party or an employee, but as an officer of the state for which he acts. The duty is not transient, occasional, or incidental, but remains unrelieved until it is finally and completely performed. It is a public trust in the best sense of that term. He is invested with one of the functions pertinent to sovereignty in the executive department of the government. The definition of what is and what is not an office is contained in the elaborate note to Shelby v. Alcorn, 72 Am. Dec. 169, 179, and a presidential elector meets every test of a public officer discussed in the note. Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302, referred to in said note, thus distinguishes between an office and a contract (page 9):

> "The question to be considered was before us in United States v. Hartwell, 6 Wall. 385. It was there said that 'an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. * * * A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.'"

It is not in keeping with the great responsibility involved to declare that such electors merely undertake a public employment. They are chosen by the electorate, and it would be altogether unusual to submit to the voters the selection of persons as electors for President and Vice President if they were merely to perform a ministerial act. No matter what custom has been followed since the present mode of selection was first provided, electors for President and Vice President are vested with authority to elect a President and Vice President, and their action is final. I cannot escape the conviction that, if the Legislature had not regarded presidential electors as public officers, they would have provided a scheme for their selection by popular vote.

I am satisfied with Mr. Justice Lennon's conclusions as to the scope and meaning of section 1188 when read into the Direct Primary Law, and that when considered, in the way he points out, a mode is available to place candidates for such electors on the November ballot without having resorted to said paragraph (b). The rule of liberal construction prescribed by the Primary Act places the duty upon courts to interpret the law so that, if possible, such a mode may be evolved that one group of citizens may not be denied rights enjoyed by other citizens.

The writ should issue.

SEAWELL, J. I dissent. I am unable to persuade myself that it was the intention of the Legislature by the enactment of our present election laws to promote and protect party welfare by preparing a scheme of legislation which would compel partisan voting, and which practically, in a legislative sense, would outlaw independent suffrage and candidacies. Whatever may be found in the law which applies to partisan voting was enacted for the convenience of the old party organizations, and the law was not enacted for the purpose of preventing the electorate from voting for independent candidates for any office for which an election is held. Any serious inequalities that are placed in the way of an equal opportunity to declare one's preference in the selection of men who execute, interpret, or make the laws or in voting for the adoption of constitutional or legislative enactments ought, in my judgment, be declared invalid. To unequally obstruct the independent electorate from exercising its will is contrary to the principles and precepts of a republican form of government, and we cannot assume that the Legislature intended such a result. But in this case it is not necessary to declare any portion of the law invalid. Existing provisions of the act may be applied to the case before us without doing violence to legislative intent. Section 1188, Political Code, provides that "a candidate for any public office for which no nonpartisan candidate has been nominated at any primary election may be nominated subsequent to said primary election, or in lieu of any primary election" in a manner there defined.

That presidential electors are public officers and perform a public function of the highest responsibility that can be conferred upon citizenship, I entertain no doubt. By the express language of the law providing for their nomination the office of elector is referred to as a public office. By the law of this state their election is provided for and the time and place is fixed at which the presidential electors must assemble, and the method by which a President and Vice President shall be voted for by them is prescribed. The compensation and mileage which they are to receive for their official services are fixed by law. Their official services are required quadrennially, and are just as certain and fixed in point of time as is the presidential election itself. The duties they perform are as much official in character as were the official duties which were formerly cast upon members of the Legislature in voting for the election of a United States senator. No one would presume to say that a member of the Legislature, under our former system, in voting for a United States senator was not acting in an official capacity, performing an official duty. There is nothing indefinite, uncertain, or occasional, as I see it, in the duties which are to be performed by a presidential elector. Neither are his duties ministerial merely. From the formative periods of our government to the present time electors have been clothed with wide discretion. In the exercise of such discretion they may vote for any person for the office of President or Vice President whom they may choose to elect. No court would assume to control the discretion reposed in them by law. The death or incapacity of a President or Vice President after his election on the first Tuesday in November and prior to the second Monday in January following may compel partisan electors to vote for a different person for President or Vice President than the person nominated at a national convention. Indeed, a political crisis may arise of such a character as to make it the patriotic duty of the electors, in their judgment and in the judgment of a majority of their partisan supporters, to vote for a person for President who had not been nominated by any convention or in any manner whatsoever. While it has been the rule that electors have cast their electoral vote in obedience to party obligations, which is, under ordinary circumstances, a moral obligation, there is nothing in the law which requires them to do so, and no law changing or amending the system has ever been passed. To my mind there exists no sound argument in favor of the claim that they are not public officials performing high and grave public duties. To hold that they belong to a sort of hybrid class in official nomenclature, or, if in fact public officers, they were not within the contemplation of the framers of the election laws, is to construe the statute against what seems to me to be the spirit of the law.

The statute provides the machinery by which independent candidates may have a place upon the ballot, and I am of the opinion that such existing provisions as would solve the difficulty should be resorted to and can be applied to the situation before us without doing violence to the rules of statutory construction. To do so would not be going beyond the sanction of legal precedent.

I think the writ should issue.

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68 Cal. App. 297

SAN GABRIEL COUNTY WATER DIST. v. RICHARDSON. (Civ. 4713.)

(District Court of Appeal, Second District, Division 2, California. Aug. 1, 1924. Hearing Denied by Supreme Court September 29, 1924.)

1. Constitutional law 🔑278(2)—Waters and water courses 🔑216—Statute providing for annexation to water district held valid.

Section 25, Act June 10, 1913 (St. 1913, p. 1062), as amended, providing for annexation of portions of a county or municipality, to county water district, "upon petition presented in the manner herein provided," in view of provision for notice to property owners and hearing of objections in section 3, does not deny due process by omitting such hearings, since a statute must be construed as a whole.

2. Constitutional law 🔑48—Construed in favor of constitutionality, if possible.

A particular construction making an act, or any part, unconstitutional, must be avoided when it can be fairly done, for the legal presumption is that the Legislature could not have so intended.

3. Constitutional law 🔑48—Statute susceptible of constitutional and unconstitutional construction must be given former.

A statute susceptible of two constructions, one consistent, and one inconsistent, with constitutional restrictions, must be construed to harmonize with the Constitution.

Application for mandamus, by San Gabriel County Water District, directed to F. R. Richardson, as President of the District. Writ granted.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for petitioner.

H. S. Farrell, of Alhambra, for respondent.

CRAIG, J. This is an original proceeding wherein the petitioner seeks a writ of mandate requiring respondent as president of the San Gabriel county water district to execute certain bonds voted by electors of the district.

[1] Petitioner is a county water district, regularly incorporated under the provisions of the act of June 10, 1913 (St. 1913, p. 1049), as amended, providing for the incorporation, organization, and management of county water districts, and the respondent is its president. On December 19, 1922, an election was held, at which time the electors of said district and those residing within a certain described area voted to annex the territory last mentioned; and on April 17, 1923, an election was held wherein all the qualified electors of said consolidated district and those of an additional area also voted for annexation of the latter territory. It is conceded that in each instance the provisions of sections 3 and 25 of said act were complied with; the former section provides for the original incorporation of such districts, and the latter for annexation. Section 25 reads as follows, with our italics:

> "25. Any portion of a county or any municipality, or both, may be added to any county water district organized under the provisions of this act, at any time, upon petition presented *in the manner herein provided* for the organization of such water district, which petition may be granted by ordinance of the board of directors of such water district. Such ordinance shall be submitted for adoption or rejection to the vote of the electors in such water district and in the proposed addition, at a general or special election held as herein provided, within seventy days after the adoption of such ordinance."

The bond election here in controversy was held December 11, 1923, and there is no contention as to the validity of any step of the proceedings therefor; but respondent contends that section 25 does not "either directly or indirectly provide for any hearing by the board of directors or for any opportunity to any property owner to object to the annexation." And it is argued that this section is therefore unconstitutional, in that it provides no "due process" for the taking of property by levying taxes required by such bond issue; that the statute fails to properly provide for annexation; and that the attempted annexations were illegal, the bond election was participated in by voters residing outside the boundaries of the original water district, and that the bonds were void and of no effect as an indebtedness against the property sought to be taxed.

Petitioner avers that section 3 of said act provides for notice to interested property owners, for objection to original organization, at a hearing publicly held, and for publication of such notice; that inasmuch as section 25 is silent upon this subject, except that it provides for a petition to be "*presented in the manner herein provided*," the Legislature intended thereby to require the same method of notice, public hearing, and protest, as that pursued under section 3, for all the purposes of section 25.

In re Extension Boundaries of Crow Creek Irr. Dist., 63 Mont. 293, 207 Pac. 121, cited by petitioner, presented a similar question, and it was there held under the general rule of construction that the section attacked was not unconstitutional; the court saying:

> "A statute is passed as a whole and not in parts or sections, and the division into sections is merely a matter of convenient reference. 25 R. C. L. 1009. It is true that section 7169 appears early in the statute and relates primarily to the organization of a district, but it declares the general policy of the law. * * *
>
> "There are not any words of restriction or limitation employed. Provision is made for the hearing in the most general terms, and any objections which would be valid as against the inclusion of particular lands in the district upon its creation are equally valid as against their inclusion upon an extension of the boundaries of the district. This is the reasonable interpretation of the language and avoids the conclusion that the legislative assembly provided for a hearing but did not intend that any relief might be obtained thereby."

[2] To sustain the respondent's theory in the case at bar would be to say that the Legislature authorized annexation of new territory to a water district by petition "in the manner herein provided," but intentionally enacted an invalid statute in this respect, since there is in section 25 no notice "herein provided." But "the courts will never, if it can be avoided, impute to the Legislature an intent to enact a law that is contrary to the Constitution. If a particular construction has the effect to declare the act or any part of it unconstitutional, such construction must be avoided, when it can be fairly done, for the legal presumption is that the Legislature could not have so intended." Estate of Potter, 188 Cal. 55, 204 Pac. 826.

The following examples illustrate the latitude allowed in construing the word under consideration in the instant case as well as the word "hereunder." Estate of Pearsons, 98 Cal. 603, 33 Pac. 451, involved a will wherein the testator in the first clause devised certain lands to two aunts, and in the second clause he devised to them also all lands held by him jointly with them, and directed that in the event of one aunt dying during his lifetime, all property of whatever nature "herein bequeathed" should vest in the survivor; but should both die before his death, "the aforesaid property otherwise bequeathed to them shall be sold at public auction to the highest cash bidder." "Thus clearly indicating," said the Supreme Court, "that he intended the right of survivorship to extend to other property than that which in the previous portion of the same clause he had devised to his aunts; nor does his use in this clause of the word 'herein' limit the right of survivorship to the property which he had in that clause devised to them. 'Herein,' as used in legal phraseology, is a locative adverb, and its meaning is to be determined by the context. 'It may refer to the section, the chapter, or the entire enactment in which it is used' (Anderson's Law Dict.), and this rule is applicable to the construction of a document, as well as of a statute." Pringle v. Wilson, 156 Cal. 313, 104 Pac. 316, 24 L. R. A. (N. S.) 1090, presented for construction a lease, and it was there said:

> "Appellant seeks to limit the meaning of this provision by construing its last word 'hereunder' as referring only to liability under the particular clause (13). The word 'hereunder' may, it is true, refer to an entire instrument, or to only a particular part of the instrument in which it appears. In re Pearsons, 98 Cal. 603, 33 Pac. 451. As here used, however, the word would seem necessarily to refer to the entire lease. The clause releases both parties from all liability. But no liability was cast upon either party by clause 13 itself in the event of a total destruction. The only liabilities mentioned were those existing in the case of a partial destruction, which is not covered by the latter part of the clause. To read the word 'hereunder' as contended for by appellant would therefore make it meaningless."

In Williams v. Iron Belt B. & L. Assn., 131 N. C. 267, 42 S. E. 607, it was said:

> "'The time herein limited' means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons."

In re Berkowitz, 143 Fed. 598, presented for construction a provision of the Bankruptcy Law, and a United States district judge of Pennsylvania there said:

> "My own inclination is to think that 'herein' refers to the whole statute, including general order 12 (89 Fed. vii; 18 Sup. Ct. vi) by force of the authority given by section 30, and therefore that clauses 3 and 4 of section 4, and section 3 of the general order, should be construed together."

Likewise, in Welch v. O'Meara, 195 Mass. 541, 81 N. E. 264, where it was sought to nullify a section of a statute for the same reason here presented, the court said:

> "The argument of the petitioner is founded largely upon an assumption that the word 'herein,' in this section, means in section 10, and not in the statute generally. * * * This is an error. * * * In this section, as in section 10, the word 'herein' refers to the chapter and not to the section."

May v. Simmons (C. C.) 4 Fed. 498, 501, and Ex parte Helton, 117 Mo. App. 609, 93 S. W. 913, also place the same construction upon the word "herein," in cases involving the question of validity of isolated sections which would require the incorporation of other sections of the same statute in order to render them effective.

[3] Section 3 of the County Water District Act requires a petition signed by at least 10 per cent. of the number of votes cast at the last general election for Governor, setting forth the boundaries of the district, due publication of notice, and notice of the time set for hearing, in order that all persons interested may appear. It is very apparent that the Legislature did not deem it necessary to repeat this language in order to make the same mode of procedure applicable to section 25, and therefore provided in the last-named section that additional territory might be added to an existing district at any time, "upon petition presented in the manner herein provided for the organization of such water district."

> "If a statute is susceptible of two constructions, one of which is consistent and the other inconsistent with the restrictions of the Constitution, it is the plain duty of the court to give it that construction, which will make it harmonize with the Constitution, and comport with the legitimate powers of the Legislature." People v. Frisbie, 26 Cal. 135, 139.

For the reasons herein stated, we are of opinion that the annexations to San Gabriel county water district were legally effected, and that the subsequent bond issue constitutes a valid lien upon said district.

It is ordered that the writ of mandate issue as prayed.

We concur: FINLAYSON, P. J.; WORKS, J.

(68 Cal. App. 270)

AKLEY et al. v. BASSETT et al. (Civ. 4332.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1924. Hearing Denied by Supreme Court Sept. 25, 1924.)

1. Quieting title 🔑46 — Person coming into court claiming only life estate cannot compel determination of claims of remaindermen.

Person who comes into court admitting that he has only life estate, or who is proved to have only such estate, may not compel determination of claims of remaindermen or conflicting claims of remaindermen as between themselves, for their interests are not hostile.

2. Quieting title 🔑52—Judgment for plaintiff construed.

Where grantee brought suit to quiet title, in fee according to deed to him, and defendants asserted that his grantor only had life estate and that was all he had, and set up their own claim to remainders and asked court to have it established, judgment for plaintiff could mean nothing else than that there was no remainder.

3. Quieting title 🔑6—Claim of remainder contingent or otherwise by defendant is adverse to plaintiff.

When defendant in action to quiet title sets up remainder, contingent or otherwise, in himself, he thereby claims an interest adverse to plaintiff within meaning of Civ. Code, § 779.

4. Quieting title 🔑6—Contention that children of life tenant whose heirs designated as remaindermen could not claim as heirs during his life, and therefore could not base adverse claim thereon, held without merit.

Contention that children of alleged life tenant who had conveyed land to one suing to quiet title to fee were not "heirs" of such life tenant, within meaning of deed to father designating his legal heirs as remaindermen because he was alive at time they filed their answer in such suit, and therefore they could not make any adverse claim to property in suit, *held* without merit, in view of Civ. Code § 779.

5. Judgment 🔑681—Rule stated as to when contingent interest in real estate bound by judgment.

Contingent interest in real estate is bound by decree quieting title when court has before it all parties that can be brought before it and it acts upon property according to rights that appear; there being no fraud or collusion.

6. Quieting title 🔑19—Remedy created by statute is equitable and governed by equitable principles.

Action to quiet title is equitable and is governed by equitable principles, and remedy created by Code Civ. Proc. § 738, is equitable where defendant is not in possession of land.

7. Quieting title 🔑21—"Claims estate or interest," in statute, defined.

Words "claims an estate or interest," in Code Civ. Proc. § 738, were intended to embrace every species of adverse claim set up by party out of possession, whereby plaintiff's enjoyment may be interfered with and therefore authorizes action to quiet title against remainder, contingent or otherwise.

8. Judgment 🔑576(1)—Decree quieting title res judicata, though based on erroneous construction of deed.

Judgment quieting title to land was res judicata, though based upon erroneous construction of deed.

9. Judgment 🔑576(1)—That judgment erroneous does not preclude setting it up as bar to second action.

In passing upon plea of res judicata, question is, not whether court decided point rightly or wrongly, but whether it did decide point and decision was final.

10. Trial 🔑404(1)—Findings must be construed together and to support judgment.

Findings must not only be construed together, but must be so construed, if possible, as to support judgment rather than destroy it.

11. Appeal and error 🔑996—Facts inferred from those found to support judgment.

Whenever from facts found one fact may be inferred which will support judgment, such inference will be deemed to have been made by trial court, and reviewing court will not draw from those facts any inference of fact contrary to that which may have been drawn by trial court for purpose of rendering judgment.

12. Equity 🔑72(1)—Finding of laches held also finding of prejudice.

Finding of laches *held* to be construed as finding of prejudice to defendants.

13. Quieting title 🔑29—Laches bars action where adverse claimant makes outlays, pays taxes, etc.

Doctrine of laches bars action where party remains passive while adverse claimant incurs risks, enters into obligations, or makes outlays in improving property, paying taxes thereon, or otherwise in reliance on his own right.

14. Equity 🔑72(1)—Rule stated that doctrine of laches bars action where changes in subject-matter have occurred.

Doctrine of laches ordinarily bars action where changes have occurred in subject-matter, or in position of parties, relative thereto, resulting in impossibility of placing them in statu quo, or marked appreciation has occurred in value of property, when rights might have been asserted before such change and granting of relief would work inequity.

15. Partition 🔑44—Quieting title 🔑29—Plaintiffs held guilty of laches.

In action for partition, to quiet title, and for accounting, plaintiffs who delayed many years in suing *held* guilty of laches, though rents received by defendants exceeded expenditures for improvements and taxes.

16. Life estates 🔑8—Evidence held to show acquisition of prescriptive title as against remaindermen.

Evidence *held* to support finding that possession of grantee of life tenant was, after termination of such estate, of such adverse character as to bar asserted rights as remaindermen.

17. Courts 🔑91(1)—Declaration of law by Supreme Court governs District Court of Appeals.

Declaration of law by Supreme Court is binding upon District Court of Appeals and every other inferior court in state until reversed or overruled by Supreme Court.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Josephine M. Akley and others against Charles N. Bassett and another. From the judgment, certain plaintiffs appeal. Affirmed.

See, also, 209 Pac. 576.

Leon R. Yankwich, of Los Angeles, for appellants.

Millard Patterson, Donald Barker, and Wheaton A. Gray, all of Los Angeles, for respondents.

HEWITT, Judge pro tem. Plaintiffs brought this action for a partition of certain real property, to quiet title to the several undivided interests therein claimed by them, and for an accounting. They are the surviving children of Joseph M. Workman and Josephine Workman, his wife. The defendant Ida L. Kelso, now the wife of Fred Kelso, was formerly the wife of George Workman. a deceased son of Joseph M. Workman, who died in 1914. The defendant Charles N. Bassett is the son and sole heir at law of O. T. Bassett, deceased. As originally instituted, the action involved a tract of land in Los Angeles county, comprising about 814 acres in the Rancho La Puente known as the Workman ranch. Besides the said Charles N. Bassett and Ida L. Kelso, a number of other persons, purchasers or the successors in interest of the purchasers from the defendant Bassett or his father, O. T. Bassett, of small parcels of the entire tract, were also made parties defendant. The plaintiffs, at the trial in the court below, abandoned the action as against all defendants other than Charles N. Bassett and Ida L. Kelso, and stipulated judgments in their favor were made and entered, thus reducing the area in controversy to 265 acres. Amended pleadings were filed and the cause was tried on the issues made by the amended complaint, hereinafter referred to as the complaint, and the answers thereto of the defendants Bassett and Kelso. The latter, though claiming an interest in the property of the same character as the plaintiffs, by virtue of her succession to the interest of her former husband, George Workman, did not join in bringing the action.

The plaintiffs allege that they are each seized of a two-eighteenths interest in the property and that the defendants Bassett and Kelso are the owners respectively of a seven-eighteenths and a one-eighteenth interest. They also allege that defendant Bassett has collected and kept large sums of money arising from the rents, issues, and profits of the property, amounting to more than $1,000,000, and has not accounted therefor; wherefore they pray that the respective interests of the parties be ascertained and determined and that an accounting be had. In her answer the defendant Kelso asks for like affirmative relief. Defendant Bassett denies the allegations of the plaintiffs and of the defendant Kelso, and avers that he is the sole owner of the property, except such portions as have been conveyed to others. He admits that he has received the rents, issues, and profits of the property, the exact amount of which he states he does not know, but that they "are not in excess of $1,000,000," and that he will ascertain and disclose the true amount thereof in the event the court determines that he shall account therefor. He alleges that he had expended large sums of money in improving and cultivating the property, and in the payment of taxes, etc. In addition to adverse possession of the property by his father and himself from 1895 to 1918, defendant Bassett also sets up several special defenses in bar of the action, the most material of which are the statute of limitations and a certain judgment in the case of Bassett v. Thornton et al., rendered by the superior court of Los Angeles county in 1895, pleaded as res adjudicata. Upon the issues as thus made up, judgment was rendered November 22, 1920, and entered November 30, 1920, in favor of the defendant Bassett, adjudging that he is the owner of the property in fee, and that neither the plaintiffs nor the defendant Kelso had any right, title, or interest therein.

Following the entry of this judgment, the plaintiff Josephine M. Akley moved the court to vacate the judgment and to enter another and different judgment as to her. The other plaintiffs also made a similar motion on their own behalf. The explanation for the making of two motions is that the trial court found that jurisdiction over Mrs. Akley had not been obtained in the case of Bassett v. Thornton, owing to defective service of summons upon her, from which the court concluded that she was not bound by the judgment therein, notwithstanding which the decision was adverse to her on other grounds, erroneously as she contended. No such question was or could be raised by the other plaintiffs. These motions were heard by a different judge than the one who had tried the cause. An order was made granting the motion of the plaintiff Akley, and denying the motion of the other plaintiffs; whereupon amended and corrected conclusions of law were signed and filed and a second judgment was entered therein, adjudging that the plaintiff Josephine M. Akley and the defendant Charles N. Bassett were the owners of one-ninth and eight-ninths interests respectively in the property, and that the other plaintiffs and defendant Ida L. Kelso had no interest therein. A partition of the property was decreed, and judgment was given in favor of the plaintiff Akley and against the defendant Bassett in the sum of $109,302.

The defendant Bassett appealed from that part of the order above mentioned granting the plaintiff Akley's said motion, and from the said second judgment. The other plaintiffs took a separate appeal from that part of the aforesaid order which denied their motion, and also from both the first and second judgments. Upon the appeal of the defendant Bassett, which we will refer to herein as the Akley Case, it was held that the lower court was in error in ordering and substituting another and different judgment in the cause. See report of the case of Akley v. Bassett, 189 Cal. p. 625, 209 Pac. 576. The order vacating the original judgment and directing amended conclusions of law was reversed, as was also the second judgment entered in pursuance thereof, and the original conclusions of law and judgment were thus left in force. The same case on a more complete record now comes before us on the aforementioned separate appeal of the other plaintiffs, Lucille C. Buehler, Agnes Workman Stoll, Mary C. Knight, and William J. Workman. The appeal in the Akley Case was taken on a bill of exceptions containing only the judgment roll, while here there is a bill of exceptions which contains the evidence and the record relating to the first judgment, the motion referred to, and the order denying the same. The appellants ask for a reversal of both judgments on the ground that the evidence does not sustain certain of the findings, which are also claimed to be contrary to law. While in the Akley Case the findings only were before the court, an examination of the evidence satisfies us that the probative facts upon which the court made findings—the court made findings upon certain probative facts—were correctly found by the court. The attack here is mainly directed to the construction which the trial court placed upon the probative facts. The findings are full and comprehensive, and set forth in detail the history of the title to the property and the acts of the parties with relation thereto. The particular findings objected to are those which find that this action is barred by the judgment in Bassett v. Thornton, and that the same is res adjudicata; that the agreement for the dismissal of their appeal in that case worked an estoppel upon appellants; that the defendant and respondent Bassett has acquired prescriptive title to the property by adverse possession; and that the action herein is barred by laches. The further general objection is made to the series of findings which deal with the deraignment of defendant Bassett's title in that they show Joseph M. Workman only to have had a life estate in the property, which was therefore the only estate he conveyed to O. T. Bassett, notwithstanding which the court found that defendant Bassett, as the successor in interest of O. T. Bassett, is the owner in fee of the property, thus implying, contrary to law, so it is claimed, that defendant Bassett could base a claim of title in fee on such a foundation.

As found by the trial court and as shown by the evidence, by a deed dated October 11, 1870, William Workman and wife conveyed the property described in the complaint herein to their son Joseph M. Workman "to have and to hold * * * to and for his use and benefit for and during the term of his natural life; and upon the decease of him * * * unto his legal heirs according to the laws of California relating to descents and distribution, and their heirs and assigns, to and for their sole and only use, benefit and behoof, in fee absolute forever; but not to the testamentary heirs and devisees" of the said Joseph M. Workman. This deed was recorded March 27, 1873. About 25 years afterward the grantee in this deed and his wife, the parents of the plaintiffs, conveyed the property to O. T. Bassett, apparently in fee, by a grant deed dated March 1, 1895. O. T. Bassett immediately made entry and took possession. Within a few weeks thereafter O. T. Bassett brought an action in the superior court of Los Angeles county to quiet his title to the property against the children of Joseph M. Workman, the same persons who are the plaintiffs here, and George Workman, now deceased, whose former wife is the defendant Ida L. Kelso. This is the case referred to in the pleadings and findings as Bassett v. Thornton et al. All of the defendants therein appeared and answered, and three of them being minors, including Josephine M. Workman, now Josephine M. Akley, did so by their guardian ad litem. Judgment was rendered in favor of the plaintiff and entered June 25, 1895. An appeal from this judgment was subsequently dismissed. O. T. Bassett died January 1, 1898, leaving his son, defendant and respondent Charles N. Bassett, as his sole heir at law. Administration was had upon O. T. Bassett's estate, and the property in question was by decree dated October 20, 1900, distributed to the son. The latter being then a minor, a guardianship of his estate ensued, and upon attaining his majority in 1902, he came into full possession and occupancy of the property in succession to his father, and under the same title, fortified by the decree in Bassett v. Thornton.

Joseph M. Workman died March 13, 1901. Appellants took no steps to assert or recover any interest in the property in question until June 24, 1918, when they instituted this action. The foundation of their claim is that their father only had a life estate in the property, that the same was the only interest which he did or could convey to O. T. Bassett, and that upon their father's death they, as his legal heirs, succeeded as remaindermen to the fee as tenants in common, except as to a six-eighteenths interest, which, presumably, was the interest of their mother which had passed to the Bassetts, father and son.

The decision of the superior court in the Akley Case was against the respondent therein, Mrs. Akley, and in favor of the appellant there (respondent here), on the grounds that the latter had been in the adverse possession of the property for more than the statutory period before the commencement of this action, which had ripened into a prescriptive title, and that the long delay of Mrs. Akley in bringing this action constituted prejudicial laches, which consequently was a bar thereto. From the above outline of that case and the appeal now before us, it is at once apparent that in all respects save only as to the defective service upon Mrs. Akley of summons in Bassett v. Thornton, and the issue of res adjudicata which was thereby eliminated from that case, the facts in the Akley Case are necessarily identical with the facts here; the difference being that the questions now to be decided and arising thereon are directed to the sufficiency of the evidence to support the findings and the conclusions which the trial court drew therefrom.

The decision herein by the trial court in favor of the respondent and against the appellants, as indicated by the aforesaid findings to which they object, was rendered on three grounds: First, that the judgment in Bassett v. Thornton was res adjudicata, and a bar to this action; second, that the respondent had acquired a title by prescription to the property under adverse possession for more than five years prior to the commencement of the action, and that appellants could not recover because they were not seized or possessed of the property within five years prior thereto; and, third, that the action was barred by the prejudicial laches of the appellants. Therefore, it is obvious, in order to prevail on this appeal here, the appellants must show that all of these conclusions of the trial court were erroneous; whereas, it is only incumbent upon the respondent to establish the validity of any one of them. If any one of these grounds is well founded, the judgment must be affirmed.

Since the effect of the judgment in Bassett v. Thornton upon the asserted rights of these appellants was not determined in the Akley Case, we will first address ourselves to the consideration of that question.

The respondent, in his answer, after reciting the identity of the parties defendant to that action with the appellants here, his own privity with the plaintiff therein, the issues made by the pleadings, and the character of the judgment rendered, pleaded such judgment as res adjudicata and a bar to this action as follows:

> "That the matters and things and issues relating to the title of said land, the subject of this action, were fully and completely adjudicated in the said action heretofore mentioned between the plaintiff herein and the ancestor and predecessor in interest of this answering defendant, and said judgment is pleaded herein as res adjudicata."

The trial court found these allegations to be true, "except that the said Josephine M. Akley was not bound by the judgment in any respect." The grounds upon which this finding is attacked may be resolved into the general statement that the nature of the action to quiet title and of contingent remainders in real property is such that the rights of the holders of such remainders cannot be adjudicated in that form of action, and that therefore the judgment in Bassett v. Thornton was void in that the court had no jurisdiction over the subject-matter.

When the action of Bassett v. Thornton et al. was brought in 1895, the father of the appellants was still living, and he did not die until about six years after the judgment therein was rendered. A short time prior thereto Joseph M. Workman and his wife had executed the deed which purported on its face to convey the property in fee to O. T. Bassett. It appears from the evidence here that there was "some neighborhood talk about something being wrong with the title"; but however that may be, the elder Bassett, evidently realizing the necessity of having any question concerning his title set at rest, and assuming to act under authority of section 738 of the Code of Civil Procedure, made the five children of his grantor the parties defendant to his action. The complaint was in the ordinary form used in an action to quiet title, it alleged that he was the owner of the property and that it was "the same as described in the deed from William Workman to Joseph M. Workman, dated October 11, 1870," and made reference to the deed for further particulars. In their answer the defendants denied that the plaintiff was the owner in fee simple of the property "or any estate therein except an estate for the life of one Joseph M. Workman"; that subject to such life estate "the heirs of said Joseph M. Workman are the owners in fee of said property, and these defendants are the children of said Joseph M. Workman, and those of them surviving at his death will be the owners of said property in fee." Their prayer was for a determination that they were the owners of the property subject to the life estate. The court found that the deed to Joseph M. Workman had been made, executed, and delivered prior to January 1, 1873; that Joseph M. Workman and his wife executed the deed dated February 25, 1895, conveying to the plaintiff all their right, title, and interest in the property in fee simple; and that the defendants were the children of Joseph M. Workman. The conclusion was that the plaintiff was the owner of the property in fee simple, and that the defendants had no right, title, or interest therein. Judgment was rendered accordingly and entered June 26, 1895, barring the defendants from asserting any claim whatever to the property adverse to plaintiff. It thus appears that these appellants had full knowledge, at the time of the condition of the title to this property, of the extent and basis of O. T. Bassett's claim, and of the character of their own. The issues in the case were clear, and the decision turned entirely upon the construction of the deed from William Workman to their father. The court having found that the deed was delivered prior to January 1, 1873, obviously concluded that it fell within the rule in Shelley's Case, which was in force in this state until January 1, 1873, when it was abolished by section 779 of the Civil Code. Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18, and cases therein cited.

In the Akley Case, in response to the contention of the appellant there (respondent here) that the judgment in Bassett v. Thornton was correct, occasion was taken to construe the deed in question. It was there said:

> "We are satisfied that the terms of the instrument remove it from the application of the rule in Shelley's Case, even though it had been delivered prior to January 1, 1873. Its language clearly indicates an intention on the part of the grantor to limit a life estate in Joseph M. Workman, and to vest a full estate in his legal heirs according to the laws of the state of California respecting descents and distribution (Montgomery v. Sturdivant, 41 Cal. 290, 298; Gordon v. Cadwalader [164 Cal. 509, 513, 130 Pac. 18]). O. T. Bassett took no greater interest in the property than his grantor, Joseph M. Workman, had. It follows, therefore, that the deed from Joseph M. Workman to appellant's immediate predecessor [O. T. Bassett] did not serve to divest respondent of her future interest in the property, which vested upon the death of her father, on March 13, 1901."

It was thus finally determined some 27 years after the judgment in Bassett v. Thornton was rendered that the case was wrongly decided on both the law and the facts, and that the appellants were in fact just what they then claimed to be, namely, remaindermen, and that O. T. Bassett had nothing more than a life estate in the property. Pivoted upon this as a foundation, appellants contend that said judgment is void because the court had no jurisdiction to pass upon their claims as the holders of contingent remainders in the property, and that as such they had no present or vested interest therein that could be adjudicated in a quiet title suit at the instance of a life tenant, or even claimed therein.

[1, 2] Prior to the death of their father, the appellants had some sort of an interest in the property, even though it was contingent. They were members, at that time, of a designated class of persons who would take the property in fee upon the falling in of the life estate. It should also be observed that O. T. Bassett did not bring the action of Bassett v. Thornton in the attitude of a life tenant, and it only confuses the issue to treat that case in any such light. It is true that a person who comes into court admitting that he has only a life estate or who is proven to have only such an estate may not compel the determination of the claims of remaindermen nor the conflicting claims of remaindermen as between themselves, for the interests of such person and the remaindermen are not hostile. A life tenant is not concerned with the validity or extent of the claims of those who may, upon his death, and after his estate is terminated, succeed to the fee. Onderdonk v. Mott, 34 Barb. (N. Y.) 106; Collins v. Collins, 19 Ohio St. 468. Cases so holding are not in point here because Bassett v. Thornton was not that sort of a case. Relying upon the fee title apparently conveyed to him by his grantor, O. T. Bassett brought his action for the very purpose of having his title confirmed. The defendants therein disputed plaintiff's claim of title in fee, asserted that he held only a life estate, set up their own claim to the remainder, and specifically asked the court to have their claim thereto established. The judgment for plaintiff could and did mean nothing else than that there was no remainder.

[3] But, aside from that, we are of the opinion that when a defendant in a quiet title action sets up a remainder, contingent or otherwise, in himself, he thereby claims an interest in the property adverse to the plaintiff, within the meaning of the law. In Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, a case somewhat analogous to Bassett v. Thornton, section 779 of the Civil Code was construed, and it was said that a remainder to the "heirs" of a life tenant, although not capable of immediate enjoyment, is nevertheless "an estate in the property capable of being transferred in the same manner as a present interest." It was said in County of Los Angeles v. Winans, 13 Cal. App. 234, 109 Pac. 640, that where property is conveyed to a mother for life, with remainder "to the heirs of her body," though the remainder is contingent the "interests of unborn grandchildren" are not mere possibilities, such as the expectancy of an heir apparent. In the next succeeding case of the same title, reported in 13 Cal. App. at page 257, 109 Pac. 650, the court held that the rights of the children to such a contingent remainder were "not mere possibilities, such as are covered by the provisions of section 700 [of the Civil Code], but estates in fee to vest in the future." In that case it appeared that in a previous quiet title action to which the life tenant and her children had been made parties defendant, a judgment had been rendered against them which they sought to avoid therein. The court, however, in referring to such action, observed that "the contention of appellants that the action cannot be maintained against the children because [of] their contingent remainder * * * finds full answer in Barnett v. Barnett, 104 Cal. 298, 301, 37 Pac. 1049," and that the defendants were concluded by the findings therein against them. Again, in Gray v. Union Trust Company, 171 Cal. 637, 154 Pac. 306, the court said that a trust providing that in the absence of a will the property should go to and vest in the heirs at law of the trustor according to the laws of succession, created an alienable estate and interest in the remainder, and it was immaterial whether they be regarded as contingent or vested. Upon the authority of these cases, we conclude that the claim pleaded by the defendants in Bassett v. Thornton was an interest in the property.

[4] But it is argued, further, that the appellants were not "the heirs" of Joseph M. Workman, who was alive when they filed their answer in that case, since no one can be the heir of a person living; therefore, not being such heirs at the time, they neither had nor could make any adverse claim to the property. This proposition also is utterly unsound, and if accepted would defeat one of the very purposes for which the action to quiet title was devised. Of course, their father might have survived them all. Upon his death others might have been his legal heirs, or the law of descent and distribution might have been changed before he died; but the possible happening of any such contingencies is immaterial. The remainder here was thus specified in the grant: "and upon the decease of him (i. e., Joseph M. Workman) * * * unto his legal heirs," etc. There was thus no uncertainty as to the class of persons who held the remainder and would succeed to the title in fee upon the death of the life tenant. The uncertainty as to the members of this class, or as to the particular individuals who would compose the class of persons thus designated as heirs, is no sufficient reason for holding that the court could not adjudicate upon the claim of those who alleged that they did fall within that class and pleaded their claims as such. Section 779 of the Civil Code, so far as material here, provides that—

> "When a remainder is limited to the heirs of * * * a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors * * * of the owner for life, are entitled to take by virtue of the remainder so

limited to them, and not as mere successors of the owner for life."

In Barnett v. Barnett, supra, it was said that—

> "By section 779 of the Civil Code the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff [i. e. the grantee], but by virtue of the remainder which was created for them at the execution of the deed to him."

In County of Los Angeles v. Winans, 13 Cal. App. 257, 109 Pac. 650, supra, the court also held as follows:

> "To construe the words 'heirs of her body' to mean 'in the capacity of heirs' would be to restore the rule in Shelley's Case and repeal by construction the express provisions of section 779," and that "these words will be considered as words of description and identity, and not of capacity, such being the effect of the section."

It is not suggested that there are or ever were any persons interested in this remainder other than the children of Joseph M. Workman, appellants here, and the defendant Mrs. Kelso who is in privity with a deceased child, and they and Mrs. Kelso's predecessor are the same persons whose claim to the property in remainder was based upon the express ground that upon the life tenant's death they would be his heirs.

[5, 6] We think that Bassett v. Thornton, in so far as the parties defendant thereto are concerned, falls within the scope of the well-established principle in equity that a contingent interest in real estate is bound when the court has before it all the parties that can be brought before it, and it acts upon the property according to the rights that appear, there being no fraud or collusion. Miller v. Railway Company, 132 U. S. 662, 10 Sup. Ct. 206, 33 L. Ed. 487. The action to quiet title is equitable and is governed by equitable principles (Polack v. Gurnee, 66 Cal. 267, 5 Pac. 229, 610; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249, 681, and the remedy created by section 738 of the Code of Civil Procedure is equitable where the defendant is not in possession of the land. (Pom. Eq. Jur. [2d Ed.] vol. 5, § 2158). In Mathews v. Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558, there existed a situation very similar to the one here presented. It was urged therein that a previous judgment in an inferior court in a quiet title action brought before the life tenant died was not binding on remaindermen who were parties thereto, because the remainder was contingent, and hence until the death of the life tenant it would be uncertain who would be entitled to the remainder. (Precisely the same contention is made here with regard to the judgment in Bassett v. Thornton.) The point was thus disposed of:

> "Conceding * * * that the deed * * * created a contingent remainder * * * still the district court had power to acquire jurisdiction over all parties interested in the contingent remainder, and by its decree determine their rights. This conclusion necessarily follows from the equity doctrine that the general rule that only those who are parties to a suit are affected by the decree is subject to the exception that, where the subject-matter of the action is the determination of the title to real estate, if all parties are brought before the court that can be brought before it, and it acts on the property according to the rights that appear, there being no fraud or collusion, its decision is conclusive as to the state of the title, and binds all contingent interests in the real estate. * * * The rule is based upon necessity, for it would be intolerable injustice if the owner of real estate could not have his title quieted where there was a claim of an outstanding contingent remainder which might possibly vest in persons not then in being."

Under the decisions cited, it is clear that the claim made by the defendants in Bassett v. Thornton was a claim to an actual interest in the property, that they were all the parties that could be brought before the court, and that their claim was adverse to the plaintiff therein. A determination having been made thereon, which long since became final, it follows that the judgment there rendered is binding upon the appellants unless there is merit otherwise in their further contention that our action to quiet title is so limited in scope as to preclude adjudication upon remainders of the character asserted in that case.

[7] We think the complete answer to such a contention is found in the language of section 738 of the Code of Civil Procedure and the construction that has been repeatedly placed thereon. So far as material here, the section referred to reads as follows:

> "An action may be brought by any person against another who claims an estate or interest in real * * * property adverse to him, for the purpose of determining such adverse claim."

This is identical with section 264 of the Practice Act, which preceded the Code. We quote from Peterson v. Gibbs, 147 Cal. 1, 5, 81 Pac. 121, 122 (109 Am. St. Rep. 107), as follows:

> "Such an action is brought, as authorized by the statute, 'for the purpose of determining' any adverse claim that may be asserted therein by defendant to the land in controversy, and this does not mean that the court is simply to ascertain, as against the plaintiff shown to have a legal interest, whether * * * such defendant has some interest, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. The object of the action is to finally settle and

determine, as between the parties, all conflicting claims * * * in controversy, and to decree to each such interest * * * therein as he may be entitled to."

The nature and object of the action to quiet title have been often defined in most comprehensive terms. The statement has been made that it embraces every sort of a claim whereby the plaintiff might be deprived of his property or his title clouded or its value depreciated. Withers v. Jacks, 79 Cal. 297, 21 Pac. 824, 12 Am. St. Rep. 143. And the rule has been even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever. Castro v. Barry, 79 Cal. 443, 21 Pac. 946. The action may be brought against any person claiming an adverse interest of whatever kind. Pom. Eq. Juris., vol. 5 (2d Ed.) § 2161. It is unnecessary to multiply citations upon this subject, for while they serve to illustrate the application of the rule to various sorts of claims, they are all to the same effect. Stoddart v. Burge, 53 Cal. 394; People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; Bulwer C. S. M. Co. v. Standard S. M. Co., 83 Cal. 589, 23 Pac. 1102; Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771.

As was said by the Supreme Court of Utah:

> "The words 'claims on estate or interest' are used in a broad sense, and are not technical in their meaning, and were evidently intended to embrace every species of adverse claim set up by a party out of possession whereby the plaintiff's enjoyment of his property may be interfered with." Goldberg v. Taylor, 2 Utah, 491.

If the employment of the action to quiet title against remainders, contingent or otherwise, is not directly or by reasonable implication authorized by these very comprehensive definitions of its scope, we think such use is specifically upheld in two early cases in this state. In Head v. Fordyce, 17 Cal. 149, it was said:

> "The statute giving this right of action to the party in possession, does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension. The plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property."

Again, in Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172, we find a situation not unlike the case before us. There it was claimed that a prior judgment in a quiet title action was void as to the plaintiff and not binding upon her for the reason that at the time a former proceeding was had the plaintiff (then a minor), though a party thereto, had no vested right, title, or interest in the premises; that her right accrued subsequent to the judgment rendered therein, when she obtained her majority, and was not affected thereby. "It is claimed, however, that the plaintiff had no interest at the date of the judgment in Lake v. Joyce; that her title subsequently vested, and was, therefore, not affected by the judgment in said action. * * * In short, it is claimed that she had an interest under the deed, and at the same time that she had not; that the instrument gave her rights which could not be defeated, provided she should attain majority; but as she might never attain majority, there was no interest vested which she could then set up, or be called upon to defend. But there is clearly no force in this position. If the deed gave her any rights whatever, whether inchoate, contingent or otherwise, which might ultimately be perfected, it served as the basis of a claim which might cloud the title to the real estate, and become the subject of judicial investigation under section 254 of the Practice Act." It was held that the prior judgment was res adjudicata.

We see no escape from the conclusion that this holding in Joyce v. McAvoy is determinative of the point that interests or rights such as these appellants pleaded as parties defendant in Bassett v. Thornton can be inquired into and passed upon in a quiet title action, and that that case disposes of appellant's contention.

[8, 9] The finding of the trial court that the judgment in Bassett v. Thornton is res adjudicata, and therefore a bar to this action, was correct, even though the judgment in the quiet title action was based upon an erroneous construction of the deed to O. T. Bassett. A judgment, though erroneous, is none the less a bar to a second action between the same parties or their privies with respect to the same subject-matter. A declaration now that the judgment in the case referred to is void because it was wrong would be in violation of established principles of law. In passing upon the plea of res adjudicata, the question is not whether the court decided the point rightly or wrongly, but the question is: Did the court decide the point, and is the decision final? Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66. As was also said in Joyce v. McAvoy, supra, it is one thing to attack a judgment on appeal, or by some direct proceeding known to the law to vacate it, and quite another thing to attack it collaterally when it comes up in evidence, as is sought to be done in this case. Under the issues in Bassett v. Thornton, the question was whether there was a remainder outstanding, and the jurisdiction of the court was not affected by its nature. The plaintiff therein had a right to an adjudication upon his title, and of necessity the court could not make it without determining whether the asserted remainder existed, and that is precisely what occurred. Any mistake then made cannot be corrected here indirectly by this collateral attack, and the judgment must stand. It would indeed be a strange paradox if now, after having submitted their claims to adjudication before a tribunal empowered to hear and determine them, the very same parties can be heard to say that because the claims pleaded were those of contingent remaindermen, the court was thereby ousted of jurisdiction. Jurisdiction did not depend upon the nature of the claim made by them, for if they could make any claim whatever, the court had power to determine whether it was well founded. The practical result of appellants' contention that the judgment against them in Bassett v. Thornton is not res adjudicata, because the remainder which they there pleaded was a contingent remainder and therefore not such an interest as could be adjudicated in an action to quiet title would lead to the absurdity that no person apparently vested with title to real property, who believes or claims that he owns in fee, can have his title quieted against others who pretend or assert that he is only a life tenant and that they have a contingent reminder therein, because, forsooth, on the face of their pleadings they show they have no present claim or interest upon which any adjudication can be had. The law does not permit the holder of a presumptively good title to remain thus helpless in the presence of such claims by others.

[10-12] With regard to the laches of the appellants, as a bar to this action, they seek to differentiate this case and the Akley Case on the ground that the trial court found the laches of plaintiff Josephine M. Akley to be prejudicial, but did not so find with regard to the other plaintiffs; that the evidence does not show prejudicial laches, and hence that these appellants are not barred thereby. The finding, so far as relevant, reads as follows:

> "XXXII. The court further finds that there was no justification whatsoever for the long delay of Josephine M. Akley in bringing this action; that such delay was prejudicial to the defendant Charles N. Bassett, and that said Josephine M. Akley and the defendant Ida L. Kelso also, were guilty of laches in so far as the doctrine of laches may be applied, if at all, to the facts in evidence."

The action was brought by several parties of whom Josephine M. Akley was only one, and if there was long and prejudicial delay in "bringing this action" they all participated therein equally with her. If the first clause of this finding had been so framed as to read that there was no justification whatever for the long delay of Josephine M. Akley "and the other plaintiffs" in bringing this action, we apprehend no possible question could arise as to its import. Conceivably the first clause of this finding taken by itself apart from the context, and divorced from other findings, might be open to the objection that it failed to find that the laches of the plaintiffs other than Josephine M. Akley was also prejudicial. But we think such construction, even as the finding reads, is strained. Assuming that it is subject to the meaning appellants give to it, under well-established rules there is no proper basis for saying that the trial court failed to find that appellants' laches was prejudicial. Elsewhere the findings fully cover the facts upon which prejudice to the respondent arose from the long delay of all the plaintiffs in bringing this action. Findings II and XIV are to the effect that paragraphs IV and XIV of the answer are true, which allege the improvement of the property by the respondent by planting the same to walnut trees, the development of water for irrigation by pumping plants and wells, and the distribution thereof by the construction of ditches and flumes, the care and cultivation of the property, and the expenditure in and about these things by the respondent of large sums of money, all of which was done openly and notoriously, more than 10 years before the commencement of this action, with the constructive knowledge of the plaintiffs, and without any assertion of ownership by them, or any objections thereto. Finding No. XVI is that the allegations of paragraph XVII of the answer are true, relative to the sale by the respondent of lots and blocks aggregating over 300 acres out of the original tract; and finding IV states that it is true that the amount of the rents, issues, and profits received by the respondent was not "in excess of $1,000,000." "It is elementary that if findings of fact are reasonably susceptible of such a construction as will support a judgment, they must receive that construction rather than one that will not so support it." People v. McCue, 150 Cal. 195, 88 Pac. 899. Findings must not only be construed together, but must be so construed, if possible, as to support the judgment rather than destroy it; they are to be liberally construed, and their language should not be so strained by the courts as to make out a case of conflict; they cannot be altogether detached from each other and considered piecemeal, and if they be doubtful or obscure reference may be had to the context for the purpose of ascertaining the meaning. Barthel v. Bd. of Ed., 153 Cal. 376, 95 Pac. 892; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868; Corea v. Higuera, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018; Murray v. Tulare Irr. Co., 120 Cal.

311, 49 Pac. 563, 52 Pac. 586; Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005; Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 Pac. 659; Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Heaton, etc., v. Arper, 145 Cal. 282, 78 Pac. 721; Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55; Haight v. Haight, 151 Cal. 90, 90 Pac. 197. Furthermore, it has been held that—

> "Whenever, from the facts found * * * other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment, this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment." Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Krasky v. Wolpert, 134 Cal. 338, 66 Pac. 309; People, etc., Bank v. Rickard, 139 Cal. 285, 73 Pac. 858; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276.

Fairly construed, the finding in question is itself necessarily a finding that the laches of these appellants as well as Mrs. Akley was prejudicial, and particularly when taken in connection with other findings.

[13-15] Let it be conceded that laches in legal significance is not mere delay, but delay that works to the disadvantage of another. Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 Pac. 600; 21 Corp. Jur. 221; 10 R. C. L., p. 396. Prejudicial laches depends upon certain well-recognized elements, among which are expenditures and changes in the subject-matter. The doctrine of laches bars an action where a party remains passive while an adverse claimant incurs risks, enters into obligations, or makes outlays in improving property, paying taxes thereon, or otherwise in reliance on his own right. Cor. Jur. 21, p. 232. Changes occurring in the subject-matter, or in the position of the parties relative thereto, resulting in the impossibility of placing them in statu quo, or a marked appreciation in the value of the property, when rights might have been asserted before such change and the granting of relief would in consequence thereof work inequity, are ordinarily fatal to a plaintiff's case. Cor. Jur. 21, p. 232; Chapman v. State Bank, 97 Cal. 155, 31 Pac. 896; Stevenson v. Boyd, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. (N. S.) 525; Andreson v. Regenold, 166 Cal. 44, 134 Pac. 999. The evidence shows that the property in question was dry, unimproved land when respondent's father entered upon it in 1895. He set it out in part to young walnut trees in 1898, which were kept up and the area there planted so enlarged by respondent that it finally consisted of a walnut grove of about 237 acres. About 28 acres of the land has been placed under irrigation and was and has continued to be used by respondent for the growing of annual crops. The walnut trees came into bearing 8 or 10 years after they were originally planted. In addition to the farm houses, pumping plant, and irrigation system placed upon the property by the elder Bassett, the respondent, first by his guardian, and then by himself personally or through his superintendent or manager, constructed other farm buildings on the property, installed additional pumping plants with the necessary appliances for irrigation, cared for, kept up, and maintained the property, and has thus expended upwards of $50,000 for those purposes. During his lifetime the elder Bassett, having caused the land to be surveyed and subdivided into acreage lots, and a map thereof to be prepared and recorded, sold parcels from the original tract, aggregating about 128 acres; and respondent continued so to do, until his total sales, aggregating something more than 300 acres, reduced his holdings from the original 814 acres to approximately 265 acres, comprising the walnut grove and "grain patch." The rents, issues, and profits that have accrued to him from such sales, and from the operation of the property in question, are, under the findings, based on the admission contained in respondent's answer, "not more than $1,000,000," which the respondent has applied to his own use and benefit. In all of the period of seventeen years from 1901 to 1918 while these changes were being effected in the property itself, the appellants said nothing and did nothing. In these circumstances, the granting of the relief here sought would be inequitable.

But it is contended, even though it is generally the rule that laches bars the enforcement of rights where a party remains passive while an adverse claimant makes expenditures in improving the property, paying taxes, etc., his inaction does not bar relief where the rents received exceed the expenditures. The trial court found in finding IV:

> "That the amount of rents, issues, and profits of the said real estate collected since March 13, 1901, * * * was sufficient to pay all taxes upon said real property and the expenses of the care, management, up-keep and cultivation thereof, and of the making of improvements thereon * * * during said period."

Our attention is called to cases from other jurisdictions which hold that where rents exceed the expenditures, the relief sought, though long delayed, will not be denied on that account. Black v. Baskins, 75 Ark. 382, 87 S. W. 647; Peabody v. Burri, 255 Ill. 592, 99 N. E. 690; Hinds v. Surbeck, 260 Ill. 606, 103 N. E. 599. And by so much the more, it is suggested, ought the rule not operate to bar this action because of the further finding that the property was highly profitable to respondent. It appeared in these cases that where there were any improvements they were either of a temporary character or of little worth, and apparently there was no appreciable change in the condition of the properties or their value. Thus, there being no other equitable consideration in which prejudice could be predicated, it was held that the laches was not prejudicial. Conceding that where such a situation obtains, a person cannot justly be deprived of his rights because of his mere delay in asserting them, it does not follow that we can generalize therefrom and adopt the rule applied in these cases as the governing principle here. In Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516, it was said that—

> "There is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. Each case as it arises must necessarily be determined by its own circumstances, or as said by this court in Bell v. Hudson, 73 Cal. 285, 288, 14 Pac. 791: 'In other words, the question is addressed to the sound discretion of the chancellor in each case.'"

Here, in the course of unexplained and inexcusable delay of the appellants for a period of 17 years, expenditures running into many many thousands of dollars were made by respondent for improvements of a substantial and costly nature, materially improving and changing the character of the property itself, and necessarily greatly increasing its value and availability, and resulting in its transformation from non-productive property into a highly improved and profitable walnut grove, and by reason of energy and business ability of the respondent therein, he has effected the sale of adjoining lands comprising more than half of the property to which he fell heir, obtaining therefrom rents, issues, and profits which may amount to $1,000,000. We are of the opinion that it would be impossible now to place the parties in statu quo; that the laches of the appellants, as found by the trial court and as established by the evidence, is prejudicial and is a bar to this action.

[16] It was held in the Akley Case that the possession of respondent's father as a life tenant was not adverse and did not start the statute of limitations running against Mrs. Akley during the life estate, "but after such estate terminated the possession, unless in some way qualified, did become adverse, the statute of limitations did begin to run at that time." See, also, Pryor v. Winter, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162. If the evidence sustains the finding that the possession of the property was adverse after the life estate terminated, the same conclusion should obtain here against these appellants. We think the evidence does support such finding. There was no interval of time from March 13, 1901, to the day when this action was commenced, on June 24, 1918, when the respondent himself, or by his guardian, or his manager and agent, who was his business associate, was not in the actual possession and occupancy of this property. His occupancy and possession were open, exclusive, hostile, and notorious, under a claim of right, and accompanied by the payment of all taxes. In addition to the facts already stated in our discussion of the question of laches, a foreman or superintendent was constantly in immediate charge of the property, and he and the farm hands or laborers under him were continuously on the ground doing the work of irrigating, cultivating and otherwise attending to the property. The contention that owing to the status of the parties as cotenants the possession of respondent was not of such a character as to be adverse to appellants as his cotenants was, in view of the evidence here, definitely settled in the Akley Case adversely to such claim.

[17] We are asked to reconsider the determination of the Supreme Court in the Akley Case, to the effect that the doctrine of laches is applicable to an action in partition where conflicting claims to the property are involved and an accounting is sought. We may not do so. A declaration of the law by the Supreme Court is the law of this jurisdiction, binding upon every inferior court in the state unless and until it be reversed or overruled by the Supreme Court. Likewise, with regard to two other contentions: First, that the finding of respondent's adverse possession of the property, notwithstanding his personal nonresidence in this state on March 13, 1901, and during any consecutive period of five years thereafter until the suit was brought, is contrary to law; and, second, that the finding that this action was not barred by sections 318 or 319 of the Code of Civil Procedure is in conflict with the finding that a recovery could not be had because the respondent had acquired a prescriptive title to the property under section 1007 of the Civil Code, thereby rendering the one or the other contrary to law. Both of these questions, under identical circumstances, except as to the parties concerned, were passed upon in the Akley Case, and decided adversely to appellants' contentions. Although the parties are different, the rule of law is thereby established.

The order vacating the original judgment and directing the entry of the substituted judgment, and the judgment entered in pursuance thereof, have heretofore been reversed in the Akley Case. As the result thereof the one originally entered was left in force and is the judgment in the case.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

MEMORANDUM DECISIONS

67 Cal. App. 658

1

PEOPLE of the state of California, Plaintiff and Respondent, v. John COURTNEY, Defendant and Appellant. (Cr. 1178.) (District Court of Appeal, First District, Division 2, California. June 12, 1924.) Appeal by defendant from a judgment of conviction of rape in the Superior Court of Alameda County; Fred V. Wood, Judge. Affirmed. H. D. Perry, of Oakland, for appellant. U. S. Webb, Atty. Gen., and Wm. F. Cleary, Dep. Atty. Gen., for the People.

LANGDON, P. J. The defendant was charged with rape, accomplished by force and violence. The evidence introduced to support the charge leaves no possible doubt of defendant's guilt. This evidence stands unchallenged, as no testimony was offered by the defendant. The points raised by appellant are trivial, and devoid of any merit whatsoever, and not worthy of discussion here. Under the circumstances, no useful purpose could be served by setting forth a statement of the facts and thereby spreading the filth of this record over the pages of the Appellate Reports. The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

68 Cal. App. 258

2

Laurel V. WEST, an Infant, by Perry C. West, His Guardian ad litem, Plaintiff and Appellant, v. Lena May WEST, Defendant and Respondent. (Civ. 4045.) (District Court of Appeal; Second District, Division 2, California. July 28, 1924. Appeal by plaintiff from a judgment in an action for annulment of marriage in the Superior Court of San Bernardino County; J. W. Curtis, Judge. Reversed. Daley & Byrne, of San Bernardino, for appellant. Chas. L. Allison, of San Bernardino, for respondent.

CRAIG, J. The opinion in the above-entitled cause, reported at 62 Cal. App. 541, 217 Pac. 567, and dated June 16, 1923, is hereby amended, so that the concluding sentences thereof shall read as follows: "The authority of the parents in the matter of giving consent to the marriage of their infant child is conferred, and also *is limited*, by the statute. This marriage became voidable immediately upon solemnization, and could become binding only in case the plaintiff had freely cohabited with the defendant after attaining the age of consent." Otherwise said opinion is to remain as originally reported.

We concur: FINLAYSON, P. J.; WORKS, J.